Saint Louis University Public Law Review

Volume 32
Number 2 *General Issue (Volume XXXII, No. 2)*

Article 5

2013

The Roberts Court and Wrongful Convictions

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THE ROBERTS COURT AND WRONGFUL CONVICTIONS

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I. INTRODUCTION

According to the Death Penalty Information Center, Joe D'Ambrosio became the 140th person in the United States to be exonerated and released from death row since 1973 when state and federal courts barred his re-prosecution in January 2012.[1] Because of court decisions castigating prosecutors for concealing evidence that could have led to his acquittal at trial, D'Ambrosio was released in 2010 after spending twenty-one years on death row.[2] Yet, he had to wait until 2012 for federal appellate courts to finally reject prosecutors' efforts to retry him for a 1988 murder.[3] As with the cases of other exonerated individuals released from prison,[4] the media coverage of the D'Ambrosio case served as yet another reminder of the regularity with which errors in the justice process send innocent people to prison for murder or other lesser charges.[5]

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Note: The views expressed in this article represent those of the authors and not their employing organizations.

1. *Innocence Cases: 2004-Present*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/innocence-cases-2004-present#142 (last visited Apr. 19, 2013).

2. Peter Krouse, *Joe D'Ambrosio, Once on Death Row on Murder Charge, Now Free After Judge Dismisses All Charges*, CLEVELAND PLAIN DEALER (Mar. 6, 2010, 4:51 PM), http://blog.cleveland.com/metro/2010/03/d.html.

3. Pat Galbincea, *U.S. Supreme Court Closes Case Against Joe D'Ambrosio for Murder*, CLEVELAND PLAIN DEALER (Jan. 25, 2012, 8:08 AM), http://blog.cleveland.com/metro/2012/01/us_supreme_court_closes_23-yea.html.

4. *See, e.g.*, Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), http://www.nytimes.com/2007/11/25/us/25dna.html?pagewanted=all&_r=0 (overview description of post-release experiences of more than 200 innocent people released from prison through DNA testing from 1989 to 2007).

5. Scholars estimate that erroneous convictions do not arise in the rare individual case, but constitute a regularly-occurring percentage of the cases processed in the system. *See* Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1519

Wrongful convictions can be produced through a myriad of causes, from "the presentation of false, mistaken, or misleading evidence to juries"[6] to "confused jurors, overzealous prosecutors, and incompetent defense counsel,"[7] and, thus, there is no simple cure for the problem. Yet, as stated by Andrew Siegel, "the nature of these problems and their frequency can be dramatically affected by the rules, incentives, norms, and directions impressed upon the individuals who serve as rotating parts in the criminal justice machine."[8] As a result, Siegel's observation points to the potential for the U.S. Supreme Court to help reduce the problem of erroneous convictions through its role as an authoritative, rule-making institution that can affect incentives, norms, and directives as a result of its interpretations of the U.S. Constitution and relevant statutes.[9]

The Supreme Court defines rules that affect the reliability of decisions in criminal cases.[10] Some of these rules diminish risks of erroneous convictions.[11] Other rules, unfortunately, serve to exacerbate those risks and contribute to unjust outcomes.[12] This article will examine the Roberts Court and what it has done, failed to do, or could do to reduce the risk of erroneous convictions. There is no claim here that the Supreme Court can ensure that decisions in criminal cases are accurate, reliable, and free from the risk of error.[13] Many discretionary decisions by victims, witnesses, police, prosecutors, judges, and jurors are simply beyond the control of the Supreme Court and its rule-making

(2010) ("If, as noted earlier, factually innocent defendants are convicted in 0.5 percent to 1 percent of all felony convictions in the United States, this indicates a flawed system.").

6. Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1224 (2005).

7. *Id.*

8. *Id.*

9. *See, e.g.*, STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 367–71 (4th ed. 1993) (describing the important impact of Supreme Court decisions on law enforcement rules and practices).

10. For example, by enabling states to require that appellants accept representation by counsel in *Martinez v. Court of Appeal of California*, the Supreme Court sought to ensure that appellate courts' decisions benefit from the expert preparation and professional presentation of attorneys rather than the uncertain offerings of *pro se* litigants. 528 U.S. 152 (2000).

11. *See, e.g.*, United States v. Wade, 388 U.S. 218 (1967) (holding defendants are entitled to presence of counsel at any post-indictment, identification lineup).

12. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51 (1988) (finding no violation of due process when police fail to preserve evidence unless defendant can prove that police acted in bad faith in destroying or failing to preserve evidence).

13. The Supreme Court has a limited ability to make sure that its rules are followed. *See* LAWRENCE BAUM, THE SUPREME COURT 209–39 (4th ed. 1992) (describing the myriad ways that officials in government and the justice system can resist, misunderstand, or disobey decisions by the Supreme Court).

authority.[14] However, the Supreme Court can and should do more to protect against erroneous convictions.

II. THE SUPREME COURT AND ATTITUDES ABOUT INJUSTICE

The Roberts Court era began with the appointment of Chief Justice John Roberts in 2005 to replace the late Chief Justice William Rehnquist.[15] Chief Justice Roberts' voting patterns are similar to those of Rehnquist, the justice for whom Roberts had worked as a law clerk soon after graduating from law school.[16] Since the appointment of Roberts, there have been three additional newcomers appointed to the Court.[17] The Rehnquist Court era saw deep divisions among the justices on many issues.[18] These divisions continued into the Roberts Court era as newly-appointed Justices Sonia Sotomayor and Elena Kagan were similar to their predecessors, Justices David Souter and John Paul Stevens, respectively, and, thus, their appointments did not change the balance of views on the Court.[19] The Roberts Court is regarded as having shifted rightward through the appointment of Justice Samuel Alito to replace his more moderate predecessor, Justice Sandra Day O'Connor.[20] In addition, there are clues that Chief Justice Roberts may actually be more conservative than Chief

14. For example, discretionary decisions by prosecutors about what charges to pursue and what sentence to recommend are not dictated by the Supreme Court. Similarly, jurors' discretionary decisions about whether evidence supports a finding of guilt beyond a reasonable doubt are matters of judgment that are not dictated by Supreme Court rulings. *See, e.g.*, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY 85–88 (2000) (describing how discretionary decisions by prosecutors and jurors determine outcomes in capital cases).

15. Sheryl Gay Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES (Sept. 30, 2005), http://www.nytimes.com/2005/09/30/politics/politicsspecial1/30confirm.html?pagewanted=all.

16. Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all.

