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## Towards an International Right to Claim Innocence

Brandon L. Garrett

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# Towards an International Right to Claim Innocence

Brandon L. Garrett\*

*In the past, wrongful convictions were seen as a local problem largely undeserving of national or international attention. Very different legal systems have shared a common approach of emphasizing the finality of criminal convictions, thereby making it very difficult to claim innocence by relying on new evidence uncovered post-trial. While international law guarantees a right to a fair trial, a presumption of innocence, and a right to appeal, no international human rights norms clearly obligate countries to allow defendants to meaningfully assert post-trial claims of innocence. Today, the procedures and attitudes toward claims of innocence that rely on newly discovered evidence are in flux as more countries have adopted broader remedies for convicts to claim innocence.*

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*In this Essay, I describe the remarkable changes that have taken place in the past few decades, driven by a mounting number of exonerations, the development of DNA technology, the work of innocence projects, and a new international dialogue on research and legal methods to address wrongful convictions. Large and small countries, civil and common law countries, and countries with very different attitudes towards criminal justice have increasingly developed mechanisms to permit convicted individuals to assert factual innocence. Countries draw from each other's legal standards, strategies, and responses to wrongful convictions. Countries now permit innocence-based challenges under various procedural labels, ranging from the writ of habeas corpus, amparo de libertad, revision, or other statutory or administrative remedies. In turn, international bodies have relaxed concerns with finality and opened the door to the broader use of innocence claims, if not recognizing a freestanding right to make use of them.*

*In a time of growing convergence and comparison of criminal procedure approaches between countries, the movement towards permitting claims of innocence may lead to recognition of an international right to claim innocence or, more plausibly, a customary international law right to claim innocence in domestic courts. This could further incentivize the international development of claims of innocence and the adoption of remedies for wrongful convictions around the world.*

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## INTRODUCTION

Traditionally, wrongful convictions have been seen as a local problem largely undeserving of national or international attention. While international law guarantees a right to a fair trial, countries have long varied widely in what rights they grant defendants to factually challenge their convictions.<sup>1</sup> The degree to which a country permits such challenges reveals that country's "confidence . . . in its norms and mores," including the accuracy of criminal convictions and attitudes towards human rights.<sup>2</sup>

Today, post-trial procedures are in flux. Criminal justice systems of all stripes have converged in developing mechanisms, at least in theory, that permit individuals convicted of crimes to correct factual errors.<sup>3</sup> Countries engage in far more dialogue on questions of criminal procedure than in the past.<sup>4</sup> As a result, the question arises whether the problem of wrongful convictions is of international significance such that there should be customary international law right to claim innocence in domestic courts after a criminal conviction.

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1. See International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1989), 999 U.N.T.S. 171, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [<https://perma.cc/TQ24-ZSKR>].

2. See IRA P. ROBBINS, *COMPARATIVE POSTCONVICTION REMEDIES* ix (1980) (describing how a comparison of "the proper point of repose for the criminal-justice system can uncover a society's conceptions of fundamental human rights").

3. Throughout this Essay, I define a "claim of innocence" as a claim, at least based in part on non-record or new factual evidence, that there is no longer sufficient evidence of guilt to convict. In some legal systems, such a claim may only be asserted post-conviction, as non-record claims cannot be raised on appeal. In other legal systems, such a claim may be asserted during an appeal. Importantly, since such a claim includes new or non-record evidence, it is distinct from a claim that the evidence presented at a trial was already insufficient.

4. See *generally* CRIMINAL PROCEDURE: A WORLDWIDE STUDY xxii (Craig M. Bradley ed., 2d ed. 2007) (surveying international dialogue concerning criminal procedure).

In this Essay, I describe remarkable changes in the past three decades, driven by a mounting number of exonerations, development of DNA technology, the work of innocence projects pioneered in the United States, and a new international dialogue on research and legal methods to address the problem of wrongful convictions, including at the United Nations.<sup>5</sup> To give a few examples of these remarkable changes: In 2014, the Chief Justice of China's Supreme People's Court gave a high-profile speech, stating, "[w]ith regard to wrongful convictions, we feel a deep sense of self-blame and demand that courts at all levels draw a profound lesson."<sup>6</sup> That year, Chinese courts reversed convictions in over 1,300 cases, including high-profile murder cases and cases where persons sentenced to death were posthumously exonerated.<sup>7</sup> In 2015, in the United States, six individuals were exonerated from death row,<sup>8</sup> and Justice Stephen Breyer wrote a dissent calling for briefing on the issue of whether the current practice of the death penalty is categorically unconstitutional, including because of evidence from such exonerations.<sup>9</sup> In Italy, perhaps the highest profile reversal based on new factual evidence in recent years was an appellate court's 2015 acquittal of Amanda Knox and Raffaele Sollecito.<sup>10</sup> In 2015, Taiwan broadened its applicable standard for reopening cases based on new evidence of innocence.<sup>11</sup>

Why are these developments surprising? Countries have long placed firm obstacles in the way of raising innocence claims after a conviction is final. In a range of legal systems, not only has it been difficult to challenge the sufficiency of the evidence that was presented at a criminal trial, but it has also been particularly challenging to assert a claim based on new evidence of innocence uncovered after a trial. This is because criminal justice systems embrace the concept of finality, an important value in any legal system for reasons of accuracy and repose and because, as the years pass, evidence becomes stale and actors must move on. Additionally, finality relates to the concept of double

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5. For an example of increased United Nations engagement with concerns regarding wrongful convictions in the death penalty setting, see U.N. HUMAN RIGHTS OFFICE OF THE COMM'R, MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES (2014), <http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf> [<https://perma.cc/C3DV-7EMV>], a recent publication discussing wrongful conviction cases and research.

6. Josh Chin, *China Top Judge Apologizes for Wrongful Convictions*, WALL STREET J. (Mar. 12, 2015), <https://www.wsj.com/articles/china-top-judge-apologizes-for-wrongful-convictions-1426184136> [<https://perma.cc/9ZGL-AMQT>].

7. *Id.*

8. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2015: YEAR END REPORT (2015), <https://deathpenaltyinfo.org/documents/2015YrEnd.pdf> [<https://perma.cc/5WT5-FEAA>].

9. *Glossip v. Gross*, 135 S. Ct. 2726, 2757–58 (2015) (Breyer, J., dissenting).

10. *Amanda Knox and Raffaele Sollecito Acquitted of Meredith Kercher Murder*, BBC NEWS (Mar. 28, 2015), <http://www.bbc.com/news/world-europe-32096621> [<https://perma.cc/AGH6-8BNQ>].

11. *See infra* Part II.

jeopardy, which protects a person from repeated criminal prosecutions.<sup>12</sup> Indeed, in *Herrera v. Collins*, the U.S. Supreme Court declined to recognize a freestanding constitutional claim of actual innocence, noting the “disruptive effect that entertaining claims of actual innocence would have on the need for finality.”<sup>13</sup>

But finality is entering a period of new international ferment. The advent of modern DNA testing and the improvement of many investigative techniques have unsettled traditional rules of finality and pushed countries around the world to provide avenues for innocence claims. All criminal justice systems now face a common practical problem: new evidence that is far more probative than the evidence relied upon at trial may come to light in some cases. DNA technology has made it possible, in some cases at least, to convincingly prove whether a convict was innocent or guilty many years later. However, many criminal cases lack DNA evidence or other evidence of sufficient reliability. During the criminal investigation, officers must rely on fallible human memory and traditional forensic techniques that can have high error rates.<sup>14</sup> Other investigative techniques can be used more accurately, but investigators have often relied on less accurate procedures, such as traditional eyewitness identification procedures, interrogation procedures, and forensics.<sup>15</sup>

A wide range of jurisdictions have responded to wrongful convictions by reconsidering barriers to asserting new evidence of innocence.<sup>16</sup> Lawyers in the United States, for instance, played a pioneering role in creating awareness that there is a practical problem with overly restrictive rules for claiming innocence after a conviction. Lawyers have used DNA to exonerate over 340 prisoners in the United States; there is no comparable body of wrongful convictions that have

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12. U.N. Human Rights Comm., General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, ¶ 19, U.N. Doc. CCPR/C/GC/32 (2007).

13. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

14. PRESIDENT’S COUNCIL OF ADVISORS ON SCI. AND TECH., EXEC. OFFICE OF THE PRESIDENT, *FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* 57, 102 (2016).

15. A range of jurisdictions face “functional similarities” in causes of wrongful convictions, as discussed by Kent Roach, *Comparative Reflections on Miscarriages of Justice in Australia and Canada*, 17 *FLINDERS L.J.* 381, 381 (2015). That said, there is a need to conduct broader comparisons, so as not to overgeneralize from the U.S. experience or ignore salient differences across jurisdictions. Mark Godsey has written a chapter that describes in detail how these same factors operate across national borders, since, after all, “[e]very criminal justice system in the world—regardless of differences in procedures and details—has one thing in common: it is operated by human beings.” MARK GODSEY, *THE HUMAN FACTOR IN WRONGFUL CONVICTIONS ACROSS NATIONAL BORDERS* (2016); *see also* Eric Colvin, *Convicting the Innocent: A Critique of Theories of Wrongful Convictions*, 20 *CRIM. L.F.* 173 (2009) (discussing sources of error in criminal cases).

16. For a piece calling for more comparative scholarship to study wrongful convictions and noting that “a string of high-profile DNA exonerations and public inquiries” have driven reform in Canada more so than Australia, *see* Roach, *Comparative Reflections on Miscarriages of Justice*, *supra* note 15.

come to light in any other country.<sup>17</sup> Lawyers and journalists in the United States also created some of the first and most successful innocence projects. Increasingly, however, many other countries have seen high-profile exonerations that rely on types of evidence other than DNA testing. These countries, including China, India, Japan, Mexico, Zimbabwe, and a network of countries across Latin America, have also created new innocence projects of their own.<sup>18</sup>

The changes in post-conviction standards for claims based on new evidence of innocence illustrate how countries have—or have not—opened the door more broadly towards claims of innocence. Countries have used different tools to relax the traditional rules of finality, using various procedural labels ranging from the writ of habeas corpus, *amparo de libertad*, and revision to other statutory or administrative remedies.<sup>19</sup> In some countries judges have fashioned new interpretations of traditional appellate vehicles. In other countries, legislators have enacted statutes that permit access to new evidence of innocence and relief.<sup>20</sup> Some countries, like India, are still in the process of creating forensic databases and have not once permitted post-conviction DNA testing, much less had DNA exonerations.<sup>21</sup> Australia has only just adopted some of its first post-conviction innocence claims.<sup>22</sup> Other countries, like the Netherlands, have had panels of judges revise standards of review in response to high-profile exonerations.<sup>23</sup> By looking comparatively at such procedures, I explore the range of legal responses and reforms to standards for litigating innocence post-

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17. See generally BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (studying the characteristics of the first 250 DNA exonerations in the United States); see also Brandon L. Garrett, *Convicting the Innocent Redux*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed ed., 2016) (describing updated data concerning first 330 DNA exonerations); *The Cases & Exoneree Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment> [<https://perma.cc/5KCT-R5LB>] (last visited Mar. 5, 2017) (providing current list of over 340 DNA exonerees and details concerning cases).

18. For a wonderful exploration of the origins of the global innocence movement, see MARK GODSEY, THE GLOBAL INNOCENCE MOVEMENT (2016) (describing earlier origins in, for example, the Miscarriages of Justice Organization founded by Patrick Joseph Hill in the United Kingdom in the 1970s). For an overview of a remarkable symposium issue dedicated to the international expansion of innocence efforts, including efforts underway in Africa, Asia, and Europe, see Mark Godsey, *Introduction*, 80 U. CIN. L. REV. 1067 (2012), *Homepage*, RED Inocente, <http://redinocente.org> [<https://perma.cc/P9CU-BYVK>] (last visited Mar. 5, 2017) (network of Latin American innocence projects), and *Innocence and Wrongful Convictions*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/wrongful-convictions.cfm> [<https://perma.cc/D483-QS5X>] (last visited Mar. 5, 2017).

19. See *infra* notes 192–93 and accompanying text (describing the *amparo de libertad*); see also *infra* notes 160–62 and accompanying text (describing revision).

20. See, e.g., *infra* notes 37, 71, 211–12.

21. See *infra* Part I.A.2.

22. Sue Milne, *The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review*, 36 ADELAIDE L. REV. 211, 211 (2015).

23. See *infra* notes 203–04.

conviction. The way in which each jurisdiction deals with this problem sheds some light on its underlying legal system and values.

In Part I, I discuss the status of post-conviction innocence claims in common law and then civil law countries. In the area of innocence claims, I find that traditional legal forms may not matter quite so much as one might expect. One might assume that the divide between civil law and common law criminal justice systems results in divergent responses. Such differences might, in turn, justify a reluctance to cement a uniform principle supporting claims of innocence in international human rights law. One might also expect civil law countries to be resistant to such change because they traditionally lack methods for reopening cases after an appeal, even though they permit *de novo* fact review during appeal.

However, the lines separating common law and civil law countries cannot be so neatly demarcated. Many common law countries adopt similarly restrictive notions of finality based chiefly on deference to the role of the jury, rather than that of the trial judge. Some common law countries have bureaucratic or heavily statutory systems for post-conviction review, while some civil law countries have judge-made standards for post-conviction review. Indeed, France, an archetypal civil law country, uses juries in *cour d'assises* that include three judges and nine lay jurors both at the most serious criminal trials and also on appeal.<sup>24</sup>

There is no formally defined dividing line between countries that have and have not changed newly discovered evidence rules. Instead, I observe that a common feature among countries that have adopted changes is that they have been confronted with wrongful convictions, sometimes quite high-profile ones, that underscored the way in which existing rules discouraged the review of new evidence of innocence. Sometimes, countries adopted changes incrementally—as more wrongful convictions came to light, a country introduced further reforms. Exonerates can provide a human face of error in criminal justice, and in some jurisdictions, they have personally testified before legislatures and advocated for legal change.

In Part II, I describe the growing international legal dialogue surrounding the problem of wrongful convictions and how to remedy them before and after they occur. This dialogue has led jurisdictions to borrowed approaches from one another. For instance, new administrative models adopted in England, Scotland, Wales, and other countries permit review of convictions outside traditional judicial proceedings. DNA technology and innocence projects have likewise spread to a growing number of jurisdictions, resulting in increased exonerations around the world. The works of scientists and legal scholars have also contributed to the study of wrongful convictions and a better understanding of the systematic causes of such errors. Further, new statutes adopted in a range

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24. Bron McKillop, *Review of Convictions After Jury Trials: The New French Jury Court of Appeal*, 28 SYDNEY L. REV. 343, 344 (2006).

of countries and rulings by the European Court of Human Rights have broadened the international toolbox of judicial remedies based on new evidence of innocence. Accordingly, the development of claims of innocence has become increasingly international.

In Part III, I consider the argument that the right to claim innocence should be recognized as a form of customary international law. Currently, there is no recognized international right to claim innocence. At best, international sources clearly do not prohibit reopening convictions based on new evidence of innocence. International human rights law has traditionally recognized certain general fair trial and appellate rights of criminal defendants, but these are procedural rights, not rights to be free from wrongful convictions. However, the right of the wrongly convicted to seek compensation once exonerated is set out in international treaties, including the International Covenant on Civil and Political Rights. That right implies that there should be a mechanism for a wrongly convicted person to obtain an exoneration prior to seeking compensation.<sup>25</sup> International human rights law should fill the gap between a general fair trial right and a compensation remedy with a right to claim innocence.