17. The new appointees were Samuel Alito in 2006, Sonia Sotomayor in 2009, and Elena Kagan in 2010. *See* David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES (Feb. 1, 2006), http://www.nytimes.com/2006/02/01/politics/politicsspecial1/01confirm.html; Charlie Savage, *Sotomayor Sworn In as New Justice*, N.Y. TIMES (Aug. 8, 2009), http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html; Peter Baker, *Kagan is Sworn In as Fourth Woman, and 112th Justice, on the Supreme Court*, N.Y. TIMES (Aug. 7, 2010), http://www.nytimes.com/2010/08/08/us/08kagan.html?gwh=04D1864E437CF3937E6FF4B6B21DBFC0.

18. The Supreme Court's divisions were illuminated by a notable percentage of 5-to-4 decisions in criminal justice cases. Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 170 (2003).

19. *See* Lipak, *supra* note 16 ("But not one of those replacements seems likely to affect the fundamental ideological alignment of the [C]ourt. . . . Justices Souter and Stevens, both liberals, have been . . . succeeded by liberals.").

20. *Id.*

Justice Rehnquist, and, thus, may contribute in his own way to a rightward shift in specific cases.[21] However, even if Justices Roberts and Alito are more conservative than their immediate predecessors,[22] these differences do not significantly alter the overall division of conservative and liberal viewpoints on the Court, with the conservatives regarded as having a five-member majority.[23] Although the Roberts Court appears to be a continuation of the Rehnquist Court, when looking solely at the liberal-conservative division among the justices, questions remain about how these justices will address the range of issues presented to the Court.[24]

The Roberts Court's decisions affecting erroneous convictions will be affected by the individual justices' attitudes[25] and their conceptions of their roles and responsibilities.[26] Many justices' attitudes and role conceptions become clear as they articulate their views in judicial opinions over their years of service on the bench.[27] Other justices may not clearly define themselves as their positions seem to change depending on the issue facing the Court.[28]

21. *Id.*

22. *Id.*

23. *See* Adam Liptak, *Supreme Court Moving Beyond Its Old Divides*, N.Y. TIMES, July 1, 2012, at A1 ("It was also not unusual that two-thirds of those decisions divided along ideological lines, with Justice Kennedy joining either the [C]ourt's four more liberal members (Justices Kagan, Stephen G. Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor) or its four more conservative ones (Chief Justice Roberts and Justices Alito, Scalia, and Clarence Thomas). . . . Justice Kennedy, a moderate conservative, . . .vote[d] with the conservatives at least 60 percent of the time in such ideologically divided cases" in all but two terms since 2000).

24. *See, e.g.*, Joan Biskupic, *Rookies on Bench may Recast Liberal Wing: 'Dynamic' Duo of Kagan and Sotomayor are Adding a Forceful Style of One-Upmanship and Vigor to Supreme Court*, USA TODAY, Mar. 1, 2011, at 9A ("It is not clear whether the forcefulness of Kagan and Sotomayor during oral arguments eventually will produce more liberal decisions."), *available at* http://usatoday30.usatoday.com/printedition/news/20110304/courtarguments04_st.art.htm.

25. Social scientists who study judicial decision making regard the attitudes of individual Supreme Court justices as key drivers of their decisions. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ADDITIONAL MODEL 64–73 (1993).

26. One important influence over judicial officers' decisions is their conception of their roles and responsibilities according to their beliefs about what judges should and should not do. *See* CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 209–10 (2d ed. 1997).

27. For example, Justice Clarence Thomas' opinions in his twenty-year career on the Supreme Court have clearly revealed that he is the justice least likely to recognize the existence of constitutional rights for incarcerated offenders, and he does not believe that judges have an important role in ensuring that humane conditions exist in prisons. *See* Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Justice Clarence Thomas*, 88 U. DET. MERCY L. REV. 829, 838–50 (2011).

28. Justice Anthony Kennedy, for example, is a justice who is frequently described as not clearly defined because "he frequently winds up in the middle, looking for that elusive compromise position that will resolve the most divisive either-or cases." JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 182 (2007).

Because the Roberts Court has so many relatively recent appointees,[29] a number of its members are yet to define themselves clearly with respect to issues related to erroneous convictions. There are arguably two polar perspectives[30] regarding judicial roles and responsibilities affecting erroneous convictions. Each attitude was represented on the Court during the Rehnquist era, but it remains to be seen whether and how these attitudes will affect majority decisions in the Roberts Court era.

A. Skepticism About the Judicial Responsibility for Error Correction

The late Chief Justice William Rehnquist concisely summarized his attitude about the judicial responsibility for correcting errors when he said: "The Supreme Court of the United States should be reserved . . . for important and disputed questions of law, not for individual injustices that might be corrected, and should be corrected, in other courts."[31] One unfortunate implication from Rehnquist's statement is that he would not necessarily act to correct injustices that should have been corrected elsewhere,[32] even though cases reach the Supreme Court only after exhausting opportunities for consideration—and correction—by lower courts.[33] In writing the majority opinion in *Herrera v. Collins*[34] concerning a request in the habeas corpus process for consideration of newly-discovered evidence of innocence, Rehnquist emphasized "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence

29. *See supra* notes 16–17 and accompanying text.

30. The characterization of perspectives as "polar" indicates "that these Justices are least likely to agree, not that they always reach consistently opposing conclusions." Christopher E. Smith, *Justice Sandra Day O'Connor and Corrections Law*, 32 HAMLINE L. REV. 477, 481 (2009).

31. Interview of William H. Rehnquist in *This Honorable Court* (PBS television broadcast Sept. 12, 1989), *quoted in* Christopher E. Smith & Avis Alexandria Jones, *The Rehnquist Court's Activism and the Risk of Injustice* 26 CONN. L. REV. 53, 66 n.63 (1993).

32. *See* Herrera v. Collins, 506 U.S. 390, 411 (1992) (Chief Justice Rehnquist wrote the majority opinion turning aside a request for consideration of newly-discovered evidence of innocence, in part, because he described executive clemency as the final avenue for the correction of erroneous convictions).

33. Typically, the Supreme Court can only review a state court conviction after it has received a final judgment from the highest level of state court in which a decision could be had. *See, e.g.*, ANTHONY LEWIS, GIDEON'S TRUMPET 18 (1964) (describing the famous case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the Supreme Court nationalized the requirement of a right to appointed counsel for indigents facing serious criminal charges, and the indigent offender was required to pursue his case through the Florida court system before he could petition the U.S. Supreme Court to hear his case).

34. *Herrera*, 506 U.S. at 392.

would place on the States."[35] Moreover, Rehnquist emphasized that executive clemency is the primary final avenue for correction of erroneous convictions.[36] He did not, however, acknowledge that governors seeking re-election or aspiring to different electoral offices may, without any regard for the actual evidence of innocence, avoid issuing pardons for fear that political opponents will use such actions against them in a subsequent election.[37] Thus, a judicial role orientation of leaving error correction responsibilities to other decision-makers creates risks that wrongful convictions will go unremedied.[38]

On the Roberts Court, Justice Antonin Scalia is the most outspoken opponent of judicial intervention to correct erroneous trial outcomes. Justice Scalia points to the text of the Constitution to deny the existence of any guarantee that defendants are entitled to have an appeals court correct an erroneous guilty verdict based on new evidence: "There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[39] Justice Scalia is quite emphatic in his assertion that there is no constitutional right to be free from punishment, including execution, merely because the defendant is actually innocent:

> 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.[40]

35. *Id.* at 417.

36. *Id.* at 415.

37. For example, when Governor Douglas Wilder of Virginia merely commuted the death sentence, but did not pardon Earl Washington in 1994 after DNA tests excluded Washington as the rapist in a rape-murder case, the law professor who represented Washington observed, "[i]t is a plausible speculation that Wilder's decision was influenced by his contemplation of a run for the U.S. Senate." Eric Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1100 n.91 (2001).

38. *See, e.g.*, Melanie Eversley & Larry Copeland, *Georgia Proceeds with Troy Davis Execution*, USA TODAY, Sept. 22, 2011, at 3A, *available at* http://usatoday30.usatoday.com/news/nation/story/2011-09-21/troy-davis-georgia-execution/50491648/1; Michael King, *Timeline of Troy Davis Case*, USA TODAY (Sept. 22, 2011, 3:07 PM), http://usatoday30.usatoday.com/news/nation/story/2011-09-21/troy-davis-timeline/50498302/1 (describing the grave risk that an innocent man was executed after a lack of judicial intervention and denial of a pardon in a case when a man was convicted solely on the testimony of witnesses, several of whom later recanted their testimony and claimed that the police coerced them into implicating the defendant).

39. Herrera v. Collins, 506 U.S. 390, 427–28 (1992) (Scalia, J., concurring).

40. Justice Scalia explained his position in a dissent from a denial of certiorari in *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting).

Moreover, Scalia shares Rehnquist's belief that judicial officers need not take action because judicial officers can expect the exercise of executive clemency when there is strong evidence of innocence,[41] notwithstanding real-world examples to the contrary.[42]

A component of this perspective seems to be a fatalistic view about the prospects of diminishing errors and unfair treatment, as if to say "the system can never be perfect, so why bother trying to improve it?"[43] Such an attitude seemed to be implicit in Scalia's comment in *Herrera v. Collins* that,

> I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate.[44]

It is possible that this attitude reflects prioritizing of values that simply does not place correction of injustice at the top of the list. Although Scalia is not credited with the most outrageous judicial statements placing the highest value on finality over other priorities,[45] it is possible that Scalia's disinclination for

41. *See Herrera*, 506 U.S. at 428 (Scalia, J., concurring) ("[I]t is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.").

42. *See* Eversley & Copeland, *supra* note 38. *See also* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER, Sept. 7, 2009, at 42, 61–62 (noting that the Texas Board of Pardons and Parole ignored an expert's report concluding that the original arson investigation had reached erroneous conclusions).

43. For example, in a memo circulated among the justices during their deliberations concerning *McCleskey v. Kemp*, 481 U.S. 279 (1987), Scalia forthrightly declared that he considered racial discrimination in the criminal justice process to be ever-present and unstoppable, and he subsequently voted to endorse the operation of the capital punishment system in Georgia despite recognizing that there was strong statistical evidence demonstrating the existence of discrimination. In Scalia's words in the memo, "it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones] is real, acknowledged by the [cases] of the court and ineradicable." Christopher E. Smith & Madhavi McCall, *Justice Scalia's Influence on Criminal Justice*, 34 U. TOL. L. REV. 535, 549–50 (2003). As described by Professor Dennis Dorin, Scalia "trivialize[ed] [racist practices] by saying, in a single-paragraph memo, that they were merely an unavoidable and legally unassailable, part of life for African-Americans." Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1077 (1994).

44. *Herrera*, 506 U.S. at 428 (Scalia, J., concurring).

45. For example, Judge Sharon Keller on the Texas Court of Criminal Appeals said, with respect to post-conviction DNA test results that excluded a prisoner as the rapist in a rape-murder for which he had been convicted, "We can't give new trials to everyone who establishes, after conviction, that they might be innocent. . . . We would have no finality in the criminal justice system, and finality is important." Gretel C. Kovach, *A Texas Judge, Accused of Misconduct, Draws Mixed Opinions on Her Fairness*, N.Y. TIMES, Mar. 8, 2009, at A14. State attorneys general have made similar arguments when asserting that there is no constitutional rights violation if a state executes an innocent person who has been convicted of murder in a fair-but-inaccurate trial. *See* Lisa Falkenberg, *Innocent on Death Row? Texas Might Listen*, HOUSTON

concern about correcting injustices reflects an emphasis on finality in criminal cases. Such priorities have been detected by analysts, such as in *Schriro v. Summerlin*,[46] when it was observed that "Justice Scalia's majority opinion privileges finality over justice and makes a virtue out of federal deference to unconstitutional state court decisions and laws."[47] Obviously, attitudes and priorities favoring finality over accuracy as well as acceptance of mistakes in criminal cases can lead justices to refrain from examining cases closely and seeking to remedy errors. A major question for the Roberts Court is the extent to which other justices share the attitudes articulated by Rehnquist and Scalia.[48]

B. An Emphasis on Careful Review and Error Correction

As with the issue of how many Roberts Court justices are skeptical of judicial responsibility for error correction, the same question exists with respect to the opposing polar perspective: an emphasis on careful review and error correction.[49] During the Rehnquist Court era and the first years of the Roberts era, Justice John Paul Stevens, who retired in 2010,[50] stood out as the strongest advocate of procedural rights to reduce the risk of erroneous convictions,[51] including careful post-conviction reviews.[52] For example, Stevens argued that the Supreme Court's rules on death-qualified jurors created pro-prosecution and pro-capital punishment bias in capital trials, two

CHRON. (Feb. 3, 2009), http://www.chron.com/news/falkenberg/article/Innocent-on-death-row-Texas-might-listen-1733387.php.

46. Schriro v. Summerlin, 542 U.S. 348 (2002).

47. Marc E. Johnson, *Everything Old Is New Again: Justice Scalia's Activist Originalism in* Schriro v. Summerlin, 95 J. CRIM. L. & CRIMINOLOGY 763, 763 (2005).

48. Chief Justice Roberts and Justice Alito generally do not support claims by criminal defendants and convicted offenders. However, they have not been on the Court long enough to draw firm conclusions about the attitudes underlying their decisions related to erroneous conviction cases. Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court's 2009-2010 Term*, 41 CUMB. L. REV. 227, 232 (2010-2011).