Why does the gap exist? In the 1960s and 1970s, when these international human rights were developed, there simply was not the same awareness of wrongful convictions. Since that time, international human rights law has been leery of reopening convictions, as doing so might violate norms of double jeopardy if judges also reopened acquittals. The International Covenant on Civil and Political Rights states a strong double jeopardy principle, but the United Nations Human Rights Committee clarified that reopening of criminal proceedings could be justified “by exceptional circumstances” that would be considered “a resumption of a trial” and not a retrial in violation of double jeopardy.<sup>26</sup>

Over time, domestic courts may increasingly take stock of the growing recognition across the world that wrongful convictions demand robust legal remedies. Just as the U.S. Supreme Court has sometimes cited to punishment practices in other countries, such as it did when striking down the juvenile death penalty in *Roper v. Simmons*,<sup>27</sup> a future court adjudicating the question of whether and how to recognize a constitutional claim of innocence might take note of the sea change not just in the United States, but globally. Meanwhile, international bodies and individual countries have recently relaxed concerns with finality and double jeopardy, recognizing that legal avenues to remedy wrongful convictions and grossly unfair trials are not inconsistent with due process, but are rather important rights. Over the decades to come there may be an international convergence on the adoption of new approaches towards

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25. See *infra* Part III.

26. U.N. Human Rights Comm., *supra* note 12.

27. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

investigating and litigating claims of innocence. There may even be the recognition of an international right to claim innocence as a matter of principle. This result would further promote the adoption of meaningful avenues to access new evidence of innocence and reverse wrongful convictions.

## I. COMPARING CLAIMS OF INNOCENCE

A comparison of the approaches taken by different countries reveals that the differences between the common law jury system and the civil law “inquisitorial” system matter far less than expected with regard to the rules that a country applies once a criminal conviction is final.<sup>28</sup> Historically, a wide range of countries—common and civil alike—have had rules of finality making it difficult to assert newly discovered evidence of innocence. But today, those rules are in flux. In this Section, I first examine common law countries’ approaches to innocence claims and finality rules and then turn to those of civil law countries. In both types of countries, there has been a remarkable amount of experimentation, with novel approaches towards innocence claims, and reconsideration of traditional rules of finality.

### A. *Common Law Countries*

While one might assume that common law countries permit more room for judicial interpretation of appellate and post-conviction standards than civil law countries, many common law countries in fact have strict statutory rules governing review of criminal convictions. Those rules, however, have become relaxed in many common law jurisdictions, partially in response to high-profile wrongful convictions. I begin by discussing such rules as they exist in the United States, in which the most high-profile innocence-related work has been done, and then examine the wider array of approaches represented in other large and small common law countries.

#### 1. *United States*

The United States has the largest prison population in the world and one of the highest world prison populations as a percentage of the general population.<sup>29</sup> The United States has also been home to the largest set of wrongful convictions brought to light by lawyers using new DNA technology.<sup>30</sup> Since 1989, when

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28. See Máximo Langer, *The Long Shadow of the Adversarial and Inquisitorial Categories*, in *THE OXFORD HANDBOOK OF CRIMINAL LAW 1* (Markus D. Dubber & Tatjana Hörnle eds., 2014).

29. *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) [https://perma.cc/XHV8-35B7] (last visited Mar. 7, 2017).

30. While there have been DNA exonerations in several other countries, with examples from China, Italy, Taiwan, and other countries discussed in this Section, in no country has there been hundreds of DNA exonerations. Several countries, like Taiwan, have had more than one DNA exoneration, and in China there have been multiple such exonerations, perhaps dozens. See *infra* notes 125, 209. One

post-conviction DNA testing first exonerated convicts in the United States, there have been 330 such DNA exonerations.<sup>31</sup> The high-profile nature of these cases dramatically altered perceptions of the criminal justice system and helped contribute to a series of changes to criminal procedure, including to rules surrounding litigation of new evidence of innocence.

At the time that the first DNA exonerees were litigating their cases, strict rules of finality made it very difficult to introduce new evidence of innocence after an appeal was completed and the conviction was deemed final. All jurisdictions had enacted some provision that provided for a new trial based on newly discovered evidence, but most states had rules limiting introduction of such new evidence of innocence to a time period of one to three years, and sometimes much less.<sup>32</sup> The federal rule was similarly stringent. It required that a motion based on newly discovered evidence be filed within three years, and it stated that the motion could only be granted in “the interest of justice,” and courts of appeals have interpreted it as permitted relief if a new trial “would probably produce an acquittal,” and if there had been prior diligence in seeking such evidence, among other requirements.<sup>33</sup> In the 1990s, only two states (Illinois and New York) had statutes providing a right to access post-conviction DNA testing.<sup>34</sup> Due to the difficulty of introducing new evidence at this time, many of the people freed by DNA tests in the first decade and a half of its use waited years to obtain those DNA tests and relief.

As DNA exonerations showed how powerful new evidence of innocence could come to light years and even decades after a conviction, the law across the United States began to change.<sup>35</sup> These changes—most of which were adopted in the past decade—were largely statutory and affected post-conviction remedies, not appeals.<sup>36</sup> Today, all fifty states, the District of Columbia, and the

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obstacle to research on such questions is that there is nothing like a National Registry of Exonerations in any country other than the United States.

31. See *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states> [https://perma.cc/6VPV-FMC7] (last visited Mar. 7, 2017).

32. *Herrera v. Collins*, 506 U.S. 590, 410–11 (1993) (noting that in 1993, seventeen states had limitations periods of less than sixty days, and eighteen had limitations periods between one and three years).

33. FED. R. CRIM. P. 33 (as amended Mar. 26, 2009); see, e.g., *United States v. Pearson*, 203 F.3d 1243, 1274 (10th Cir. 2000); *United States v. Chavis*, 880 F.2d 788, 793 (4th Cir. 1989).

34. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631, 1646–50, 1673–75 (2008).

35. See *id.* at 1629; see also Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 685, 686 (2005) (providing analysis of state post-conviction procedures for litigating new evidence of innocence).

36. To provide some context, in the United States—unlike in England and Wales, for example—there are two or more additional layers of post-appellate review of a criminal conviction. Following the direct appeal, which is as of right, state post-conviction and then federal habeas corpus review is possible. However, a vacatur of the conviction may lead to a retrial of the case, while in England and Wales, there is not necessarily a retrial after a reversal. See *Criminal Appeal Act 1968*, c. 19, § 7 (UK).

federal government have enacted statutes specifically permitting post-conviction DNA testing by at least some classes of convicts. These statutes typically do not have any time limitation and provide post-conviction relief based on the test results.<sup>37</sup> Some of the statutes also include provisions for relief based on non-biological new evidence of innocence.<sup>38</sup>

To be sure, the adoption of these statutes has not solved the problem. Several state courts have interpreted the statutes in highly restrictive ways that make it difficult for prisoners to obtain testing and relief.<sup>39</sup> In addition, many states adopted statutes that are on their face quite restrictive and impose high thresholds to obtain DNA testing and relief. For example, some statutes restrict or limit access to post-conviction testing in cases where the defendant could have requested testing at trial, where the defendant was convicted of certain enumerated felonies, where the defendant pleaded guilty, or where the defendant did not litigate the question of identity at trial.<sup>40</sup> The vast majority of convicts in the United States plead guilty, and in doing so, they typically waive the right to pursue an appeal or post-conviction relief.<sup>41</sup> Instead, they may only challenge their conviction under narrow circumstances, such as by raising the voluntariness of the plea itself or by claiming ineffective assistance of counsel during the negotiation of the plea.<sup>42</sup> Further, the U.S. Supreme Court has yet to recognize a freestanding due process right to access DNA testing post-conviction.<sup>43</sup> As a result, no freestanding innocence claim can clearly be litigated in federal habeas petitions, and any relief must therefore largely be sought in the state courts, which, as just mentioned, has made it difficult for prisoners to obtain testing and relief.

In response to concerns that the remedies available are inadequate, some states have revisited their statutes to broaden access to post-conviction DNA testing. For example, Texas recently changed the wording of its statute to include

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37. For a graphic illustrating the adoption of post-conviction DNA testing statutes, see *Today, All 50 States Have DNA Access Laws, but Many DNA Access Laws Have Limitations*, INNOCENCE PROJECT, [https://globalwrong.files.wordpress.com/2013/05/dna\\_innocencenetwork\\_website.pdf](https://globalwrong.files.wordpress.com/2013/05/dna_innocencenetwork_website.pdf) [<https://perma.cc/C8A3-NEDB>] (last visited Mar. 7, 2017).

38. See, e.g., VA CODE 19.2-327.10-.14 (petition for a writ of actual innocence based on non-biological evidence).

39. See Garrett, *Claiming Innocence*, *supra* note 34, at 1646–50; Rebecca Stephens, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM L. & CRIMINOLOGY 309, 320–23 (2013).

40. See BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION REMEDIES 164 (2013); Stephens, *Disparities in Postconviction Remedies*, *supra* note 39, at 315.

41. See, e.g., *Missouri v. Frye*, 566 U.S. 133, 142–43 (2012) (recognizing and citing federal data that “pleas account for nearly 95% of all criminal convictions”).

42. See Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 648–50 (2013) (describing appeals waivers and waivers of post-conviction remedies, and exploring debate concerning whether to permit waiver of claims of ineffective assistance of counsel).

43. *But see* Dist. Attorney’s Office v. Osborne, 557 U.S. 52, 67–72 (2009) (recognizing a procedure right to non-arbitrary treatment under preexisting post-conviction remedies).

evidence that has a “reasonable likelihood of containing biological material,” since courts had previously required inmates to prove the existence of microscopic material before testing would be granted.<sup>44</sup> More recently, California adopted a standard that grants habeas corpus relief based on new evidence that is “credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial,” as well as based on “false evidence” introduced at trial that was “substantially material or probative.”<sup>45</sup> The false evidence language does not mean that wholly new evidence exists. Rather, it recognizes that a convict may discover that the evidence introduced at trial was false, where, for example, a witness offered perjured testimony or scientific evidence was flawed or erroneous. Prior to the enactment of this statute, there was no codified standard of proof in California for habeas relief based on new evidence of innocence. Instead, there was a court-developed standard that was perceived as one of the most restrictive in the country. The author of the legislation sought to make the California standard consistent with that of forty-three other states, which adopt a “more likely than not” standard.<sup>46</sup>

California and Texas have also enacted statutes that permit post-conviction litigation of changed scientific evidence, based on a change in the understanding of the reliability of the evidence that supported a criminal conviction.<sup>47</sup> Such efforts broaden the types of unreliability that can support a motion for post-trial relief. Those legal changes may also reflect the changing uses of scientific evidence. In this context, the United States has taken a leading position by adopting an approach that requires searching judicial scrutiny of scientific evidence. The *Daubert* standard details the rules governing the admissibility of scientific expert testimony in courts in the United States.<sup>48</sup> The standard asks trial judges to assure that “an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.”<sup>49</sup> That receptivity to

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44. Accord S.B. 487, 84th Leg., Reg. Sess. (Tex. 2015); H.B. 2435, 84th Leg., Reg. Sess. (Tex. 2015); see TEX. CODE CRIM. PRO. 61 (a-1).

45. Accord S.B. 1134, 2016 Leg., Reg. Sess. (Cal. 2016); see CAL. PENAL CODE § 1473(b)(1) (2017).

46. See S. RULES COMM., OFFICE OF S. FLOOR ANALYSES, S. FLOOR ANALYSIS SB-1134, 2016 Leg., Reg. Sess. (Cal. 2016). The prior standard was developed in *In re Lawley*, 179 P.3d 891, 897 (Cal. 2008) (citation omitted) (holding that new evidence “must undermine the entire prosecution case and point unerringly to innocence or reduced culpability” and “[i]f ‘a reasonable jury could have rejected the evidence presented, a petitioner has not satisfied his burden”).

47. See CAL. PENAL CODE § 1473 (West 2017); TEX. CODE CRIM. PROC. ANN. art. 11.073(b) (West 2015). For an excellent discussion of these new post-conviction statutes, see Jennifer E. Laurin, *Criminal Law’s Science Lag: How Criminal Justice Meets Changed Scientific Understanding*, 93 TEX. L. REV. 1751 (2015), and David S. Mitchell, Jr., Comment, *Lock ‘Em Up and Throw Away the Key: “The West Memphis Three” and Arkansas’s Statute for Post-Conviction Relief Based on New Scientific Evidence*, 62 ARK. L. REV. 501, 531 (2009).

48. See *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579, 590–96 (1993).

49. *Id.* at 597.

certain types of forensic evidence may be double-edged, however. In the United States, many of the state statutes passed to provide a right to post-conviction litigation of new evidence of innocence are limited to DNA testing. Non-DNA evidence of innocence is more difficult to litigate in many jurisdictions.

There is no entitlement under the U.S. Constitution to legal representation during state post-conviction proceedings.<sup>50</sup> While an expanding network of pro bono innocence projects and clinics now take cases involving innocence claims, that network does not have the capacity to represent all convicts with innocence claims. Without a lawyer, it is very difficult for a convict to adequately investigate and litigate a possible claim of innocence. Only one state, North Carolina, has created a commission to investigate claims of actual innocence, and that agency has quite limited resources and staff.<sup>51</sup> As a result, potentially innocent convicts continue to face real legal and practical obstacles towards litigating claims of innocence in the United States.

## 2. India

In India, criminal trials are conducted before a judge, as jury trials were abolished in the 1950s.<sup>52</sup> After a conviction, state-level appellate High Courts have the power to review questions of both fact and law. Section 391 of the Code of Criminal Procedure further provides that these appellate courts have the power to take additional evidence on appeal if the court “thinks additional evidence to be necessary.”<sup>53</sup> Under Article 136 of the Constitution of India, the Supreme Court of India has appellate power over all courts in India, a plenary power that permits review of questions of both law and fact. The Court has interpreted that power to include authority to review lower court factual findings, though only in exceptional circumstances—if the lower court has acted “perversely or otherwise improperly” in approving a conviction or if “a manifest injustice has been occasioned.”<sup>54</sup> Judicial review is less constrained in death penalty cases, in which the Supreme Court can review the record *de novo*.<sup>55</sup> In addition, for final convictions, a defendant can seek revision in a High Court, a proceeding which

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50. *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987).

51. For a description of the Commission’s work, see generally GARRETT, *CONVICTING THE INNOCENT*, *supra* note 17, at 241.

52. Neil Vidmar, *The Jury Elsewhere in the World*, in *WORLD JURY SYSTEMS* 421, 426 (Neil Vidmar ed., 2000).

53. Central Government Act, No. 2 of 1974, INDIA CODE CRIM. PROC. § 391 (1973); *see also* Bhanwar Singh, *Criminal Appeals*, 1 J.T.R.I. J. 4–5 (1995), <http://ijtr.nic.in/articles/art11.pdf> [<https://perma.cc/MY24-HWHF>] (describing conflicting interpretations of that provision).

54. *Indira Kaur & Ors. v. Sheo Lal Kapoor*, (1988) 2 SCC 488 (India) (“It is no doubt true that this Court will unlock the door opening into the area of facts only sparingly and only when injustice is perceived to have been perpetuated. But in any view of the matter there is no jurisdictional lock which cannot be opened in the face of grave injustice.”); *Arunachalam v. P.S.R. Sadhanantham*, (1979) 2 SCC 297 (India).