49. Justice Sotomayor and Justice Kagan are relatively supportive of claims by defendants and convicted offenders, but they have not been on the Court long enough to draw firm conclusions about the attitudes underlying their decisions related to erroneous conviction cases. *Id.*

50. Joan Biskupic, *Obama's court choice: Consensus or clash?*, USA TODAY, Apr. 12, 2010, at 5A.

51. *See, e.g.*, Christopher E. Smith, *The Roles of Justice John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK U. L. REV. 719, 736–39 (2006) (noting that Justice Stevens was the foremost advocate of the adversarial process, the right to counsel, and the right to trial by jury).

52. *See, e.g.*, Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 TEMP. POL. & CIV. RTS. L. REV. 83, 102–06 (2007) (Justice Stevens became the lone justice to always dissent from Supreme Court imposed prohibitions on filing petitions by prisoners who frequently sought to litigate cases *pro se*).

elements that might enhance the risk of improper convictions and sentences.[53] In a speech to the American Bar Association, Stevens complained that the voir dire processes in capital jury trials are conducted in a manner so that "jurors are likely to assume that their primary task is to determine the penalty for the presumptively guilty defendant."[54] Stevens also wrote the leading dissenting opinion asserting that there should be a constitutional right for convicted offenders to have DNA tests conducted on evidence that has been preserved in criminal cases.[55] In another example, he also wrote the leading dissenting opinion arguing that death row inmates should be entitled to a right to counsel for the preparation of habeas corpus petitions.[56]

In light of Justice Stevens' retirement,[57] who, if anyone, will emerge as the leading voice for careful review of cases to protect against erroneous convictions? Justice Sonia Sotomayor is an intriguing possibility as she "provided a clue that she may emerge as the Court's new outspoken leader who defends prisoners' rights."[58] She wrote a strong, solo dissent from a denial of certiorari in a case concerning a prisoner who was punished because he stopped taking his AIDS medication.[59] Although prisoners' rights cases do not raise exactly the same issues as cases concerning erroneous convictions,[60] Sotomayor's assertiveness in this prisoner's case may indicate that she possesses the empathy and sensitivity to injustice that President Obama declared he was seeking in a Supreme Court justice when he selected her for nomination.[61]

53. Christopher E. Smith, *Justice John Paul Stevens and Capital Punishment*, 15 BERKELEY J. CRIM. L. 205, 247–49 (2010).

54. Justice John Paul Stevens, Address at the American Bar Association Thurgood Marshall Awards Dinner (Aug. 6, 2005), *quoted in* Smith, *supra* note 53, at 247–48.

55. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 87–88 (2009).

56. Murray v. Giarratano, 492 U.S. 1, 15, 20, 29 (1989) (Stevens, J., dissenting).

57. Biskupic, *supra* note 50, at 5A.

58. Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 880 (2011).

59. Pitre v. Cain, 354 Fed. Appx. 142 (5th Cir. 2009), *cert. denied*, 131 S. Ct. 8 (2010) (Sotomayor, J., dissenting).

60. Prisoners' rights cases may raise a variety of issues from the Bill of Rights, including First Amendment protections for free exercise of religion and Eighth Amendment protections against cruel and unusual punishments. *See* JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 99–116, 121–56 (9th ed. 2010). However, erroneous conviction cases often focus on new, post-conviction evidence and issues concerning fair judicial processes. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 393, 398, 400, 404–05 (1993) (assertion of actual innocence based on newly discovered evidence is not grounds for federal habeas corpus relief).

61. Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 263–65 (2010).

The ultimate impact of the Roberts Court on issues related to erroneous convictions will depend on whether the skeptical perspective emphasizing finality, as illustrated by Justice Scalia, continues to hold the upper-hand when the nine justices vote on cases.[62] The continuation of current trends in the Court's decisions will be affected by retirements and new appointees[63] as well as by the changing dynamics of open-mindedness, assertiveness, and persuasiveness within the justices' interactions and deliberations.[64]

III. THE ROBERTS COURT: DECISIONS MADE AND DECISIONS NEEDED

It is important to examine judicial decisions in order to evaluate the Roberts Court's performance—and potential—in addressing issues of erroneous convictions. Specific Roberts Court decisions have been characterized as "nail[s] in the coffin the Court has been constructing for the theoretically 'innocent.'"[65] The Court should reconsider these decisions in order to fulfill its proper responsibilities for encouraging accurate judicial outcomes. In addition, decisions during previous Court eras should be changed in order to reduce current impediments to identifying and remedying erroneous criminal convictions.[66]

A. Roberts Court Errors In Need of Correction

Professor Janet Hoeffel has described *District Attorney's Office of the Third Judicial District v. Osborne*[67] as the Roberts Court's missed "opportunity to do the right thing" with respect to one aspect of erroneous convictions.[68] Osborne was sentenced to serve more than twenty years in prison upon conviction for kidnapping, assault, and sexual assault.[69] In post-conviction proceedings, Osborne claimed ineffective assistance of counsel and

62. For example, the pro-government outcome favored by the skeptical perspective was supported by the five conservative justices (Roberts, Scalia, Kennedy, Thomas, and Alito) in recent cases related to erroneous convictions such as Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 54, 61–62 (2009) and Connick v. Thompson, 131 S. Ct. 1350, 1355 (2011).

63. *See* Smith, *supra* note 58, at 856–81 (including a discussion of specific changes in the Supreme Court's composition and the potential impact on corrections law).

64. *See* Biskupic, *supra* note 24.

65. Janet C. Hoeffel, *The Roberts Court's Failed Innocence Project*, 85 CHI.-KENT L. REV. 43, 43 (2010).

66. *See, e.g.*, Smith & Jones, *supra* note 31, at 76 ("[T]hese conservative[e] [justices] have shown greater concern for improving efficiency than for achieving justice: the new procedural rules governing habeas corpus increase the risk that innocent men and women will [be executed] for crimes they did not commit.").

67. *Osborne*, 557 U.S. at 52.