55. *Mohammad Ajmal Mohammad Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1 (India).

conducts further inquiry and consider additional evidence, although such proceedings are discretionary.<sup>56</sup> The Constitution also permits common law writs such as habeas corpus to be filed in the High Courts.<sup>57</sup>

There have been high profile wrongful conviction cases in which the Supreme Court of India has ordered acquittals on appeal. One example is the acquittals of six men, all of whom were convicted of killing thirty-three people in a terrorist attack on a Gujarat temple, based on evidence of police misconduct, torture, and coerced confessions.<sup>58</sup> The Court emphasized the “absence of corroborating evidence” to verify the since-retracted confession statements and the absolute lack of “independent evidence to implicate the accused persons for the crime.”<sup>59</sup>

While the first uses of fingerprinting occurred in India, modern fingerprint databases are a recent development for the country. So, not surprisingly, there is not yet any national DNA databank in India. The creation of such a database might require far more research on population statistics, particularly since India is such a large country with many different ethnic groups. Indeed, India has been slow to widely adopt DNA technology. When DNA testing became available in criminal cases in the late 1980s, the only Indian city to utilize the technology was Hyderabad. It was not until almost a decade later, in the late 1990s, that DNA testing became available to crime labs in other cities, including Chennai and Delhi. However, labs in these other cities still regularly send difficult samples to the U.S. Federal Bureau of Investigation, since these labs may lack standards or accreditation or have outdated equipment.<sup>60</sup> In addition, Indian police do not have trained crime scene investigators to properly collect forensic evidence.<sup>61</sup> Currently, DNA testing is not routine in criminal cases, except those involving questions of paternity following sexual assaults. In 2005, the Indian Code of Criminal Procedure was revised to permit testing of suspects in criminal cases.<sup>62</sup>

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56. INDIA CONST. art. 227, § 1; INDIA CODE CRIM. PROC. §§ 397–401; *see also* Vineeta Vinayak Palkar, India, INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CRIMINAL LAW 225 (Frank Verbruggen & Vanessa Franssen eds., Dec. 2001) (noting that courts have confined revision review to questions of law).

57. INDIA CONST. art. 226, § 1.

58. *Adambhai Sulemanbhai Ajmeri & Ors. v. State of Gujarat*, (2014) 7 SCC 716 (India).

59. *Id.*

60. *DNA Experts (in India) Could also be Guilty of Giving False Results*, COUNCIL FOR RESPONSIBLE GENETICS, (Oct. 12, 2012, 12:39 AM), [http://www.councilforresponsiblegenetics.org/blog/post/e28098DNA-experts-\(in-India\)-could-also-be-guilty-of-giving-false-resultse28099.aspx](http://www.councilforresponsiblegenetics.org/blog/post/e28098DNA-experts-(in-India)-could-also-be-guilty-of-giving-false-resultse28099.aspx) [<https://perma.cc/TBV7-QSNK>].

61. *Id.*

62. Central Government Act, No. 2 of 1974, INDIA CODE CRIM. PROC. § 53 (2005); *see also* Thogorani v. State of Orissa & Ors, (2004) SCC OnLine Ori 297 (affirming legality of DNA test of suspects). In 2015, a DNA profiling bill was introduced that would have created a DNA databank. Sharon Fernandes, *Four Problems with DNA Database*, TIMES OF INDIA (Aug. 2, 2015), <http://timesofindia.indiatimes.com/india/Four-problems-with-the-DNA-database/articleshow/48311840.cms> [<https://perma.cc/C8W5-4K3D>] (describing proposed India's Human DNA Profiling Bill 2015).

However, lower courts are divided as to the admissibility of DNA evidence in criminal investigations, rendering the use of such evidence uncertain. Scholars have argued that there is a “need to re-examine these sections and laws as there is no rule present in the Indian Evidence Act, 1872, and Code of Criminal Procedure, 1973 to manage science and technology issues.”<sup>63</sup>

Recently, though, the Supreme Court of India provided more clarity on when DNA may be admissible in criminal cases. In *Dharam Deo Yadav v. State*, the Court held that DNA testing was admissible as evidence in a murder case, noting that DNA testing may not be “infallible,” but that it “is being used extensively in the investigation of crimes.” The Court further noted that it “often accepts the views of the experts” regarding DNA evidence. The Court concluded that a “DNA profile . . . is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory.”<sup>64</sup>

Despite the occasional admission of DNA evidence at trial, no rulings in India have recognized any right to post-conviction DNA testing in a criminal case. The only relevant rulings simply note that DNA evidence may be compelled from a suspect and may be admissible under some circumstances, such as in affirming convictions under a deferential sufficiency of the evidence standard.<sup>65</sup> Indeed, not only is there no right to obtain DNA testing post-trial—or at trial, for that matter—but there is no established standard in India for reversing a conviction based on new evidence of innocence.

### 3. *United Kingdom*

The United Kingdom has, over the past two decades, relaxed traditional rules of finality that restricted consideration of new evidence of innocence in appeals. In addition, it has created a novel administrative agency tasked with reviewing potential wrongful convictions. In the United Kingdom, the right to appeal—much less the right to raise new evidence of innocence post-conviction—did not traditionally exist. It took several spates of high-profile wrongful convictions for those rules to gradually be changed, but it was not chiefly DNA cases that worked those changes.

In 1907, the English Court of Appeal was created following a series of high-profile wrongful conviction cases that added pressure to adopt a general mechanism to examine the sufficiency of the evidence supporting criminal

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63. Nirpat Patel, Vidhwansh K. Guataman & ShyamSundar Jangir, *The Role of DNA in Criminal Investigation—Admissibility in Indian Legal System and Future Perspectives*, 2 INT’L J. HUMAN. & SOC. SCI. INVENTION 15, 16 (2013) (the authors note how “the admissibility of these evidences has remained in a state of doubt as the opinion of the Supreme Court and various High Courts in various decisions remained conflicting” and they contrast how “[m]any developed countries have been forced to change their legislation after the introduction of the DNA testing in the legal system”).

64. *Dharam Deo Yadav v. State of Uttar Pradesh*, (2014) 5 SCC 509 (India).

65. *See, e.g., id.*; *Thogorani v. State of Orissa & Ors.*, (2004) SCC OnLine Ori 297.

convictions.<sup>66</sup> Scholars have debated whether Sir Arthur Conan Doyle's advocacy played a role in the passage of the Act.<sup>67</sup> In 1966 and then in 1968, the Criminal Appeal Acts in England and Wales were revised to empower the Court of Appeal with the ability to reverse a conviction, which is "under all the circumstances of the case unsafe or unsatisfactory." This replaced a prior standard that referred to whether the jury verdict was unreasonable or unsupported by the evidence.<sup>68</sup> However, a court could not entertain a second appeal or an action raising new evidence of innocence after the time to file an appeal had expired. In addition, judges rarely granted leave to file an appeal.<sup>69</sup> Since only a court can vacate the conviction itself, the only other traditional avenue for post-conviction relief was a Royal Pardon, which could be granted based on the royal prerogative of mercy after a finding of innocence.<sup>70</sup>

Those traditional rules dramatically changed over the past two decades, as the rules of finality were relaxed symmetrically. Despite double jeopardy concerns, the Criminal Justice Act of 2003 allows for retrials of criminal convictions based on "new and compelling evidence," so long as that evidence was not adduced at the original trial or was available at the original trial but not used.<sup>71</sup> At the same time that rules for raising new evidence of innocence were relaxed, prosecutors gained the power to quash acquittals based on new and compelling evidence of guilt.<sup>72</sup> In contrast to the due diligence provisions that many jurisdictions impose on inmates bringing forth new evidence of innocence, the repeat prosecution available in the United Kingdom is not limited to evidence that it diligently pursued or was available at the first trial.<sup>73</sup> However, prosecutors can only make one application for a retrial following an acquittal. Scotland adopted a similar approach to repeat prosecution in the Double Jeopardy Act of 2011, which permits acquittals to be set aside based on "substantially" strengthening new evidence and in the "interests of justice."<sup>74</sup>

The Criminal Appeal Acts were substantially revised in 1995 to create a Criminal Case Review Commission (CCRC) in England and Wales to investigate potential wrongful convictions. The CCRC was created in response

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66. Criminal Appeal Act 1907, 7 Edw. 7, c. 23 (UK); *see also* ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS 1844–1994 (1996); 5 LEON RADZINOWICZ & ROGER HOOD, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1986).

67. D. Michael Risinger, *Boxes in Boxes: Julian Barnes, Conan Doyle, Sherlock Holmes and the Edalji Case*, 4 INT'L COMMENT. ON EVIDENCE, no. 2, 2006, at 88–89.

68. Criminal Appeal Act 1966, c. 31 § 2 (UK); Criminal Appeal Act 1968, c. 19, § 2 (UK).

69. NICOLA PADFIELD, TEXT AND MATERIALS ON THE CRIMINAL JUSTICE PROCESS 405 (4th ed. 2008).

70. *Id.* at 412.

71. Criminal Justice Act 2003, c. 44, §§ 78, 79(2) (UK); *see also* RICHARD TAYLOR, MARTIN WASIK & ROGER LENG, BLACKSTONE'S GUIDE TO THE CRIMINAL JUSTICE ACT 2003 113 (2004) (providing an overview of the Criminal Justice Act of 2003).

72. Criminal Justice Act § 76(5); ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS 397 (4th ed. 2010).

73. Criminal Justice Act § 78(2).

74. Double Jeopardy Act 2011, asp. 16, § 4(7)(a), (d) (Scotland).

to prominent wrongful conviction cases, including the Birmingham Six, the Guildford Four, and the Maguire Seven cases.<sup>75</sup> In England, a claim of innocence can now be raised after the time to file an appeal has expired by seeking review from the CCRC once all appeals have been exhausted. Any referral from that body to the Court of Appeals is treated as a new direct appeal and as timely filed.<sup>76</sup> The CCRC does not adopt formal criteria for what cases it may take. There has been much scholarly analysis and critique of The CCRC's standards and whether its practices are too restrictive, as well as whether its administrative resources are adequate to investigate the flow of requests the CCRC receives.<sup>77</sup> Since its inception in 1997, it has reviewed over 20,000 cases and referred over 500 cases for reversal on appeal, resulting in 412 successful appeals of criminal convictions.<sup>78</sup>

In addition to creating the CCRC, the 1995 Criminal Appeal Acts revisions also replaced the phrase “unsafe or unsatisfactory” with just the word “unsafe” and made the “unsafety” standard mandatory: the Court of Appeal “shall allow an appeal against conviction if they think that the conviction is unsafe.” That amendment was understood to have “restated existing practice.”<sup>79</sup> Now, once a case is referred by the CCRC to the appellate courts, the standard permits a conviction to be quashed if it is found to be “unsafe” under the Criminal Appeal Acts. The term “unsafe,” as the Court of Appeal has put it, “does not lend itself to precise definition.”<sup>80</sup> Sometimes “unsafety will be obvious,” for example, where there is evidence that a different person committed the crime, where the act was not a crime, or where there was “significant legal misdirection,” making the trial unfair.<sup>81</sup> In other cases, the unsafety is “much less obvious,” and the

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75. See ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT at i (1993) (recommending the creation of the CCRC to replace the Criminal Case Unit of the Home Office, under which the Home Secretary could order new investigations of criminal cases for referral to the Court of Appeal). For a description of human rights efforts advocating for the creation of the CCRC, see JUSTICE, REMEDYING MISCARRIAGES OF JUSTICE (1994).

76. Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 118–21 (2009); *Our History*, CRIMINAL CASES REVIEW COMM'N, <http://ccrc.wpengine.com/about-us/our-history> [<https://perma.cc/3825-RC4L>] (last visited Mar. 14, 2017).

77. The standards ask whether there is a “real possibility that the conviction . . . would not be upheld” by the Court of Appeals. Criminal Appeal Act 1995, [chapter], § 13(1) ([Jur.]). There is limited judicial review of decisions by the CCRC. CRIMINAL CASES REVIEW COMM'N, JUDICIAL REVIEW: POLICY AND PROCEDURE, <http://ccrc.wpengine.com/wp-content/uploads/2015/03/Judicial-Review-Policy-and-Procedure-FM-.pdf> [<https://perma.cc/PM4F-EVQ4>] (last visited Mar. 14, 2017); see also William E. O'Brian, Jr., *Fresh Expert Evidence in CCRC Cases*, 22 KING'S L.J. 1, 1–16 (2011) (discussing the CCRC standards for considering new expert evidence).

78. See *CCRC Case Statistics*, CRIMINAL CASES REVIEW COMM'N, <http://www.ccrc.gov.uk/case-statistics> [<https://perma.cc/8URH-FCPH>] (last visited Mar. 14, 2017).

79. BEN EMMERSON, ANDREW ASHWORTH & ALISON MACDONALD, HUMAN RIGHTS AND CRIMINAL JUSTICE, 21-36-38 (2012). Sir John Smith, *The Criminal Appeal Act 1995*, CRIM L.R. 920 (1995).

80. *R v. Criminal Cases Review Comm'n Ex p. Pearson*, [2000] 1 Cr. App. R. 141, 146.

81. *Id.*

question is whether the Court of Appeal “entertains real doubts.”<sup>82</sup> The House of Lords prominently interpreted that provision of the Act in *R. v. Pendleton*. There, it explained the standard as requiring the appellate court to ask whether the new evidence “might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.”<sup>83</sup> That standard, that a new jury “might” no longer reach the same result, is more permissive than the comparable standard in some U.S. jurisdictions, which, for example, insists that a new jury “would” or “probably would” reach a different result or that there is “clear and convincing evidence” that a new jury would reach a different result.<sup>84</sup>

International law influenced the current, broader interpretation of the “unsafe” conviction standard. Specifically, the English courts developed their interpretations of the standard in light of the Human Rights Act of 1998 and the ruling in *Condon v. United Kingdom*, which interpreted Article 6 of the European Convention on Human Rights as requiring a fair hearing at trial and suggesting the general need for appellate review of the overall fairness of the criminal trial.<sup>85</sup>

Scientific evidence has also played a greater role since the creation of the CCRC, and courts in England have had to reconsider their standards for evaluating scientific evidence.<sup>86</sup> Modern forensic DNA technology was pioneered in the United Kingdom, which now has the largest DNA databank proportion to population in the world.<sup>87</sup> DNA testing is routine during criminal investigations, and English courts have used DNA tests to exonerate convicts in high-profile cases. While English courts have rejected certain types of forensic psychiatric and psychological evidence, they have granted relief based on new expert evidence that undercuts prior scientific expert evidence, including in cases involving sudden-infant-death-syndrome testimony, pathologist’s evaluations, explosives analysis,<sup>88</sup> and post-conviction DNA testing.<sup>89</sup> As the Court of

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82. *Id.* at 146–47.

83. *R v. Pendleton* [2001] UKHL 66.

84. *See Griffin, supra* note 76, at 138–40. Griffin explores what differences between the U.S. and U.K. systems might explain the different approach. For instance, in the U.K., (1) there is no constitutional right to a jury, (2) jury verdicts need not be unanimous, (3) courts may also review acquittals, and (4) there is the possible influence of the European Convention on Human Rights. *See id.*

85. *See About Us*, CRIM. CASES REV. COMMISSION, [www.ccr.gov.uk/about-us/](http://www.ccr.gov.uk/about-us/) [<https://perma.cc/ZA8W-AHEZ>] (last accessed June 30, 2017); EUROPEAN CONVENTION ON HUMAN RIGHTS, art. 6(3); *Condon v. United Kingdom*, 31 Eur. Ct. H.R. 1 (2001); EMMERSON, ASHWORTH & MACDONALD *supra* note 79, at 21–38.

86. *See generally* William E. O’Brian Jr., *supra* note 77, at 1–16 (describing changes to scientific evidence standards in the U.K.).

87. JAY D. ARONSON, GENETIC WITNESS: SCIENCE, LAW, AND CONTROVERSY IN THE MAKING OF DNA PROFILING 15, 17 (2007); *see also* Brandon L. Garrett & Kerry Abrams, *DNA and Distrust*, 91 NOTRE DAME L. REV. 757, 774–75 (2015) (describing development of U.S. and U.K. DNA databanks).

88. *See, e.g., R v. Clark*, [2003] EWCA Crim 1020, 2003 WL 1822883, ¶ 178 (SIDS); *R v. Assali*, [2005] EWCA Crim 2031, 2005 WL 2119809, ¶ 5 (explosives); *R v. Boreman*, [2006] EWCA Crim 2265, 2006 WL 1635086, ¶ 3 (arson evidence).

89. *See, e.g., R v. Shirley*, [2003] EWCA Crim 1976, 2003 WL 21554724, ¶ 6.

Appeal explained in a murder and sexual assault case involving shoe print and serology evidence:

In the result there is nothing in the materials relied upon by the Crown, all of which we have examined carefully, to dispel the very strong probability that there was only one male contributor to the DNA found in the intimate samples taken from the victim. As we have said it is accepted that if that is the court's conclusion, the appellant cannot have been that contributor. In short, in light of the fresh evidence obtained from the DNA profiles, this appellant's conviction is plainly unsafe. The appeal will be allowed and the conviction quashed.<sup>90</sup>

While probative new scientific evidence resulted in an exoneration in that case, the courts have continued to rethink standards for proper use of scientific evidence. In 2011, the Law Commission issued a report titled *Expert Evidence in Criminal Proceedings in England and Wales*, which reconsidered the role that scientific evidence plays in criminal cases and recommended that a statute be adopted regulating the admissibility of scientific evidence. The Commission recommended that courts should admit the opinion of an expert if “(a) the opinion is soundly based, and (b) the strength of the opinion is warranted having regard to the grounds on which it is based.”<sup>91</sup> In 2013, the Government chose not to enact that recommendation, explaining that resources constraints made the proposals “not feasible,” as they would result in “additional pre-trial hearings.”<sup>92</sup> Instead, the Government asked that court rules be amended “to provide a stronger indication of the factors that trial judges should consider when assessing expert evidence.”<sup>93</sup> The rules have been revised. The new Rule 33.2 states: “An expert must help the court to achieve the overriding objective by giving opinion which is—(a) objective and unbiased; and (b) within the expert's area or areas of expertise.”<sup>94</sup> In addition, a new set of Criminal Practice Directions advises courts that:

Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such

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90. *Id.* ¶ 44.

91. LAW COMM'N, MINISTRY OF JUSTICE, EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES, 2011, Law Com No 325, at 42 (UK), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229043/0829.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229043/0829.pdf) [<https://perma.cc/72TF-J5KX>].

92. LAW COMM'N, MINISTRY OF JUSTICE, THE GOVERNMENT'S RESPONSE TO THE LAW COMMISSION REPORT, 2013, at 4 (UK) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260369/govt-resp-experts-evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260369/govt-resp-experts-evidence.pdf) [<https://perma.cc/TRL2-XWM2>].

93. *Id.* at 6.

94. See Criminal Procedure Rules 2014, § 33.2 (UK), <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-33.pdf> [<https://perma.cc/9FW2-KYD8>].

factors.<sup>95</sup>

The revised Criminal Practice Directions proceed to list factors that a court “may take into account,” including, “the extent and quality of the data on which the expert’s opinion is based and the validity of the methods” used, whether the conclusions were based on peer-reviewed publications or “others with relevant expertise,” and whether the methods followed “established practice in the field.”<sup>96</sup> The Criminal Practice Directions add that reliability should also be considered using detailed factors, including whether the data is “flawed,” whether the expert relied on “unjustifiable assumption[s],” or “an inference or conclusion which has not been properly reached.”<sup>97</sup> In short, these Criminal Practice Directions recommend a searching inquiry much like the *Daubert* test adopted in the United States. Time will tell how rigorously courts in the United Kingdom apply these new criteria, particularly in the difficult context where new scientific evidence is introduced after a criminal conviction.

#### 4. Canada

As can those in the United Kingdom, convicts in Canada can appeal to a provincial court of appeal on three grounds: legal error, unreasonable conviction, or miscarriage of justice. If the convict appeals based on these grounds, the court may broadly consider new evidence of innocence.<sup>98</sup> In addition, Section 683 of the Criminal Code of Canada allows courts of appeals to consider new evidence in general.

In 2002, Canada adopted a revised procedure under which a person claiming to have been wrongfully convicted, but whose appeals have been exhausted, can apply to the federal Minister of Justice to reopen a case based on a miscarriage of justice. The Minister of Justice “has investigative powers that can be used by the Minister, or delegated to some other qualified person.”<sup>99</sup> Prior to the 2002 revisions, the Minister lacked such investigatory powers. The 2002 revisions also established legal standards that make the Minister of Justice’s decision making more transparent.<sup>100</sup> However, it is rare for the Minister of Justice to reopen criminal cases. The Ministry cannot process the hundreds of cases per year that an agency like the CCRC can. For example, between April

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95. Royal Courts of Justice, Court of Appeal (Criminal Division), Criminal Practice Directions Amendment No. 2, [2014] EWCA Crim 1569, § 33A.4, <https://www.judiciary.gov.uk/publications/criminal-practice-directions-amendment-no-2> [<https://perma.cc/R9JN-DTQW>].

96. *Id.* § 33A.5.

97. *Id.* § 33A.6.

98. See Kent Roach, *Wrongful Convictions in Canada*, 80 U. CIN. L. REV. 1465, 1482–89 (2012).

99. Kent Roach, *Canada*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 4, at 57, 88.

100. For an accessible description of the procedures used in such reviews, see *The Review Process*, DEPT. OF JUSTICE, CANADA, <http://www.justice.gc.ca/eng/cj-jp/ccr-rc/proc.html> [<https://perma.cc/5H78-SP4M>] (last visited Mar. 17, 2017).

2015 and March 2016, the Ministry reviewed seven applications, with others awaiting a more complete assessment. The Ministry granted no remedies, and only one case proceeded past the preliminary stages to an investigation.<sup>101</sup>

There have been a series of DNA exonerations in Canada. Four of these exonerations were highly publicized and resulted in detailed reports, changes to criminal procedure rules, and greater concern about wrongful convictions among Canadian judges.<sup>102</sup> However, there has not yet been any change to the appellate standards of review in Canada to permit greater fact-finding or consideration of claims of innocence.<sup>103</sup>

### 5. Ireland

Unlike in the United Kingdom, but like in the United States, habeas corpus may be used in Ireland to litigate post-conviction challenges, including those seeking to introduce newly discovered evidence of innocence. Article 40 of the Constitution of Ireland requires that habeas corpus be made available before the High Court in order to secure the release of a prisoner who is unlawfully detained.<sup>104</sup> Procedures to quash a conviction are similarly grounded in the Constitution, specifically in judicial review provisions of Article 34.3.1.<sup>105</sup> The Attorney General of Ireland also provides legal representation during such proceedings.<sup>106</sup>

The Criminal Procedure Act rules for asserting newly discovered evidence place the burden on the convict:

A person . . . (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive, may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order

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101. Dept. of Justice, Canada, Applications for Ministerial Review—Miscarriages of Justice 2016, <http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/rep16-rap16/rep16.pdf> [https://perma.cc/3DF7-PXJE]; see also Roach, *supra* note 99, at 88 (describing Ministry of Justice investigations of possible wrongful convictions).

102. See Roach, *Wrongful Convictions in Canada*, *supra* note 98, at 1474, 1503, 1508–09, 1514–17. For the failure of legislative improvements to criminal procedure in Canada, see *id.* at 1520–21.

103. *Id.* at 413 (“In Canada, all appeals from convictions are determined under [section] 686 of the *Criminal Code* because of the federal Parliament’s exclusive jurisdiction over criminal law and procedure. There have been no changes to these provisions even though Canadian inquiries have recommended that appellate judges should take a more inquisitorial approach to appeals and that appeals should be allowed on the basis of a lurking doubt. This fits into a pattern of Canada’s Parliament not being responsive to demands to reform the law better to prevent and remedy wrongful convictions.”).

104. Constitution of Ireland 1937 art. 40. This Article largely superseded the prior Habeas Corpus Act of 1782. Habeas Corpus (Ireland) Act, 1781, 22 Geo 3 c 11.

105. Article 34(3)(1) provides “full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.” Constitution of Ireland 1937 art. 34(3)(1).

106. See, e.g., *Byrne v. Governor of Mountjoy Prison* [1998] 1 ILRM 386 (H. Ct.) (Ir.). Some commentators have found that while habeas corpus and Article 40 applications “used to have a somewhat hallowed place in judicial thinking,” they no longer take precedence in terms of scheduling over other applications. MÍCHEÁL P. O’HIGGINS, BAR COUNCIL, CRIMINAL JUDICIAL REVIEW: REMOVING CRIMINAL CASES FROM JUDICIAL REVIEW (2011).

quashing the conviction or reviewing the sentence.<sup>107</sup>

There is also a procedure under section 7 of that Act which allows a convict to apply to the Minister of Justice for a pardon based on new facts showing that there was a “miscarriage of justice.” Further, section 9 of the Act provides for the payment of compensation to a person found to have suffered a wrongful conviction.<sup>108</sup>

Irish courts have traditionally been skeptical of new scientific evidence, and there have not been any DNA exonerations to date. As David Langwallner has described, “it remains to be seen how our appellate courts would accept expert opinion presenting more sensitive DNA profiling that casts doubt on the safety of a conviction.”<sup>109</sup> But this lack of receptivity may change. In 2014, Ireland enacted the Criminal Justice (Forensic Evidence and DNA Database System) Bill, which provides for the creation of a DNA database.<sup>110</sup> However, the legislation was silent on the topic of post-conviction DNA testing, as well as on how to handle post-conviction requests for more sophisticated types of DNA tests.<sup>111</sup>

#### 6. Australia

The Australian Court of Appeal is itself modeled after the English Court of Appeal. So, unsurprisingly, Australia’s “unsafe” verdict standard borrows the “unsafe” conviction standard from the United Kingdom, despite somewhat different statutory language.<sup>112</sup> Section 568(1) of the Australia’s Crimes Act 1958 (Vic) states that the Court of Appeal reverses a conviction where:

[T]he verdict of the jury . . . is unreasonable or cannot be supported having regard to the evidence or the judgment of the court before which the appellant was convicted[, there was] a wrong decision of any

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107. Criminal Procedure Act 1993, (Act No. 40/1993) (Ir.) § 2(4), <http://www.irishstatutebook.ie/eli/1993/act/40/enacted/en/html?q=Criminal+Procedure+Act&years=1993> [https://perma.cc/6KPA-D3XN].

108. For detailed and insightful analysis of these provisions, see David Langwallner, *The Irish Innocence Project*, 80 U. CIN. L. REV. 1293, 1307 (2012).

109. *Id.* at 1328.

110. Seanad Éireann, Minister for Justice and Equality & Frances Fitzgerald, T.D., Second Stage Speech, Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013 (May 27, 2014), <http://www.justice.ie/en/JELR/Pages/SP14000122> [https://perma.cc/W7NJ-3V29]; see also Explanatory Memorandum, Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013, <http://www.oireachtas.ie/documents/bills28/bills/2013/9313/b9313dmemo.pdf> [https://perma.cc/S9PA-KJTQ] (providing for the establishment of a DNA database).

111. Stephen Donoghue, *Guest Post: Irish Innocence Project and DNA Databases*, HUMAN RIGHTS IN IRELAND (Feb. 28, 2011), <http://humanrights.ie/criminal-justice/guest-post-irish-innocence-project> [https://perma.cc/8XHW-HLRK]. On the Irish Innocence Project generally, see *About, IRISH INNOCENCE PROJECT*, <http://www.innocenceproject.ie/about> [https://perma.cc/RR85-DRU8] (last visited Mar. 14, 2017).

112. Chris Corns, *Proven Miscarriages of Justice: Retrial or Acquittal? The Discretionary Power of Courts of Appeal in Hong Kong and Australia*, 37 H.K. L.J. 41, 44 (2007).

question of law[,] or that [there] was a miscarriage of justice . . . .<sup>113</sup>

However, even if the Australian court determines that a conviction was unsafe, it may still dismiss the appeal if there was still no “miscarriage of justice,” and the court can order a retrial if there is sufficient evidence to re-convict.<sup>114</sup> In addition, courts in Australia often emphasize in their rulings the importance of the constitutional role of a jury and the need for deference to a jury verdict.<sup>115</sup>

Like England and Scotland, Australia has relaxed traditional rules of finality for acquitted convicts. In the state of South Australia, for example, prosecutors can retry individuals based on “fresh and compelling” evidence of certain serious crimes.<sup>116</sup> In New South Wales and the Australian Capital Territory, certain provisions permit an appellate court to conduct a judicial inquiry into a claim of innocence.<sup>117</sup>

Innocence advocates and the Australian Law Reform Commission have argued that Australia should adopt a statute permitting post-conviction DNA testing. In so arguing, they cite evidence from DNA exonerations in the United States and a DNA exoneration in Australia that occurred in 2001.<sup>118</sup> To date, such efforts have been unsuccessful, although a DNA Review Panel was created in 2006 in New South Wales to review cases in which DNA testing might prove innocence, however, the rules were fairly restrictive, and the panel expired in 2014.<sup>119</sup> As Professor Kent Roach detailed, there has only been one DNA exoneration, and absent a “string of high profile DNA exonerations” and public inquiries, there has been little pressure to adopt changes to respond to wrongful convictions.<sup>120</sup>

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113. Crimes Act 1958 (Vic) s 568(1) (Austl.).

114. See, e.g., *Weiss v. The Queen* (2005) 223 ALR 662; *R v. Thomas* [No 3] (2006) VSCA 300.

115. *Chamberlain v. The Queen* [No. 2] (1984) 153 CLR 521, 534 (Gibbs, CJ & Mason, J); *id.* at 670 (Brennan, J). For a detailed discussion, see Gregor Urbas, *DNA Evidence in Criminal Appeals and Post-Conviction Inquiries: Are New Forms of Review Required?*, 2 MACQUARIE L.J., 141 (2002), <http://www.austlii.edu.au/au/journals/MqLJ/2002/6.html#fnB25> [<https://perma.cc/BGR9-GU53>].

116. See Statutes Amendment (Appeals) Act 2013 (SA) adding § 353A to Criminal Law Consolidation Act 1935 (SA); see also Roach, *supra* note 15, at 240 (discussing this legislation and similar legislation recently enacted in Tasmania in 2015, as well as how the legislation has been used in the courts).

117. See David Hamer, *Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission*, 37 UNSW L.J. 270, 288 (2014); see also MARK FINDLAY, STEPHEN ODGERS & STANLEY YEO, *AUSTRALIAN CRIMINAL JUSTICE* 312 (4th ed. 2009) (describing how such procedures have the benefit of being “less formalistic” than traditional appeals).