68. Hoeffel, *supra* note 65, at 43.

69. *Osborne*, 557 U.S. at 59.

sought to have more discriminating DNA testing applied to evidence from the crime scene than the particular scientific test that was actually applied.[70] Alaska denied his request to conduct the DNA tests so Osborne pursued litigation to gain access to the evidence for which he would pay the financial costs for DNA testing.[71] Writing for the five-member majority, Chief Justice Roberts rejected the assertion that there is a constitutional right to conduct post-conviction DNA tests as part of the right to due process.[72] In part, Roberts relied on his conclusion that legislatures should sort out the conditions and circumstances for post-conviction testing of evidence and that judges should exercise judicial restraint in refraining from identifying a new constitutional right.[73] Roberts expressed fears about detrimental impacts on the criminal justice system: "The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice."[74] As Professor Hoeffel observed, however, "Chief Justice Roberts did not elaborate on how such a disaster would come to pass. Recognition of the due process claim requested by Osborne would affect [only] a small number of cases. Such an opening could only enhance the public's sense that justice was done."[75] Thus, Roberts' expressed fears of harm to the system appear to be exaggerated and, even if true, should not automatically outweigh the goal of ensuring that innocent people are not erroneously locked away in prison.

On behalf of the four dissenters, Justice Stevens emphasized the importance of both the damage to individual liberty from erroneous conviction and the government's own interest in making sure that the correct individual has been punished:

> In sum, an individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing postconviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of a crime. In this case, the State has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other nonarbitrary explanation for its conduct. Consequently, I am left to conclude that the State's failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process.[76]

70. *Id.*
71. *Id.* at 58–60.
72. *Id.* at 72–74.
73. *Id.*
74. *Id.* at 62.
75. Hoeffel, *supra* note 65, at 56.
76. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 100 (2009) (Stevens, J., dissenting).

Thus, the dominant perspective of skepticism turned aside an opportunity to recognize that avoidance of wrongful convictions should be a central concern of the justice system rather than, as characterized by Professor Hoeffel, a continuation of trends in Supreme Court decisions that "all but severed any relationship between a claim of actual innocence and the Constitution."[77]

One effective way to deter misconduct by government officials and remedy rights violations that result from such misconduct is to impose civil liability on officials through civil litigation processes.[78] The use of civil liability has been especially important for making police officers more knowledgeable, aware, and worried about their actions that would violate citizens' rights.[79] Unfortunately, in *Connick v. Thompson*,[80] the Roberts Court missed an opportunity to apply civil liability principles against prosecutors in a manner that would have created greater pressure to avoid misconduct that leads to erroneous convictions.[81] In that case, John Thompson was convicted of robbery and murder and thereafter sentenced to death.[82] Prior to gaining his release because of these erroneous convictions, he spent fourteen of his eighteen years in prison enduring the isolation of death row and experiencing the psychological pressure of several execution dates that approached amid the legal challenges to his convictions.[83] Thompson's erroneous conviction was caused by prosecutorial misconduct in hiding exculpatory evidence.[84] Prosecutors commit a violation of defendants' constitutional rights when they fail to share exculpatory evidence with the defense attorney.[85] He avoided execution and gained release solely through the luck of his private investigator discovering the prosecutorial misconduct shortly before his scheduled execution.[86] As described by one commentator,

> [P]rosecutors had failed to turn over evidence that would have cleared him. . . . This evidence included the fact that the main informant against him had

77. Hoeffel, *supra* note 65, at 43.

78. *See* GEORGE F. COLE, CHRISTOPHER E. SMITH & CHRISTINA DEJONG, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 316 (13th ed. 2013).

79. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 59–114 (2009).

80. Connick v. Thompson, 131 S. Ct. 1350 (2011).

81. As noted in Justice Ginsburg's dissent, "The prosecutorial concealment . . . is bound to be repeated unless municipal agencies bear responsibility" for the withholding of exculpatory evidence. *Id.* at 1370 (Ginsburg, J., dissenting).

82. *Id.* at 1355 (majority opinion).

83. Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas writes one of the meanest Supreme Court decisions ever*, SLATE (Apr. 1, 2011, 7:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html.

84. *Id.*

85. The constitutional requirement that prosecutors reveal exculpatory evidence was established by the Supreme Court's decision in *Brady v Maryland*, 373 U.S. 83 (1963).

86. Lithwick, *supra* note 83.

> received a reward from the victim's family, that the eyewitness identification done at the time described someone who looked nothing like him, and that a blood sample taken from the crime scene did not match Thompson's blood type.[87]

In addition, "a junior assistant D.A. on the Thompson case, confessed as he lay dying of cancer that he had withheld the crime lab test results and removed a blood sample from the evidence room. The prosecutor to whom [he] confessed said nothing about this for another five years."[88]

Thompson gained a new trial as a result of the revelations about the hidden evidence and he was quickly acquitted by the jury in the second trial.[89] He sued the prosecutor, Connick, for causing the rights violation and unjust lengthy prison sentence by failing to train the assistant prosecutors about their responsibilities for revealing exculpatory evidence.[90] A jury awarded $14 million to Thompson for the harm that he suffered, but the conservative five-member majority on the Supreme Court erased the award by declaring that he could not sue the prosecutor, even though the prosecutor admitted to failing to train his assistant prosecutors.[91] On behalf of the majority, Justice Clarence Thomas said, among other things, that assistant prosecutors can be presumed to have learned what they need to know in law school, notwithstanding their evident ignorance and misconduct in hiding evidence in Thompson's case.[92] In his effort to maximize the immunity from civil liability enjoyed by prosecutors, Justice Thomas "willfully ignor[ed] the entire trial record . . . [to] reduce the entire constitutional question to a single misdeed by a single bad actor [i.e., one assistant prosecutor]."[93] In reality, as Justice Ginsburg presented in her dissenting opinion, no fewer than five prosecutors were involved in manipulating the evidence or hiding information in order to convict Thompson of crimes that he did not commit.[94]

The traditional principle of immunizing prosecutors from most civil lawsuits regarding their official actions has value for protecting the independence of prosecutors' decision making and sparing them from being bogged down defending themselves against frivolous lawsuits filed by vengeful criminal offenders.[95] However, granting absolute immunity that

87. *Id.*

88. *Id.*

89. Connick v. Thompson, 131 S. Ct. 1350, 1357 (2011).

90. *Id.*

91. *Id.* at 1377 (Ginsburg, J., dissenting).

92. *Id.* at 1361 (majority opinion).

93. Lithwick, *supra* note 83.

94. Connick, 131 S. Ct. at 1384 (Ginsburg, J., dissenting).

95. Prosecutors have traditionally been among the small categories of decision makers, including legislators, jurors, judges, and presidents, who enjoy absolute immunity "because their actions are protected in the interest of public policy, so long as the actions are taken as part of

includes protection for intentional misconduct that leads an innocent person to face execution carries the principle too far. It erases the needed pressures and incentives for prosecutors to follow proper rules and respect individuals' rights.[96] As noted by Professor Susan Bandes, "letting Connick's office off the hook does violence to the deterrent aims of the statute [creating liability for constitutional rights violations] and removes any incentive for prosecutors to institute rules and programs designed to minimize the likelihood of violating rights."[97]

Prosecutors continue to feel pressures from their superiors[98] and from society[99] to make sure that they can make a conviction stick. On the other hand, however, this pressure to gain convictions may actually create incentives to violate rules and cover-up rule violations rather than follow the rules of law.[100] Thus, civil liability for prosecutors who commit misconduct could have significant value as a factor that helps to counteract processes that lead to erroneous convictions.

B. Errors From Prior Court Eras

The Roberts Court has the authority to overturn prior Supreme Court decisions that a majority of contemporary justices conclude were wrongly decided.[101] While certain Supreme Court justices have expressed reluctance about actively seeking issues that might be reconsidered,[102] the Roberts Court

their official duties." CLAIR A. CRIPE & MICHAEL G. PEARLMAN, LEGAL ASPECTS OF CORRECTIONS MANAGEMENT 312 (2005).

96. As officials who are immune from lawsuits and who have a variety of motives and pressures in their jobs, prosecutors are susceptible to making decisions and taking actions that violate both ethics and law. Bennett L. Gershman, *Why Prosectors Misbehave*, *in* COURTS AND JUSTICE: A READER 328 (G. Larry Mays & Peter R. Gregware eds., 2009).

97. Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715, 734 (2011).

98. *E.g.*, *id.* at 730 ("And indeed it is commonplace that obtaining convictions tends to be the key to prosecutorial advancement.").

99. *See* SMITH, *supra* note 26, at 102 ("Prosecutors' decisions are normally influenced by their desire to maintain cooperative relationships with other actors in the criminal justice system or to preserve a positive image in the eyes of voters and political elites.").

100. *See, e.g.*, Ephraim Unell, *A Right Not to Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 959 (2011) ("Prosecutors concerned about job security and promotion, particularly but not exclusively in jurisdictions where prosecutors are elected, face pressure to increase conviction rates. The prevalence of a 'win at all costs' culture in prosecutorial offices can erode individual prosecutors' internal sense of norms and ethical behavior.").

101. CHRISTOPHER P. BANKS & DAVID M. O'BRIEN, COURTS AND JUDICIAL POLICYMAKING 308 (2008).

102. *See* Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 233 n.23 ("[M]ore than most Justices he would accept rulings from which he had dissented as binding precedent.").

justices have not been shy about accepting for reconsideration issues that can lead to the reversal of precedents from prior Court eras.[103] The protection of innocent people from wrongful convictions is supremely important as a matter of justice, so the Roberts Court should consider every opportunity to clear away precedents that contribute to wrongful convictions.

One such precedent was produced in the case of *Carlisle v. United States*.[104] Defendant Charles Carlisle stood trial on a federal marijuana charge.[105] Under Federal Rule of Criminal Procedure 29(c), Carlisle filed a motion for a judgment of acquittal following the jury's return of a guilty verdict.[106] Because the district court granted the motion despite the fact that it was filed one day past the seven-day time limit detailed in Rule 29(c), the Sixth Circuit U.S. Court of Appeals reversed and ordered reinstatement of the original guilty verdict.[107] The appellate court held that an untimely motion for a judgment of acquittal shall not be granted under the jurisdiction of a district court.[108] Subsequently, Justice Antonin Scalia's majority opinion for the Supreme Court affirmed the decision of the Court of the Appeals by enforcing the statutory filing deadline as a limitation on a trial judge's authority.[109]

103. For example, in the middle of oral arguments in *Montejo v. Louisana*, 556 U.S. 778 (2009), a case concerning police questioning of charged defendants outside of the presence of counsel, "Justice Alito suddenly made the out-of-the-blue suggestion that the Court should consider overruling [*Michigan v. Jackson*, 475 U.S. 625 (1986)], despite the fact that this prospect had not been raised, briefed, or argued by the parties as an issue in the case." Christopher E. Smith, *Justice John Paul Stevens: Staunch Defender of* Miranda *Rights*, 60 DEPAUL L. REV. 99, 135 (2010). Ultimately, they reversed the prior precedent. *Id.* In another example, during the 2012 Term, the Roberts Court accepted for hearing a challenge to race-based affirmative action programs in higher education admissions (*Fisher v. University of Texas*, No. 11-345), which clearly constituted a reconsideration of the Rehnquist Court's prior decision endorsing certain practices in the University of Michigan case of *Grutter v. Bollinger*, 539 U.S. 306 (2003). Adam Liptak, *Supreme Court Faces Weighty Cases and a New Dynamic*, N.Y. TIMES (Sept. 29, 2012), http://www.nytimes.com/2012/09/30/us/supreme-court-faces-crucial-cases-in-new-session.html? pagewanted=all&gwh=B695CCEBB2A28D41DAB80746DEEF8299. Former *New York Times* reporter, Linda Greenhouse, who specialized in covering the Supreme Court, asserted that, with respect to the University of Texas affirmative action case, "the Supreme Court's purely discretionary decision last February to grant review in this case was an aggressive act of agenda setting. . . . So the logical inference is that the current majority—Justice Samuel A. Alito Jr. having replaced Justice O'Connor—doesn't like the precedent." Linda Greenhouse, *History Lessons*, N.Y. TIMES (Oct. 3, 2012, 8:30 PM), http://opinionator.blogs.nytimes.com/2012/10/03/history-lessons/.

104. Carlisle v. United States, 517 U.S. 416 (1996).

105. *Id.* at 418.

106. *Id.*

107. *Id.* at 419.

108. *Id.*

109. *Id.* at 433.

The essential flaws and detrimental consequence of the majority's decision were made clear in a dissenting opinion by Justice John Paul Stevens, joined by Justice Anthony Kennedy.[110] As summarized by Stevens, "The majority nevertheless maintains that the Rule must be read to require judges, in some instances, to enter judgments of conviction against defendants they know to be innocent."[111] In establishing this precedent, the majority clearly elevated the value of adhering to strict procedural rules above the more important value of ensuring that criminal punishment is reserved for those defendants whose guilt is proven beyond a reasonable doubt.[112] Is slavish adherence to a filing deadline really more important than keeping an innocent person from being sent to prison? Here the risk of erroneous conviction seemed particularly undervalued because the procedural violation was especially minor, as the motion was only one day late in failing to meet a short seven-day deadline.[113]

Justice Stevens emphasized the inherent power of the federal court:

> There is a "power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.'" *United States* v. *Morgan*, 307 U. S., at 197. Of course, that power does not survive after the court's jurisdiction of the subject matter has expired. It is surely sufficient, however, to enable the judge to refuse to impose sentence on a defendant when the record does not contain evidence of guilt.[114]

Justice Stevens characterized the issue in the case differently than the articulation advanced in the majority's analysis:

> The question in this case, therefore, is not whether Rule 29 . . . *authorizes* the court to grant an untimely motion for a judgment of acquittal; . . . Rather, the question is whether that Rule *withdraws* the court's pre-existing authority to refrain from entering judgment of conviction against a defendant whom it knows to be legally innocent."[115]

To Stevens and Kennedy, the statute was silent about this inherent power,[116] and, therefore, the majority relied on an erroneous negative inference to claim that the statutory filing deadline intended to indicate that judges

110. *Carlisle*, 517 U.S. at 436 (Stevens, J., dissenting).