118. *R v. Button* [2001] QCA 133 (10 Apr. 2001) (Austl.) (Williams JA, White & Holmes JJ); *Post-Conviction Use of DNA Evidence*, AUSTL. LAW REFORM COMM’N, <http://www.alrc.gov.au/publications/45-post-conviction-use-dna-evidence/introduction> [<https://perma.cc/UX8C-WDB7>] (last visited Apr. 14, 2017).

119. Extract from NSW Legislative Council Hansard and Papers, 20 Nov. 2013 (Proof), Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2013 (NSW), [https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLC/1688/2R\\_Crimes\\_\(DNA\\_Review\).pdf](https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLC/1688/2R_Crimes_(DNA_Review).pdf) [<https://perma.cc/83ZU-WAJJ>]; Hamer, *supra* note 117, at 292–95.

120. See Roach, *supra* note 15, at 237–39. The first and only recognized DNA exoneration, that of Frank Button, is described in Roach, *id.*

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The Sections above described remarkable variation among common law countries in their approaches towards claims of innocence. But a range of countries are gradually expanding access to remedies regarding newly discovered evidence of innocence in response to wrongful convictions: England created the CCRC to review claims of innocence, Canada uses a more limited Minister of Justice model, and the United States only has such an administrative agency in the state of North Carolina. Some jurisdictions have passed a range of statutes broadening access to new evidence of innocence, as each state in the United States has done, while others have created influential judicial standards, such as the United Kingdom's "unsafe" conviction standard. In still other jurisdictions, like the United States and Ireland, the common law writ of habeas corpus provides a post-appellate avenue for litigation.

### B. Civil Law Countries

Similar to the pattern across the common law countries discussed above, there is real variation in how civil law countries have adapted post-conviction rules surrounding newly discovered evidence. As the Sections that follow will describe, the differences between civil and common law countries may be quite fine, at least with regard to post-conviction claims of innocence. Although many countries in both types of systems historically did not permit new challenges post-appeal, many now do, and they have changed the law through statutes that look similar in both civil and common law countries, or through the writ of habeas corpus.

#### 1. China

The People's Republic of China has rapidly changed its criminal procedure with a series of statutory enactments over the past several decades. The entire judicial system has been rebuilt from the ground up since the 1979 Criminal Procedure Law reestablished criminal courts that had been shut down during the Cultural Revolution.<sup>121</sup> While criminal procedure rules prohibit torture and require recording interrogations, the rules still do not provide suspects with the right to silence or to counsel and permit police to interrogate suspects for up to thirty-seven days, and even that time period may be extended.<sup>122</sup> Confessions remain the dominant evidence in criminal cases in China, with police focusing primarily on obtaining confessions.<sup>123</sup> A large number of Chinese officials

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121. See Ira Belkin, *China*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 4, at 91, 105; TERENCE C. HALLIDAY, LUCIEN KARPIK & MALCOLM M. FEELEY, THE LEGAL COMPLEX AND STRUGGLES FOR POLITICAL LIBERALISM, 65 (2007).

122. Ira Belkin, *China's Tortuous Path Toward Ending Torture in Criminal Investigations*, 24 COLUM. J. ASIAN L. 273, 279–80 (2011).

123. *Id.* at 279.

continue to be disciplined for committing known instances of torture.<sup>124</sup> As a result, over the past two decades, the Chinese criminal justice system has been rocked by a number of high-profile wrongful convictions and exonerations.<sup>125</sup>

China uses an inquisitorial system in which criminal convictions follow from a bench trial. After a conviction, China allows for two levels of *de novo* review (of both fact and law)—one at the local level and one at the regional Intermediate People’s Court.<sup>126</sup> The criminal justice supervision procedure, sometimes translated as a criminal retrial procedure, permits review of the factual record in a criminal case, including that which is based on new factual evidence.<sup>127</sup> Prosecutors, called “people’s procuratorates,” can also present a petition to a court with evidence that a conviction was wrongful, although in practice, the procuratorates rarely present such petitions.<sup>128</sup>

The criminal procedure law sets out three ways to reopen a criminal case: (1) if a court finds material mistakes in a judgment; (2) a procuratorate may petition a court to reopen the case if it finds one of four conditions occurred during the process of conviction—(i) insufficiency of material evidence, (ii) mistaken application of law, (iii) violation of legal procedure, or (iv) trial judge misconduct like corruption or abuse of power—and (3) a defendant may petition to the original trial court or the appellate court to reopen a case based on those preceding conditions as well as on newly discovered evidence. Few cases have ever been reopened based on the third channel, and, in general, each of these mechanisms for review is broadly and vaguely defined, preserving a great deal of discretion for procuratorates and for courts.<sup>129</sup> There are additional remedies of a less formal nature as well. Inmates trying to introduce new evidence of innocence may rely on Politics and Law Committees, People’s Congresses, and the media to pressure courts into reexamining wrongful convictions.<sup>130</sup>

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124. U.N. Comm’n on Human Rights, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1, 47, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006); Belkin, *supra* note 122, at 276 & n.8. “No one knows how many such cases happen in China each year. A report from the ministry of public security said 1,800 police officers were suspended for torture in 2009. In a survey conducted three years earlier, 70% of prisoners said fellow detainees they knew had made forced confessions.” *Id.* (quoting Tania Branigan, *Chinese Police Chief “Tortured to Death,”* GUARDIAN, Jan. 15, 2011, at 26) (internal quotation marks omitted).

125. See Belkin, *supra* note 122, at 274.

126. See Belkin, *supra* note 121, at 105; Ira Belkin, *China’s Criminal Justice System: A Work in Progress*, 6 WASH. J. MOD. CHINA 61, 3 (2000).

127. Chinese Legal Science, [http://en.cnki.com.cn/Article\\_en/CJFDTOTAL-ZGFX200502018.htm](http://en.cnki.com.cn/Article_en/CJFDTOTAL-ZGFX200502018.htm) [<https://perma.cc/75YQ-XSZA>] (last visited Mar. 14, 2017).

128. See Huang Shiyuan, *Chinese Wrongful Convictions: Discovery and Rectification*, 80 U. CIN. L. REV. 1195, 1205 (2012).

129. I am grateful to Chi Yin for thoughtfully and clearly setting out this framework and explaining each of these procedures to me in detail. Email from Chi Yin to Author (Oct. 30, 2016) (on file with author).

130. For an example of a case in which the media and scholars played a role, see, for example, Anthony Kuhn, *China Exonerates Man Executed 21 Years Ago for a Murder He Didn’t Commit*, NPR (Dec. 15, 2016, 10:15 AM), <http://www.npr.org/sections/parallels/2016/12/15/505561232/china->

A number of wrongful convictions have come to light in China, and high-profile cases have resulted in reversed convictions. For instance, there have been remarkable death penalty cases in which the supposedly murdered individual resurfaced very much alive, even after an innocent person had been sentenced to death and sometimes already executed.<sup>131</sup> Confessions have been ubiquitous in wrongful convictions in China, and almost all criminal cases rely on confession statements. China has responded to such wrongful convictions and executions in a number of ways. In 2010, China adopted an exclusionary rule for coerced confessions, intended to add teeth to a decade of measures that had failed to adequately address coerced confessions.<sup>132</sup> In 2013, the Supreme People's Court issued an opinion calling on lower courts to ensure "that innocent people are not prosecuted." The Court stated that lower courts may do so by preserving "procedural rights" and the "independent exercise of judicial power" and by adhering to "the principle of evidence-based judgments."<sup>133</sup> The Court also called for evidence and "investigative research" to change the notion of "the supremacy of confession."<sup>134</sup> In addition, the Court's opinion declared that confessions "extracted by the use of torture or other illegal methods such as subjecting them to cold, hunger, sunlight, heat, or fatigue during interrogation, shall be excluded."<sup>135</sup> Further, the Court held that except in emergency situations, all interrogations that were not electronically recorded would be excluded as evidence.<sup>136</sup> The Court added that physical evidence should not be used unless it is tested using DNA or fingerprint comparison.<sup>137</sup> The Court directed additional guidance towards improving court hearings and the use of witness evidence, as well as using a "scientific system" for performance reviews of judges, rather than relying on appeal or reversal rates.<sup>138</sup> The principles in the opinion were generally stated, and compliance across the country is likely a work in progress, but the opinion sets out an agenda for broad criminal procedure changes with a focus on greater accuracy in adjudication.

Statements following the Court's 2013 opinion underscore the continued emphasis on improving accuracy of criminal adjudication. In 2015, the Chinese

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exonerates-man-executed-21-years-ago-for-a-murder-he-didnt-commit [https://perma.cc/MZL6-ARHH].

131. *Id.*

132. Belkin, *supra* note 122, at 282, 287–90 (providing an in-depth and fascinating account of the origins and enactment of the Chinese exclusionary rule). A requirement for recording interrogations in corruption cases had previously been adopted in 2008, following "pathbreaking research and pilot projects carried out by Chinese legal scholars." *Id.* at 286.

133. Supreme People's Court, The Supreme People's Court's Opinion on Establishing and Completing Work Mechanisms for Preventing Unjust, False and Wrongly-Decided Criminal Cases (Nov. 21, 2013).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

Communist Part Political Legal Committee<sup>139</sup> noted that it was reinforcing statements from the General Secretary and others. Those statements required that interrogations be conducted in approved places with both audio and video recording, reiterated the provisions of the Supreme People's Court in 2013, and emphasized the importance of timely review of potential errors.<sup>140</sup>

With wrongful convictions an increasingly public topic for discussion regarding policy change in China, perhaps there will be movement towards adopting additional criminal procedure changes and creating more robust legal avenues for litigating innocence. However, the experience with prior revisions suggests reasons for caution. Statements against coercion during interrogations do not alter the reality that police can subject individuals who have no rights to silence or counsel to lengthy interrogations. The 1996 Criminal Procedure Law changes that expanded the right to counsel apparently resulted in a host of issues: even fewer cases in which criminal defendants were represented at trial; "considerable jeopardy" for defense lawyers, including those who have challenged tortured confessions; and "cycles of clarifying regulations," further ambiguities, and conflict.<sup>141</sup>

Moreover, those seeking exoneration still face great difficulties, as highlighted by the recent case of *Nie Shubin*. In that case, Nie was found guilty of a rape and murder in Hebei Province in 1994 and was quickly executed. He was cleared in 2005 when another man confessed and DNA testing matched that other man. But it still took eleven more years and a second re-examination of the case for Nie's family to obtain an exoneration from the Supreme People's Court in China.<sup>142</sup> Going forward, an important question will be whether changes in standards for appeal or an emphasis on scientific consideration of evidence can make headway in a system that still relies so overwhelmingly on highly coercive interrogations and a non-adversarial and non-independent system.<sup>143</sup>

The Chinese criminal law system varies from that in Hong Kong, where appellate courts modeled on those in the United Kingdom have adopted different standards for reopening criminal cases. In Hong Kong, section 83(1) of the Criminal Procedure Ordinance (Cap 221) provides that the Court of Appeal may reverse a conviction if: (a) "under all the circumstances of the case it is unsafe or unsatisfactory"; (b) "on the ground of a wrong decision on any question of law"; or (c) "that there was a material irregularity in the course of the trial." Courts in Hong Kong have broadly interpreted that standard to include cases with

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139. Belkin, *supra* note 122, at 288 (noting that this group is "the most powerful body in the Chinese criminal justice system").

140. Chinese Communist Party Political Legal Committee, Provisions on Earnest Prevention of Miscarriages of Justice (May 14, 2015).

141. See Halliday & Liu, *supra* note 121, at 72, 83.

142. Kuhn, *supra* note 130.

143. See Belkin, *supra* note 122, at 297 (making suggestions for additional reforms, including efforts to encourage police not to rely solely on confessions, and adoption of a presumption of innocence in criminal proceedings in China).

“lurking doubt” about the support for a conviction.<sup>144</sup> Those standards are drawn from the Criminal Appeal Acts in the United Kingdom.

## 2. *Russian Federation*

Civil law countries typically provide a more defined, formal means to assert new factual evidence during an appeal or post-appeal than common law countries. Russia has a three-level civil law system of review for convictions: appeals, cassational review, and supervisory review. Defendants, prosecutors, and victims are entitled to seek review of a criminal judgment. An appeal can be based on questions of law and fact and is conducted as a *de novo* trial in which parties can present new evidence. Following an appeal, cassational review can similarly involve both issues of law and fact (in contrast to other countries where such review is limited to only questions of law). Therefore, inmates can present additional evidence at that stage, although not from new investigations. Supervisory review, by a panel of judges, also allows for consideration of questions of law and fact.<sup>145</sup>

Once those three procedures have been exhausted, the 2001 Russian Criminal Procedure Code allows for reopening a criminal case based on new or newly-discovered circumstances. These new circumstances can include: discovery of false testimony; criminal actions of a judge, investigator, or prosecutor; a statute that was applied by the convicting court later being found unconstitutional; or a finding that the convicting court violated the European Convention of Human Rights.<sup>146</sup> There is no statute of limitation on reopening a conviction. In addition, the rules of finality are relaxed in both directions, meaning that prosecutors may also seek to reopen a case if there was an acquittal at trial.<sup>147</sup>

## 3. *Brazil*

Brazil is a civil law country, with rules based on Portuguese and other Continental sources, but it also has extremely complicated rules for judicial review. As in other civil law countries, questions of law and fact may be reviewed *de novo* during the appeal, and a retrial is permitted on appeal.<sup>148</sup> Brazil also permits the use of the common law writ of habeas corpus to challenge any incarceration in violation of individual rights—but not to assert new facts. In addition, Article 621 of the Brazilian Code of Criminal Procedure permits post-

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144. Chong Ching Yuen v. Hong Kong, [2004] 7 H.K.C.F.A.R. 126 (C.F.I.) (H.K.).

145. UGOLOVNO-PROTSESSUAL'NYI KODEKS ROSSIYSKOI FEDERATSII [UPK RF] art. 413(3) (2001) (Russ.) (criminal procedure code of the Russian Federation); Catherine Newcombe, *Russia, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 4, at 460–63.

146. See Newcombe, *supra* note 145, at 463–64.

147. See *id.* at 464–65 (noting that not only were there high rates of acquittals, or 17.6 percent acquittals, but about half of those acquittals were reversed by a higher court).

148. Erin Creegan, *Cooperation in Foreign Terrorism Prosecutions*, 42 GEO. J. INT'L L. 491, 501 (2011) (summarizing articles 593, 616 and 624 of the Code of Criminal Procedure).

appellate review of a final conviction in four different types of situations: (1) where the conviction is against the plain text of the law, or where it conflicts with the evidence gathered; (2) where the conviction is based on false evidence; (3) where there is new evidence of innocence; and (4) where circumstances might require reduction of the penalty.<sup>149</sup> Such review proceeds in the national Supreme Court for the cases in which it approved the conviction or in the State or Federal Court of Appeals for other cases.<sup>150</sup> The prosecution can intervene during this review process. Ultimately, the Supreme Court or the Court of Appeals can grant the request to acquit the plaintiff, vacate the conviction, alter the classification of the offense, or alter the sentence, including in cases of jury trials. Finally, in addition to those procedures, the jurisprudence of the Superior Tribunal de Justiça, a national court in the judicial hierarchy immediately below the Brazilian Supreme Court but above the Court of Appeals, may grant habeas corpus for convicted defendants in order to review their sentences. This jurisprudence can be seen as an additional type of review for final judgments.<sup>151</sup> However, judicial review by the Superior Tribunal is narrow and restricted to cases in which the sentence was imposed on erroneous grounds.<sup>152</sup>

Some of the first post-conviction challenges based on DNA evidence in Brazil have happened in recent years. For instance, in 2006, the Court of Criminal Appeals for the State of Rio Grande do Sul overturned a 1995 conviction for rape based on DNA test results.<sup>153</sup> Perhaps more wrongful convictions will be successfully litigated in the future using such evidence.