111. *Id.* at 446.

112. *See supra* notes 25–48 and accompanying text regarding differing values and attitudes driving decisions concerning wrongful convictions.

113. *Carlisle*, 517 U.S. at 418.

114. *Id.* at 453 (Stevens, J., dissenting).

115. *Id.* at 437 (emphasis in original).

116. *See id.* at 443 ("Therefore, absent some express indication that Congress intended to withdraw the power that implicitly attends its initial grant of jurisdiction, a district court acts well within its discretion when it sets aside a jury verdict and acquits a defendant because the prosecution failed to prove its case.").

lacked power outside of the statute to counteract erroneous jury decisions.[117] The Stevens dissent made its point most strongly by referring to trial judges' authority to prevent a case from going to a jury when a prosecutor has failed to carry the burden of proof regarding criminal guilt:

> It would be most strange to conclude that this [inherent] authority, which enables a district court to keep a case from the jury altogether when the Government fails to prove its case, does not permit the same court to revise a guilty verdict that the jury returns despite the Government's insufficient proof.[118]

Unfortunately, this case presented the Court with an opportunity to consider the fate of a man whose guilt was not clearly proven, yet the majority opinion emphasized the lapsed filing deadline as the defining factor against granting a motion for acquittal.[119] Because this precedent undervalues the importance of using available mechanisms—including the wisdom and judgment of experienced judges[120]—to guard against wrongful convictions, the Supreme Court should look for an opportunity to revisit and overrule this precedent.

Another case the Roberts Court should both revisit and overturn is *Arizona v. Youngblood*,[121] as it also aided in the Court's contributions to wrongful convictions. On October 29, 1983, a middle-aged man abducted, kidnapped, confined, molested, and sodomized a ten-year-old boy after the boy left an evening church service.[122] Sadly, the attack lasted nearly ninety minutes after which time the young boy was released from captivity.[123] The assailant threatened to kill the boy if the young victim spoke with the police.[124] Subsequently, the child returned home and his mother drove him to a hospital where a sexual assault kit collection procedure was performed for the purpose of gathering potential evidence, including semen samples, hair, blood, and saliva.[125]

After examining the slides containing biological evidence, the crime lab investigator concluded that a sexual assault occurred, but no further tests were

117. *Id.* at 421–26 (majority opinion).

118. *Id.* at 442 (Stevens, J., dissenting).

119. *See Carlisle*, 517 U.S. at 416.

120. Judges typically have expertise with evaluating evidence from past experience as attorneys as well as experience on the bench while, by contrast, jurors have a single encounter with the courtroom process and their interactions with other jurors, thereby limiting their abilities as effective fact-finders and careful determiners of standards of proof. *See* Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L. J. 687 (1990).

121. Arizona v. Youngblood, 488 U.S. 51 (1988).

122. *Id.* at 52.

123. *Id.*

124. *Id.*

125. *Id.*

carried out that might have helped to either identify or exonerate suspects.[126] The boy's clothing, which contained stains from bodily fluids, was not refrigerated to prevent the biological materials from degrading.[127] Meanwhile, the victim identified a suspect from a photographic lineup and Larry Youngblood was placed into police custody.[128] When the clothing and other samples were actually tested more than a year later in order to provide proof linking the suspect to the evidence, the crime lab scientists were unable to successfully isolate a blood-type classification or any other factor useful for identification from the biological material.[129] Youngblood claimed that the boy had made a mistaken identification of him as the assailant, but he was convicted of the crime.[130] He appealed by alleging that proper preservation and timely testing of the biological evidence would have exonerated him.[131] The Arizona Court of Appeals reversed the conviction by finding a violation of due process.[132] The Arizona court stated that "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process."[133]

Chief Justice Rehnquist authored the majority opinion, which stated that the police were not proven to have acted in "bad faith" while conducting their investigation, and the police carry no constitutional duty to perform any particular tests.[134] Therefore, the police did not violate the Due Process Clause.[135] However, Justice Blackmun's dissenting opinion, joined by Justices Marshall and Brennan, argued that "[t]he Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial."[136] In other words, proof of "bad faith" by the police should not be required to establish that a defendant has been deprived of a fair trial because, as was apparently the case for Youngblood, "police ineptitude . . . [can] den[y] the opportunity to present a full defense" and thereby violate the right to due process.[137]

Police should bear the responsibility for preserving evidence in their possession in order to permit future testing. Fulfillment of this responsibility is

126. *Id.* at 53.
127. *Youngblood*, 488 U.S. at 53.
128. *Id.*
129. *Id.* at 54.
130. *Id.*
131. *Id.*
132. *Id.* at 54–55.
133. *Youngblood*, 488 U.S. at 54.
134. *Id.* at 58.
135. *Id.*
136. *Id.* at 61 (Blackmun, J., dissenting).
137. *Id.*

essential because of the many cases in which scientific testing techniques have improved over the years so that, for example, convictions based on blood types have been overturned years later when newly-developed DNA testing techniques freed wrongly-convicted prisoners through exclusion of individuals among those who share a blood type.[138] In all of these cases, if police had permitted the destruction, degradation, or loss of biological evidence, whether done intentionally or negligently, then innocent people would have remained in prison, including wrongly-convicted individuals serving life sentences.[139] A legal duty to preserve evidence certainly requires the expenditure of scarce law enforcement resources,[140] but to do otherwise would represent the abdication of a greater responsibility to preserve individual liberty and guard against wrongful convictions.[141]

IV. CONCLUSION

The tragic consequences of insufficient emphasis on guarding against wrongful convictions are easy to see when innocent people serve long prison

138. For examples of exonerations based on scientific testing techniques that were not available at the time of conviction, *see New DNA Testing Frees Convicted Colorado Rapist, Killer*, NBC NEWS (Apr. 30, 2012, 4:55 AM), http://usnews.nbcnews.com/_news/2012/04/30/11466476-new-dna-testing-frees-convicted-colorado-rapist-killer?lite; Molly Hennessey-Fisk, *Texan Wrongly Convicted of Rape Freed after 24 Years in Prison*, L.A. TIMES (Aug. 25, 2012), http://articles.latimes.com/2012/aug/25/nation/la-na-nn-rape-texas-exonerated-20120824; *Convicted Texas Man Cleared by DNA Test After 30 Years in Prison*, PBS NEWSHOUR (Jan. 4, 2011), http://www.pbs.org/newshour/bb/law/jan-june11/texascase_01-04.html; *DNA Tests Free Convicted Rapist*, CBS NEWS (Feb. 11, 2009, 8:54 PM), http://www.cbsnews.com/2100-201_162-532165.html.