#### 4. France

France has made significant changes to its system that make it easier to bring claims of innocence on appeal. Since France is a civil law inquisitorial system, its criminal investigations typically consist of a dossier recording the results of the investigation paper, which is then reviewed by a judge. However, the most serious criminal cases, in which a conviction could result in ten or more years in prison, are handled by a *cour d'assises*, a jury consisting of three judges

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149. See CÓDIGO DE PROCESSO PENAL [C.P.P.] art. 21 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/Decreto-Lei/Del3689.htm](http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del3689.htm) [<https://perma.cc/R5N5-E4HF>]; INTRODUCTION TO BRAZILIAN LAW 223–24 (Fabiano Deffenti & Welber Barral eds., 2011). I am grateful to Fernando Dias for the point that while the word evidence translated to Portuguese is “evidência,” that term does not correspond exactly to “proof.” There is also a fifth possible source of review, in which the claim is that the entire proceeding in which the conviction was entered were legally void. Renato Brasileiro de Lima, MANUAL DE PROCESSO PENAL 1727 (Editora Juspodivm, 2d ed. 2014).

150. See C.P.P. art. 624.

151. See *id.*

152. C.P.P. art. 624; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Art. 105(1)(e) (Braz.).

153. Revisão Criminal 70012499000, Tribunal de Justiça do Rio Grande do Sul, 4<sup>o</sup>. Grupo de Câmaras Criminais, Relator Marcelo Bandeira Pereira.

and six laypeople.<sup>154</sup> A two-thirds majority of the cour d'assises is required to convict, but the lay jurors may not view the dossier as the judges may and the jurors can only rely on testimony of live witnesses who are questioned by the presiding judge. Thus, this type of mixed jury is judge dominated.<sup>155</sup>

Convictions in France may be appealed de novo, raising both issues of fact and law to the Court of Appeals or the Appellate Assize Court (for felonies). An appeal at the criminal appeals division of the Court of Appeals (*court d'appel*) involves a hearing at which witnesses are not called, but at which the dossier is examined and the defendant may be questioned.<sup>156</sup> Further appeals can be taken to the criminal chamber of the Cour de Cassation, but only for a "violation" of an issue of law.<sup>157</sup> But finding a plausible issue to raise on appeal may be difficult, as there may be little record of proceedings even at the more elaborate court d'assises jury trial, since there is no transcript of the testimony, no written pre-trial rulings, and no record of jury instructions given before deliberations; the only record is a brief summary by the court clerk.<sup>158</sup> There have been questions raised (and a French reservation on the issue) as to whether these procedures satisfy the requirements of the Seventh Protocol of the European Convention of Human Rights, which state that a country must make available a process for a conviction to be re-examined on appeal.<sup>159</sup> Once the appeal is complete at the appellate and Supreme Court level, or once the time to pursue such appeals has expired, a conviction is final.

But challenges raising new evidence of innocence or a collateral attack on the conviction may be brought by filing a petition called a *révision* in the Court of Cassation ("pourvoi en révision").<sup>160</sup> There are four grounds for the petition:

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154. McKillop, *supra* note 24, at 344; CODE DE PROCÉDURE PÉNALE (CRIMINAL PROCEDURE CODE) arts. 240, 243, 248 (Fr.).

155. McKillop, *supra* note 24, at 344; C. PR. PÉN. art. 359.

156. McKillop, *supra* note 24, at 346.

157. *See id.* at 344–45; *see also* Richard S. Frase, *France*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 4, at 235 (describing the appeals process in France).

158. McKillop, *supra* note 24, at 345; C. PR. PÉN. art. 348.

159. *See* McKillop, *supra* note 24, at 345. According to the webpage of the Council of Europe, the French reservations to Protocol No. 7 remain in effect. *See Full List*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/declarations> [<https://perma.cc/72JL-A8AL>] (last visited Mar. 14, 2017).

160. C. PR. PÉN. art. 622. "The revision of a final criminal decision may be applied for in the interest of any person found guilty of a felony or misdemeanour where:

1. after a conviction for homicide, documents are presented which are liable to raise a suspicion that the alleged victim of the homicide is still alive;
2. after a sentence imposed for a felony or misdemeanour, a new first-instance or appeal judgment has sentenced for the same offence another accused or defendant and where, because the two sentences are irreconcilable, their contradiction is the proof of the innocence of one or the other convicted person;
3. since the conviction, one of the witnesses examined has been prosecuted and sentenced for perjury against the accused or defendant; the witness thus sentenced may not be heard in the course of the new trial;
4. after the conviction, a new fact occurs or is discovered which was unknown to the court on the day of the trial, which is liable to raise doubts about the guilt of the

(1) new evidence suggesting an alleged homicide victim is alive; (2) someone else found guilty of the same offense; (3) a witness against the accused committed perjury; or (4) new evidence places the accused's guilt in doubt.<sup>161</sup> Perhaps because of the limitations of those procedures, revision is very rarely granted.<sup>162</sup>

France has, however, adopted changes over the past several decades that have expanded access to relief based on newly discovered evidence of innocence. In 1989, following public debates about the high-profile case of Guillaume Seznec (in which no revision has yet been granted), the standard for granting revision was modified to permit granting revision not only where new evidence establishes innocence, but also where it creates doubt.<sup>163</sup> In 2005, when a large and complex set of convictions for child abuse were largely overturned on appeal in the 2004 Outreau case, the National Assembly created a Parliamentary Committee of Inquiry to investigate the matter and make recommendations.<sup>164</sup> Hundreds of witnesses were examined, including victims, defendants, prosecutors, judges, and experts, and the Committee made recommendations for possible criminal justice reforms. An additional report by the General Inspectorate of Judicial Services also recommended reforms.<sup>165</sup> One such reform—the videotaping of police interrogations, for both minors and adults—was adopted in 2008.<sup>166</sup>

More drastic measures were adopted in 2014. The “Loi 2014-640” provides that the revision request can be filed when new facts or evidence are discovered (“vient à se produire un fait nouveau”) that were not known at the time of the conviction.<sup>167</sup> The new evidence request must be sufficient to show the innocence of the defendant, or at least put guilt in doubt.<sup>168</sup> The 2014 law also adopted a new form of review, a “re-exam,” for those whose convictions have been recognized by the European Court of Human Rights as infringing the European Convention on Human Rights.<sup>169</sup> The 2014 law extended the right to

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person convicted.”

161. See Frase, *supra* note 157, at 241; C. PR. PÉN. art. 622.

162. Nathalie Dongois, *Wrongful Conviction in France: The Limits of “Pourvoi en Revision,”* in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 249 (C. Ronald Huff & Martin Killias eds., 2008).

163. *Id.* at 260 & n.34; see also C. PR. PÉN. art. 622 (“[A]fter a conviction, a fact is produced or revealed or evidence unknown at the time of the trial is produced so as to establish the innocence of the convicted person.”).

164. See Christiane Besnier, *Présentation: Le Phénomène Outreau*, 55 *DROIT ET CULTURES* 11, 11 (2008), <http://droitcultures.revues.org/299> [<https://perma.cc/F93L-J2KF>].

165. Jacqueline S. Hodgson, *The French Prosecutor in Question*, 67 *WASH. & LEE L. REV.* 1361, 1372–74 (2010).

166. C. PR. PÉN. arts. 706–52.

167. C. PR. PÉN. art. 624.

168. *Id.*

169. EUROPEAN CONVENTION ON HUMAN RIGHTS, <http://www.echr.coe.int/Pages/home.aspx?p=basictexts&&c=fra> [<https://perma.cc/FJ9Y-BFYZ>] (last visited Mar. 14, 2017).

file review requests to members of the public minister (“procurer general”) working at the “Cour de Cassation.” The law also sets out procedural rules of the review and re-exam motion.<sup>170</sup> The law describes the types of remedies that the Court might render,<sup>171</sup> it describes procedures for suspending a sentence pending review,<sup>172</sup> and it provides for compensation for an individual found to have been wrongfully convicted.<sup>173</sup> The law raised the number of “magistrats” working in the Court of Review and Reexam to eighteen,<sup>174</sup> and created a five-member Commission of Instruction, which examines the lawfulness of requests before the Court considers their merits. If it takes the request, the Commission appoints a member to examine it and to draft a report on the case. In addition, the Commission has the power to gather evidence, and the convict can file a motion pleading the gathering of any evidence.<sup>175</sup> After this proceeding, the Commission can submit the case to the Court of Review and Reexam, which can also gather additional evidence.<sup>176</sup> If the judges find the request to be well grounded, they can void the conviction and order a retrial, or they can simply void the sentence.<sup>177</sup> If a person is found to have been wrongfully convicted, the person has the right to civil damages against the State, as do other persons harmed by the mistaken judgment.<sup>178</sup>

The “Cour de Cassation” releases annual reports about its activities. In 2014, the first year under the new law, the Court reported that in many cases the allegedly new evidence had been already presented in the court that rendered the conviction.<sup>179</sup> In 2015, the Court noted an increase in the number of the review requests filed—from 154 reviews filed in 2014 to 186 reviews filed in 2015.<sup>180</sup> The Commission submitted eight cases to decision by the Court in 2015, but the Court has so far granted only one case involving a minor traffic offense.<sup>181</sup> Perhaps over time, these new procedures will create a more robust system for considering claims of innocence.

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170. C. PR. PÉN. art. 624.

171. *Id.* art. 624-7.

172. *Id.* art. 625.

173. *Id.* art. 626-1.

174. According to article 623-1, the Court can decide cases with only thirteen of its members. *Id.* art. 623-1.

175. *Id.* art. 624-5.

176. *Id.* arts. 624, 624-3.

177. *Id.* art. 624-7.

178. *Id.* art. 627.

179. Cour de Cassation, Rapport Annuel, Livre 5: Activité de la Cour (2014) [https://www.courdecassation.fr/publications\\_26/rapport\\_annuel\\_36/rapport\\_2014\\_7040/livre\\_5\\_activite\\_cour\\_7202/revision\\_condamnations\\_7233/commission\\_revision\\_32114.html](https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2014_7040/livre_5_activite_cour_7202/revision_condamnations_7233/commission_revision_32114.html) [<https://perma.cc/7BQZ-6NMT>].

180. Cour de Cassation, Rapport Annuel, Livre 4: Activité de la Cour (2015), [https://www.courdecassation.fr/publications\\_26/rapport\\_annuel\\_36/rapport\\_2015\\_7698/livre\\_4\\_activite\\_cour\\_7728/instruction\\_demandes\\_7739/commission\\_instruction\\_34707.html](https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2015_7698/livre_4_activite_cour_7728/instruction_demandes_7739/commission_instruction_34707.html) [<https://perma.cc/8ZXX-N5XN>].

181. *Id.*

### 5. Italy

In Italy, the court process works much like that in France and in other civil law countries. Trial is before a judge or a panel of judges, with a Corte d'Assise for the most serious cases with two judges and six lay jurors. The Corte di Assise di Appello or the Corte di Appello (depending on the seriousness of the crime) hear appeals of convictions on questions of law or fact using a panel of three judges (or two judges and six lay jurors for appeals of a Corte d'Assise judgment).<sup>182</sup> Such an appeal is considered a new trial, and the appeals court can hear new evidence. After this appeal, the defendant can appeal to the Court of Cassation and then to the Supreme Court of Cassation (“Corte Suprema di Cassazione”) on questions of law only.<sup>183</sup>

The Corte di Appello also has jurisdiction to hear requests for revision, much like the procedure in France or a collateral attack on the judgment of conviction. A revision can be based on new evidence of innocence or because evidence on which the conviction was based turns out to be false.<sup>184</sup> Perhaps the highest profile reversal based on new factual evidence in recent years was the acquittal on appeal to the Corte di Cassazione of Amanda Knox and Raffaele Sollecito, in which the court considered on appeal new DNA evidence, including evidence concerning the failure to adhere to proper protocols when conducting the original DNA tests.<sup>185</sup> Notably, while that litigation provided far more interest in how forensic science evidence is handled in criminal investigations and trials, it did not result in calls to alter procedures for considering new evidence of innocence.<sup>186</sup>

### 6. Germany

In Germany, a civil law system that holds trials before a judge, there are two types of available appeals of convictions: general appeal and appeal on legal grounds (termed, as it is in France and Italy, a “revision”). When granted, a

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182. The Corte di Assise di Appella is competent to decide serious crimes, while the Corte di Appello hears appeals from all other criminal cases. For an overview, see *Ordinary Courts—Italy*, EUR. E-JUSTICE PORTAL, [https://e-justice.europa.eu/content\\_ordinary\\_courts-18-it-maximizeMS-en.do](https://e-justice.europa.eu/content_ordinary_courts-18-it-maximizeMS-en.do) [<https://perma.cc/3WTA-H4K5>] (last visited Mar. 14, 2017).

183. See Rachel A. Van Cleave, *Italy*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 4, at 348.

184. See *id.* at 349.

185. See Cass. Pen., sez. V, 27 marzo 2015, n. 36080 (It.), <http://www.giurisprudenzapenale.com/wp-content/uploads/2015/09/cass-pen-2015-36080.pdf>; *Amanda Knox and Raffaele Sollecito Acquitted of Meredith Kercher Murder*, BBC NEWS (Mar. 28, 2015), <http://www.bbc.com/news/world-europe-32096621> [<https://perma.cc/A9GN-B9FU>].

186. Carla Vecchiotti & Silvia Zoppis, *DNA and the Law in Italy: The Experience of “The Perugia Case,”* 4 *FRONTIERS IN GENETICS* 1 (2013). The ThyssenKrupp case is another high-profile criminal proceeding in which a new appeals trial was ordered in Italy. See *Cassation Upholds ThyssenKrupp Sentences (2)*, ANSA, (May 13, 2016 8:22 PM), [http://www.ansa.it/english/news/general\\_news/2016/05/13/cassation-upholds-thyssenkrupp-sentences-2\\_ae513413-ca79-4e82-90e1-f452bdc229a9.html](http://www.ansa.it/english/news/general_news/2016/05/13/cassation-upholds-thyssenkrupp-sentences-2_ae513413-ca79-4e82-90e1-f452bdc229a9.html) [<https://perma.cc/W5NP-SYCT>].

general appeal results in a new trial addressing both guilt and sentencing. The appeals court must collect and present any evidence, old or new, necessary to arrive at a new judgment.<sup>187</sup> In contrast, a revision is not based on new evidence of innocence because it is confined to legal issues.<sup>188</sup> In recent years, the German Federal Court of Appeals has become more open to considering new factual evidence on a revision by characterizing it as a procedural claim that the trial judges did not satisfy their obligation to collect all relevant evidence.<sup>189</sup> Perhaps, as has been done in other countries, these judges have expanded traditional vehicles to help accommodate new evidence of innocence, without recognizing a freestanding right to claim innocence.

Under Code of Criminal Procedure Article 359, both the defense and the prosecutor can apply to reopen a case decided by final judgment. Article 359 allows for reopening of a case on six grounds: (1) a document admitted against the defendant was false or forged; (2) a witness provided a false statement; (3) a judge committed a criminal violation of his or her duties in the case; (4) a civil court judgment on which the criminal judgment was based is quashed; (5) new evidence is produced that tends to support the defendant's acquittal; or (6) the ECHR has found the conviction was based on a treaty violation.<sup>190</sup> Article 359 has been part of the Code of Criminal Procedure for many decades.<sup>191</sup> There have been no recent changes to the legal standards used in Germany, but there has been some modest changes in judicial receptivity towards considering new factual evidence.

### 7. Mexico

In Mexico, convictions can be appealed on questions of law or fact, and the appeals courts can hear new evidence through either habeas corpus or a vehicle called the *amparo de libertad* ("amparo"), which is generally used to address errors in law.<sup>192</sup> In both state and federal courts in Mexico, a defendant can challenge a final judgment of conviction by requesting an amparo to protect fundamental rights.<sup>193</sup> Following the exhaustion of appeals and habeas corpus or amparo, an inmate may seek a formal recognition of innocence under the Federal Criminal Procedure Code, a status that is rarely granted. There are four grounds

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187. See Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 4, at 268–69.

188. See *id.* at 270.

189. See *id.* at 270–71.

190. See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 359 (Ger.); Isabel Kessler, *A Comparative Analysis of Prosecution in Germany and the United Kingdom: Searching for Truth or Getting a Conviction?*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE*, *supra* note 162, at 220.

191. See Daniel E. Murray, *Convictions Obtained by Perjured Testimony: A Comparative View*, 27 *OHIO ST. L.J.* 102, 112 (1966).

192. Miguel Sarré & Jan Perlin, *Mexico*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 4, at 389–90.

193. See *id.* at 393.

for a recognition of innocence: (1) the conviction is solely based on evidence found to be false; (2) there is new evidence that invalidates the evidence on which the conviction was based; (3) the crime is found to have not occurred (for example, if a murder victim is found to be alive); or (4) a second person has been sentenced for the same crime and both the defendant and that second person could not have committed the crime.<sup>194</sup>

As of 2007, there were no cases in which DNA evidence led to a recognition of innocence, and the remedies involving newly discovered evidence of innocence remain extremely narrow.<sup>195</sup> Perhaps that will begin to change as Mexico uses a trial court system and local courts implement the 2009 revisions to the Federal Code of Criminal Procedure. Such a change would initially make fact-development subject to an adversarial process and perhaps would lead to an increased ability to litigate questions of fact on appeal and post-conviction.<sup>196</sup>

#### 8. *Israel*

In Israel, the defendant or prosecutor may appeal a criminal judgment on questions of law and fact, and the appeals court may hear new evidence or return the case to a lower court for it to hear more evidence.<sup>197</sup> In some cases, the Supreme Court, with permission of the Attorney General, can order immediate acquittal without returning the case to a lower court. In addition, the defendant can request a retrial in order to correct a mistaken conviction. There are four grounds for a retrial: (1) evidence presented at trial that was necessary for the conviction is proven false; (2) new evidence has been discovered which would alter the outcome at trial; (3) another person has been found guilty of the crime such that the person originally convicted could not have committed the crime; or (4) there is substantial suspicion that the conviction was a miscarriage of justice.<sup>198</sup> However, retrials are rarely granted. The best-known reversal based on new evidence in Israel was that in the case of John Demjanjuk, in which he was sentenced to death in 1988, but the Supreme Court of Israel overturned his sentence based on new statements admitted on appeal in 1989. While DNA testing was not involved in that case, it is increasingly common in Israel. There is a new national DNA database in Israel.<sup>199</sup> Perhaps, as in other countries, this will lead to more charges dropped before trial or more reversed convictions.

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194. *Id.* at 395 (citing Código Penal Federal [CPF], art. 560, Diario Oficial de la Federación [DOF] day-month-year).

195. *Id.*

196. For an overview of these changes, see David A. Shirk, *Justice Reform in Mexico: Change & Challenges in the Judicial Sector*, 3 MEX. L. REV. 189, 220–22 (2011).

197. Rinat Kitai-Sangero, *Israel*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 4, at 299.

198. *See id.* at 300–01.

199. Shahar Ilan, *The Case for the DNA Database*, HAARTEZ (June 29, 2008), <http://www.haaretz.com/print-edition/features/the-case-for-the-dna-database-1.248698> [<https://perma.cc/6WCT-3SPV>].

### 9. Netherlands

In recent years, Dutch judges have adopted revised standards of review for post-conviction claims of innocence in response to several high-profile wrongful convictions,<sup>200</sup> including in a series of cases that the Knoops law firm in Amsterdam, which founded an innocence project, has brought and which have resulted in exonerations of several individuals in a short period of time.<sup>201</sup> The new legal standard explicitly discusses the need to consider the impact that new evidence of innocence might have on the previous evidence introduced at trial. Adopted in 2012, Article 461 of the Dutch Code of Criminal Procedure permits the defense to request that the Attorney General conduct further investigation into a case based on a “novum” or a new fact not known to the judge at the time of the trial.<sup>202</sup> The Supreme Court of the Netherlands has reopened several cases using this Article 461 standard.<sup>203</sup> The Court has also recognized that depending on the facts of a case, new forensic evidence might lead to a retrial.<sup>204</sup> The result of those changes appears to be a new openness to investigating and remedying claims of innocence.

## II.

### TRANSNATIONAL INFLUENCE ON INNOCENCE CLAIMS

The development of claims of innocence should not be seen as confined to particular jurisdictions. As described above, the approaches adopted by countries have broadly influenced each other, in both civil and common law criminal justice systems. In this Part, I describe how the spread of DNA technology, the growing movement to create innocence projects to investigate claims of innocence, the work of scientists and legal scholars who increasingly study

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200. Mark Godsey, *Peter van Koppen on Miscarriages of Justice: “Dutch Judges Need to Be More Critical,”* WRONGFUL CONVICTIONS BLOG (June 21, 2012), <https://wrongfulconvictionsblog.org/2012/06/21/peter-van-koppen-on-miscarriages-of-justice-dutch-judges-need-to-be-more-critical> [https://perma.cc/233R-V2T6].

201. See *Homepage*, KNOOPS’ INNOCENCE PROJECT, [http://www.knoops.info/en/knoops-innocence-project\\_en](http://www.knoops.info/en/knoops-innocence-project_en) [https://perma.cc/9X3D-XQS3] (last visited Apr. 15, 2017); Mark Godsey, *Dutch Supreme Court Reopens Knoops’ Innocence Project Case*, WRONGFUL CONVICTIONS BLOG (Mar. 24, 2016), <https://wrongfulconvictionsblog.org/2016/03/24/dutch-supreme-court-reopens-knoops-innocence-project-case> [https://perma.cc/2KT8-P7EN].

202. Mark Godsey, *In Netherlands, New Evidence Shows Innocence in Hilversum Showbiz Murder Case*, WRONGFUL CONVICTIONS BLOG (July 9, 2014), <http://wrongfulconvictionsblog.org/2014/07/09/in-netherlands-new-evidence-shows-innocence-in-hilversum-showbiz-murder-case> [https://perma.cc/UX2G-T4RK].

203. See Mark Godsey, *In Netherlands, New Evidence in the Deventer Murder Case*, WRONGFUL CONVICTIONS BLOG, (July 22, 2014), <http://wrongfulconvictionsblog.org/2014/07/22/in-netherlands-new-evidence-in-the-deventer-murder-case> [https://perma.cc/S9MZ-PFET].

204. GEERT-JAN ALEXANDER KNOOPS, REDRESSING MISCARRIAGES OF JUSTICE: PRACTICE AND PROCEDURE IN NATIONAL AND INTERNATIONAL CRIMINAL LAW CASES 114–15 & n.53 (2006) (discussing the Puttense Homicide case, Case No. NJ2001, 564, Supreme Court of the Netherlands).

wrongful convictions, and the role of international institutions have all created a new international dialogue.

#### A. *The Innocence Movement*

One unique feature of the response to wrongful convictions in the United States has been the litigation of innocence claims by non-profit and private groups. The United States has a long history of civil rights and criminal justice litigation by private attorneys who have pushed the law in creative directions. First inspired by the Innocence Project at Cardozo Law School, founded by Barry Scheck and Peter Neufeld, and the work of other pioneers like Centurion Ministries and the Center for Wrongful Convictions at Northwestern Law School, an Innocence Network of projects and law school clinics has grown to represent prisoners across the United States. An annual Innocence Network Conference has turned into an international event, and innocence projects from around the world have joined the Network.<sup>205</sup> Exchanges with lawyers doing innocence work in the United States have resulted in the spread of these projects. For example, a visiting attorney at the Arizona Innocence Project created a new innocence project in Belgium.<sup>206</sup>

In turn, the large number of wrongful convictions brought to light by DNA testing and other post-conviction investigations has resulted in lobbying by lawyers, academics, and policy groups to change the law to prevent wrongful convictions not just in the United States but internationally as well. Within the United States, a criminal justice reform movement has led to important changes in many states, and not only changes regarding rules of finality and access to post-conviction DNA testing, but also changes regarding preservation of evidence, eyewitness identification procedures, videotaping of interrogations, and forensic crime lab procedures. Scientists and legal scholars have increasingly studied wrongful convictions, making further recommendations for improvements, some of which have been adopted in the United States. Those recommendations are also increasingly being examined elsewhere (and some of the research has long been conducted in other countries or pre-dates the more recent interest in wrongful convictions in the United States). Two examples of such countries are Taiwan and South Australia.

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205. *Innocence Network: Member Organizations*, INNOCENCE NETWORK, <http://innocencenetwork.org/members> [https://perma.cc/2DZ5-C3K3] (last visited Mar. 14, 2017) (including projects in Canada, France, Ireland, Italy, New Zealand, South Africa, and Taiwan); see *Homepage*, INNOCENCE CAN., <http://www.aidwyc.org> [https://perma.cc/TJ7W-TNBP] (last visited Apr. 15, 2017) (formerly known as the Association in Defence of the Wrongly Convicted or “AIDWYC”); *Homepage*, GRIFFITH UNIV. INNOCENCE PROJECT, <https://www.griffith.edu.au/criminology-law/innocence-project> [https://perma.cc/KSY3-VHYS] (last visited Apr. 15, 2017) (Australia).

206. *Innocence Project: Une Initiative Pour Traquer les Erreurs Judiciaires*, LE VIF (Apr. 3, 2013 11:38 AM), <http://www.levif.be/actualite/international/innocence-project-une-initiative-pour-traquer-les-erreurs-judiciaires/article-normal-76875.html> [https://perma.cc/8LNX-XMNU].

1. *The Effect of the United States Innocence Movement on Taiwan*

One country that has increasingly looked to research and lessons from wrongful convictions in the United States is Taiwan. The Taiwanese legal system is not a natural fit for U.S. legal sources; its legal system's models are the German and Japanese systems. Taiwan has a civil law criminal justice system, with inquisitorial bench trials and narrow standards for reversal on appeal. The Taiwan Criminal Procedure Act Article 420 provides the standard for granting a retrial.<sup>207</sup> The standard provides that a motion for retrial may be made upon several grounds, including where "material testimony, expert opinion, or interpretation on which the original judgment is based has been proven false"; where there was "fabricated, or altered," exhibits; and where "the discovery of new evidence is sufficient to show that the convicted shall be acquitted."<sup>208</sup> Thus, the two elements that must be shown to obtain a retrial based on factual evidence are "new" and "sufficient" evidence. In the past, the courts in Taiwan had narrowly interpreted what evidence was "new" and "sufficient."

In 2014, Taiwan had its first DNA exoneration—a man named Long-Qi, who was granted a retrial by the Taiwan High Court in 2013.<sup>209</sup> In 2014, in part in reaction to the recent exoneration, Taiwan revised the Article 420 standard for granting a retrial. The revision was intended to repeal judicial interpretations of Article 420 dating from the 1930s through the 1960s, which had interpreted "newly discovered" and "sufficient" elements to require a very high level of proof and "newness."<sup>210</sup> The revised Article 420 states that a conviction may be reversed "[w]here the discovery of new evidence" alone or with the totality of the evidence, "is sufficient."<sup>211</sup> In addition, "new evidence" is now defined to include "evidence that had existed or been confirmed before the final judgment was rendered but has not been investigated or considered, as well as facts and evidence that exist or is confirmed after the final judgment is rendered."<sup>212</sup> The Legislator's Note to the 2015 amendments describes how "new evidence" may not be exclusively limited to evidence that already existed before the judgment was final, and that the evidence need not alone be sufficient to show that the conviction should be reversed.<sup>213</sup> Legislators stated that the barriers imposed by

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207. Code of Criminal Procedure art. 420 (2007) (Taiwan), Laws and Regulations Database of the Republic of China, <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0010001> [<https://perma.cc/T7N8-D2X6>].

208. *Id.* § 1–2, 6.

209. For a documentary about this case, see Twanafi, *The Man Who Can Not Be Excluded/English Sub*, YOUTUBE (Oct. 7, 2014), <http://youtu.be/-AbqCRqhmQM> [<https://perma.cc/PWK3-EWCS>].

210. *See supra* note 207.

211. Code of Criminal Procedure art. 420.

212. *Reasons for Requesting Retrial Under Article 420 of the Amended Code of Criminal Procedure*, LEE AND LI ATTORNEYS AT LAW, Taiwan, June 26, 2015, <http://www.lexology.com/library/detail.aspx?g=9943f70f-f2a4-46df-b44e-547f67d4b9f4> [<https://perma.cc/M7SK-VEAD>].

213. *Id.*

appellate judges were not mandated by the text of Article 420 and described those barriers as unconstitutional.<sup>214</sup>

The Taiwanese courts have just begun to issue decisions interpreting the revised standard. In the most recent ruling, on the motion of the prosecutor, a Taiwanese court reversed a conviction based on new DNA evidence. Indeed, the prosecutor's briefs cited U.S. research on wrongful convictions to support its argument.<sup>215</sup>

## 2. *The Effect of the United States Innocence Movement on South Australia*

Compare, however, a very different response to the large body of wrongful convictions in the United States. In South Australia, local legislation to prevent wrongful convictions is highly contested. In 2012, at a parliamentary debate, the South Australian Attorney General noted: "South Australia is not Texas. This State is not awash with wrongful convictions and the falsely imprisoned."<sup>216</sup> Subsequently, however, South Australia enacted the 2013 amendments to the Appeals Act, chiefly in response to a high-profile murder conviction in which an appeal asserting new evidence of innocence was dismissed under the prior limits on introducing newly discovered evidence.<sup>217</sup> After the 2013 amendments, that convict received leave to appeal under the new provisions and introduced evidence that the forensic evidence at his trial was flawed. As a result, his conviction was quashed in favor of a retrial.<sup>218</sup> There is no such legislation elsewhere in Australia that uses common law prerogative power to obtain mercy usually only available in theory.<sup>219</sup>

There is no authoritative list of exoneration cases in many countries. Policymakers may compare what little is known about the incidence of wrongful convictions in their countries with the larger amounts of data available in the United States and conclude they do not have the same problems.

### B. *Spread of Forensic Technology*

The use of DNA technology has played an important role in many countries that have changed their rules in response to wrongful convictions. However, its use in criminal investigations is highly uneven across the world. Its use very

214. *Id.*

215. *Id.*

216. South Australia, *Parliamentary Debates*, House of Assembly, 28 Nov. 2012, 3953 (John Rau, Attorney General), *repealed by* South Australia, *Parliamentary Debates*, Legislative Council, 19 Feb. 2013, 3167 (G.E. Gago, Minister for Agriculture, Food and Fisheries); *see* David Hamer, *Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission*, 37 UNSW L.J. 270, 278 (2014).