139. *See New DNA Testing Frees Convicted Colorado Rapist, Killer*, *supra* note 138.

140. Kevin Johnson, *Storage of Evidence Key to Exonerations*, USA TODAY, Mar. 28, 2011, at 13A, *available at* http://usatoday30.usatoday.com/printedition/news/20110328/crimelab28_st.art.htm.

141. Justice John Paul Stevens described the importance of individual liberty as something that predated the Constitution and a value that was neither created by nor extinguished by law:

> But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

sentences.[142] Larry Youngblood, the man convicted of rape, whose case was turned aside by the Supreme Court in 1988, later had a stroke of luck when a small swab of biological evidence was found and tested using new DNA techniques in 2001.[143] The tests proved that Youngblood was innocent, just as he had claimed all along.[144] If not for the fortunate discovery years later, Youngblood would have had no hope of gaining exoneration. Other prisoners who are deprived of opportunities to test evidence cannot count on enjoying similar luck.

Unfortunately, the Supreme Court's role in facilitating such injustices merely creates opportunities for additional people to be affected, such as the 141 cases in Colorado in which a *Denver Post* investigation found that police and prosecutors had destroyed evidence that prisoners sought to have tested.[145] Included among these cases was one in which police, in violation of their own department's policies and a court order to test the evidence, tossed into a dumpster DNA evidence labeled "DO NOT DESTROY" and thereby prevented a prisoner from attempting to prove his innocence.[146] As nationally-known criminal defense attorney Abe Hutt said about his client's case, you should not have to

> scream about your innocence from a [prison] cell for 10 years and finally get the money together to have this stuff tested only to have so many people at the police department be careless, negligent, bad faith, reckless, whatever you want to call it, and thereby destroy forever your ability to prove your innocence and then have a court look at you and say, well, tough, that's kind of the way it goes.[147]

Police officials claimed that the evidence was destroyed through "miscommunication", so a Colorado judge ruled that they were merely negligent and not acting in "bad faith."[148] Thus, the possibly-innocent prisoner continued to languish in prison with his avenue for exoneration eliminated.[149]

As Professor Peter Neufeld has noted, "[i]n law school, we have been taught that, absent bad faith, the destruction of critical evidence will not be deemed prejudicial. As a result, there has been no requirement that law

142. *See supra* note 138 and accompanying text.

143. Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 646 (2001).

144. *Id.*

145. Susan Greene & Miles Moffeit, *Bad faith difficult to prove: Through carelessness or by design, tiny biological samples holding crucial DNA fingerprints often disappear on authorities' watch. Innocent people languish in prison, and criminals walk free*, DENVER POST, Oct. 1, 2007, at A01, *available at* http://www.denverpost.com/evidence/ci_6429277.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

enforcement agencies use due diligence to preserve evidence."[150] Unfortunately, the Supreme Court bears at least partial responsibility for many injustices resulting from the precedents that it has established that provide insufficient protection against erroneous convictions. Moreover, as the 300th innocent person was freed from prison through subsequent DNA testing in 2012[151] and hundreds of others were exonerated by other means since 1989,[152] evidence accumulates indicating that the problem of wrongful convictions is more acute than people realized—with error rates for some crimes potentially as high as fifteen percent.[153]

The Supreme Court does not bear sole responsibility for guarding against the risks of wrongful convictions. State legislatures can craft laws that mandate evidence preservation, opportunities for scientific testing, and reform of lineups and other procedures that lead to mistaken identifications.[154] Prosecutors can proactively facilitate the reexamination of evidence, as demonstrated by the model program in Dallas, Texas,[155] rather than resisting legitimate efforts to determine if someone was wrongfully convicted.[156] Yet, the Supreme Court plays an important role and it can do more to advance the accuracy of criminal case outcomes. As indicated by the discussion in this article, the Roberts Court has made decisions concerning DNA testing and prosecutorial misconduct that enhance rather than diminish the risk of wrongful convictions.[157] The justices could use their authority to undo the harm caused by these precedents as well as correct errors in prior precedents that enhance the risk of wrongful convictions by, for example, needlessly limiting trial judges' authority to enter "not guilty" verdicts and failing to prevent the destruction of testable evidence.[158]

150. Neufeld, *supra* note 143, at 646.

151. Douglas A. Blackmon, *Louisiana death-row inmate Damon Thibodeaux exonerated with DNA evidence*, WASH. POST (Sept. 28, 2012), http://articles.washingtonpost.com/2012-09-28/national/35494689_1_dna-evidence-damon-thibodeaux-death-row-inmate.

152. *See* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REP. BY THE NAT'L REGISTRY OF EXONERATIONS (2012), *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

153. *See* Blackmon, *supra* note 151.

154. *See* Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L. J. 263, 263–64 (2002).

155. *See* Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1037–38 (2011-2012).

156. Shaila Dewan, *Prosecutors Block Access to DNA Testing for Inmates*, N.Y. TIMES, May 17, 2009, at A1, A3, *available at* http://www.nytimes.com/2009/05/18/us/18dna.html?pagewanted=all.

157. *See supra* Part III.A.

158. *See supra* Part III.B.

The Supreme Court's tolerance of legal doctrines that enhance the risk of error reflects the individual justices' interpretive approaches, values, and priorities.[159] Thus, progress on the needed refinement of legal doctrines—and the advancement of justice for wrongly-convicted individuals—will likely depend on changes in the Supreme Court's composition. With four septuagenarians serving on the Roberts Court at the start of its 2012 term,[160] compositional changes are likely on the horizon, and the impact of those changes on doctrinal developments depends largely on the timing of those changes, the identities of the departing justices, and the orientation of the president who appoints replacements.[161] Ideally, it should not take a change in the Court's composition to find majority support for placing a high priority on preventing erroneous convictions. Unfortunately, however, that is likely the situation that we face.

159. *See supra* Part II.A–B.

160. At the start of the Supreme Court's 2012 Term, Justice Ruth Bader Ginsburg was 79, Justice Antonin Scalia and Anthony Kennedy were 76, and Justice Stephen Breyer was 74. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited Apr. 19, 2013).

161. For a description of the individual justices, their approaches to certain criminal justice issues, and the prospects of change in doctrine through compositional changes in the Supreme Court, *see* Smith, *supra* note 58, at 875–88.