217. Milne, *supra* note 22, at 214; Statutes Amendment (Appeals) Act 2013 (SA) § 353A (Austl.).

218. Milne, *supra* note 22, at 215.

219. For a discussion on this point, *see id.* at 216.

much depends on the resources, sophistication, and priorities of criminal justice systems. In some countries, like India, forensics are rarely used during criminal investigations. As a result, there have been no DNA exonerations in those countries. In other countries, there have been large numbers of DNA exonerations. In the United States, for example, many exonerations were facilitated by the creation of a nationwide DNA databank that can be used to identify culprits in current and cold cases.

However, new technology does not entirely explain why some countries revise innocence claim protocols and some do not. Even in countries that still do not often use DNA technology in criminal cases, there is hope that wrongful convictions can be identified, remedied, and studied. Indeed, some of the most sweeping changes adopted in the United Kingdom were adopted in response to non-DNA exonerations that did not chiefly rely on forensic evidence. These changes included revision of the appellate standards of review and the creation of the CCRC.

### C. *The Administrative Model*

The United Kingdom's CCRC is the leading model for an administrative body designed to review claims of innocence. For instance, the CCRC is the model for similar bodies created in Scotland and in Norway.<sup>220</sup> In the United States, only the state of North Carolina has created such an administrative body—the Actual Innocence Inquiry Commission—which is modeled, in part, on the CCRC.<sup>221</sup> By contrast, most countries rely on trial courts to investigate claims of innocence and on appellate judges to review claims involving newly discovered factual evidence. Although Canada occasionally convenes a Ministry of Justice investigation and France convened a special commission in a high profile case, such inquiries are not routine. But perhaps they should be. Scholars have argued that it is more efficient to delegate the specialized and difficult work of the investigation and initial adjudication of innocence claims to an expert bureaucratic body. Such a model makes sense given the limitations of appellate judges and the need for careful investigation and screening of criminal cases prior to any appellate review of innocence claims. Whether more countries will

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220. Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153, 1155 (2013); see Criminal Procedure (Scotland) Act 1995, c. 46, § 194B(1) (UK), <http://www.legislation.gov.uk/ukpga/1995/46/section/194B> [<https://perma.cc/HK4N-YEYY>]; *Frontpage*, NORWEGIAN CRIMINAL CASES REVIEW COMM'N, <http://www.gjenopptakelse.no/index.php?id=163> [<https://perma.cc/8QKM-2N3J>] (last visited Apr. 15, 2017); Comm'n, Information, <http://www.sccrc.org.uk/ViewFile.aspx?id=429>; see also MARK GODSEY, THE GLOBAL INNOCENCE MOVEMENT, *supra* note 18, at 14 (describing the work of the CCRC in Norway).

221. See *About Us*, N.C. INNOCENCE INQUIRY COMM'N, <http://www.innocencecommission-nc.gov/about.html> [<https://perma.cc/KDK7-M988>] (last visited May 20, 2017); Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 654 (2004).

adopt such mechanisms remains to be seen. Perhaps the CCRC model will be successful in countries in which innocence projects and lawyer-driven investigations are less likely to be approved by the government than government-run agencies.

#### D. *The European Convention on Human Rights*

International institutions can also play a crucial role in the development of mechanisms to remedy wrongful convictions. The European Convention on Human Rights, along with the judicial interpretation of its provisions by the European Court of Human Rights and by domestic courts, is one important source of international human rights law. The European Convention, under Article 4 Section 2 of Protocol No. 7, adopted in 1984, permits the “reopening of the case . . . if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings.”<sup>222</sup> Such review “shall not” be barred by the prior provision, Article 4, Section 1, that articulates a double jeopardy principle. The separate Convention language on the right to a criminal appeal is generally worded and does not include a post-conviction right to new evidence of innocence claims.<sup>223</sup> Even to the extent that the Convention can be interpreted as encouraging post-appeal innocence claims, such review of appellate procedures is deferential to a particular Government’s authorities, and a case will only be reopened if the state authorities did not strike from the language of the Convention: “to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.”<sup>224</sup>

The European Court of Human Rights also respects the “binding nature of a final judicial decision,” and will interfere only “if serious legitimate considerations outweigh the principle of legal certainty.”<sup>225</sup> As described above in Part I, rulings by the European Court of Human Rights have influenced appellate practice and rules in criminal cases.<sup>226</sup> The degree of that influence is hard to measure, though, given the generality of the provisions of the

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222. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 4 § 2, Nov. 22, 1984, 213 U.N.T.S. 222, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000168007a082> [<https://perma.cc/MM62-E29F>]. The Explanatory Report to Protocol 7 adds that “[t]he term ‘new or newly discovered facts’ includes new means of proof relating to previously existing facts.” COUNCIL OF EUR., EXPLANATORY REPORT TO THE PROTOCOL NO. 7 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS ¶ 31 (1984), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016800c96fd> [<https://perma.cc/2FV3-N9XA>]. The Report adds: “Furthermore, this article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person.” *Id.*

223. Protocol No. 7 art. 2 (“Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.”).

224. Nikitin v. Russia, App. No. 50178/99, Eur. Ct. H.R. (2004).

225. Bratyakin v. Russia, App. No. 72776/01, Eur. Ct. H.R. (2006).

226. See EMMERSON, ASHWORTH & MACDONALD, *supra* note 79, at 3–52.

Convention. In addition, courts may cite both to their own constitutional and statutory norms and to the European Convention. Courts in the United Kingdom, for example, have often cited to harmless-error type principles to conclude that even though the trial fairness guarantees of the Convention may have been violated, there was no miscarriage of justice based on the strength of the evidence of guilt and that, as a result, the convictions could be deemed “safe” on appeal.<sup>227</sup> There have also been U.K. cases in which the European Court found a violation of the Article 6 fair trial rights, but the CCRC and the English Court of Appeals found that the conviction was safe.<sup>228</sup>

Any jurisdiction’s courts would be reluctant to suggest any incompatibility between domestic law and the Convention. Not only does the Convention fail to guarantee any specific appellate procedure, much less provide for any specific form of review of newly discovered evidence of innocence, but the European Court of Human Rights has generally been highly deferential to domestic courts on evidentiary matters.<sup>229</sup> Thus, any influence of the European Court of Human Rights on rules regarding post-appellate innocence claims may be fairly indirect. The countries that have changed their rules may have been more influenced by other factors, such as the force of individual wrongful convictions and other countries’ responses to the practical problem of wrongful convictions. As with other factors—like lawyers, DNA technology, and high-profile wrongful convictions—international human rights law plays an important role in an international right to claim innocence. The next Part questions whether international human rights law could play an even larger role.

### III.

#### AN INTERNATIONAL RIGHT TO CLAIM INNOCENCE

##### A. *Domestic Constitutional Law*

The U.S. Supreme Court has not yet recognized—except hypothetically—a freestanding due process right to claim innocence, even in death penalty cases.<sup>230</sup> However, the Court has increasingly cited data from exonerations and rulings from other types of claims, like the constitutionality of capital punishment under the Eighth Amendment.<sup>231</sup> The Court has also cited the

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227. *Id.* at 21–49, 51 (describing, for example, *McInnes v. HM Advocate* [2010] UKSC 1; *R. v. Craven* [2001] 2 Cr.App. R. 12, CA).

228. *Id.* at 3–52; *Dowsett v. Criminal Cases Review Comm’n* [2007] EWHC 1923 (Admin.) (Eng.); *see also* *Dowsett v. United Kingdom*, App. No. 39482/98, Eur. Ct. H.R. (2003) (describing litigation on remand in the U.K. following European Court of Human Rights judgments).

229. *Kostovski v. Netherlands*, App. No. 11454/85, 12 Eur. Ct. H.R. 434 (¶ 39) (1989) (“[T]he admissibility of evidence is primarily a matter for regulation by national law.”).

230. *See* *Herrera v. Collins*, 506 U.S. 390 (1993). For a discussion of the current status of claims brought under *Herrera*, *see* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG, *supra* note 17, at 223–24.

231. *See* *Kansas v. Marsh*, 548 U.S. 163, 207–11 (2006) (Souter, J., dissenting) (DNA exonerations constitute “a new body of fact” when considering the constitutionality of capital

punishment practices of other countries, for example, when it struck down the juvenile death penalty in *Roper v. Simmons*.<sup>232</sup>

It is possible that a new case litigating the question of whether and how to recognize a constitutional claim of innocence might similarly take note of the sea change not just in the United States, but globally. To be sure, substantive due process rulings, unlike rulings concerning contemporary standards of decency under the Eighth Amendment, might look more to legal tradition in the United States. But the United States' domestic rules of finality have undergone significant change in recent years, and perhaps a court reconsidering *Herrera* would end its analysis with the mechanism that all 50 states have now adopted to hear post-conviction innocence claims by statute. That mechanism is activated at least for post-conviction DNA tests, but also for a wide range of non-DNA remedies through statutes and judicial decisions.<sup>233</sup>

Countries in which such changes have not been as widespread and countries with courts relatively open to relying on international sources might both look more to their neighbors or to the changing status of innocence claims internationally when deciding how to interpret appellate and post-conviction rules.

#### B. Human Rights Standards or Rulings

What effect would international recognition of a right to claim innocence have? Perhaps such recognition would have a highly limited impact, both outside and even inside the European Union, in which member countries would be directly bound by human rights norms. To be sure, International dialogue may be influenced by a European Court of Human Rights ruling recognizing some right to consideration of new evidence of innocence after conviction and articulating some particular standard of review. If such a ruling became customary international law or was incorporated into international human rights documents, it could have an impact on the remedies available in countries that seek to comply with such international norms. Over time, a right to assert innocence may increasingly be seen as essential to a fair criminal justice system, regardless of whether it is a civil law or a common law system.

Traditional human rights standards and international bodies' and judges' interpretation of them have sought to enforce a right to be presumed innocent until proven guilty, but not a right to litigate innocence even after one has been found guilty. For example, the U.N. Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) provisions regarding criminal trials and appeals can be quite specific, but do not

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punishment); *see also* *Glossip v. Gross*, 135 S.Ct. 2726, 2772–76 (2015) (Breyer, J. dissenting) (discussing death row exonerations and noting “the evidence that the death penalty has been wrongly imposed (whether or not it was carried out) . . . is striking”).

232. *See Roper v. Simmons*, 543 U.S. 551, 576–78 (2005).

233. Garrett, *Claiming Innocence*, *supra* note 34, at 1631, 1646–50, 1673–75.

traditionally include avenues to litigate new evidence of innocence. The U.N. Declaration of Human Rights describes a right to a “fair and public hearing” and a “right to be presumed innocent until proved guilty,” as well as a right not to be found guilty of “any act or omission which did not constitute a penal offence . . . at the time when it was committed” or to receive a sentence heavier than that which applied at the time the offence was committed.<sup>234</sup> Fairness at trial, accuracy of sentences, and limiting convictions to those for actual offenses are all reflected in these principles, but they do not clearly state a principle that there should be a remedy to correct a factual error. Had these principles been drafted today, given the growing international concern with wrongful convictions, they might have included procedures—beyond just a heightened burden of proof at trial—to ensure factual accuracy, should newly discovered evidence of innocence come to light after the conviction.

Yet many of these human rights treaties do provide for compensation for the wrongly convicted once exonerated. For instance, ICCPR Article 14(6) provides that persons whose convictions were reversed based on new evidence of innocence or a miscarriage of justice should receive compensation.<sup>235</sup> In addition, like the European Convention, ICCPR Article 14(7) states a strong double jeopardy principle, and, in response, the United Nations Human Rights Committee, which is tasked with issuing general comments interpreting the ICCPR, noted that reopening criminal proceedings could be justified “by exceptional circumstances,” which could be considered “a resumption of a criminal trial,” and not a retrial in violation of double jeopardy.<sup>236</sup> These sources therefore imply that there must be some avenue available to reverse a conviction based on newly discovered evidence of innocence.

The practical problem of reviewing the accuracy of criminal convictions is deserving of international attention. Trial rights do not adequately protect against wrongful convictions since many criminal cases are resolved, as a practical matter, during police interrogations that produce confessions and during plea bargaining. To be sure, nongovernmental organizations have made proposals for

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234. G.A. Res. 217 (III) A, Universal Declaration of Human Rights arts. 10–11 (Dec. 10, 1948).

235. International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1989), 999 U.N.T.S. 171 (“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”); see Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 22, 1984, 213 U.N.T.S. 222; see also American Convention on Human Rights, Nov. 22, 1969, art. 10, 1144 U.N.T.S. 123, 147 (entered into force July 18, 1978) (requiring similar compensation). For cases regarding failure to compensate wrongly convicted persons, see, for example, *Poghosyan & Baghdasaryan v. Armenia*, App. No. 22999/06, Eur. Ct. H.R. (2012), and *Shilyayev v. Russia*, App. No. 9647/02, Eur. Ct. H.R. (2005).

236. General Comment on the International Covenant on Civil and Political Rights, Gen C. 13/21, art. 14(7) (¶ 19).

some time to add new declarations of rights, or even a third international human rights covenant.<sup>237</sup> Moreover, as Frédéric Mégret put it, “international human rights law is interested in broad outcomes, not the discreet ways of implementing them.”<sup>238</sup> Over time, perhaps the United Nations Human Rights Committee will revisit its advisory language and develop procedures to ensure that relief is available in such “exceptional circumstances.” Likewise, other international criminal courts or tribunals, such as the International Criminal Court, might recognize and support such norms,<sup>239</sup> though such guidance might not be particularly clear or binding. The details of implementation—whether by an appellate judge using revision, by a post-conviction judge using habeas corpus, or by an administrative agency—would likely be left open in recognition of the diversity of approaches used by different countries. What is more uncertain is whether international human rights recognition of wrongful convictions would provide greater influence than the forces already driving expansion of remedies for wrongful convictions. Some countries seem to be more directly reacting to the practical problems posed by new evidence of innocence that surface with regularity in serious criminal cases.

### C. Customary International Law

Customary international law may be the most promising for an international right to claim innocence. Customary international law is widely recognized to protect individual rights, including freedom from slavery, summary execution, torture, “prolonged arbitrary detention,” and “systematic racial discrimination.”<sup>240</sup> Lawyers could make the argument that the convergence of national practices to permit clear avenues to litigate claims of innocence constitutes a form of customary international law, or at least an aspect of international law derived from custom that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>241</sup> Claiming

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237. See Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607, 610, 612–13 (1984).

238. Frédéric Mégret, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, 14 UCLA J. INT’L L. & FOREIGN AFF. 37, 53 (2009).

239. To be sure, there are separate questions whether criminal procedure rules adopted for use in various countries are suitable for international criminal proceedings. See, e.g., Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 J. ARMED CONFLICT L. 45, 46 (1998) (“[T]here is no imperative reason why the standards of any particular state for national trials . . . should determine [procedures for international criminal trials].”). But see U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 106, S/25704 (May 3, 1993) (“It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.”).

240. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW INST. 1987).

241. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2). For a discussion of the increasing application of CIL not just to relations among and between nations, but also to “the relationship between a nation and its own citizens, particularly in the area of human

innocence after a conviction has become final was not a traditional feature of criminal justice, but is now widely seen as an indispensable component of criminal justice across the world. Over time, it may be recognized as a legal obligation that states must consistently follow.<sup>242</sup>

As a result, adequate and fair mechanisms to litigate innocence may increasingly be treated as an international right and a legal obligation for states to enact. In many countries, the vast majority of cases are resolved during an interrogation and confession (where, even if a trial follows, guilt may be a foregone conclusion) or through plea bargaining (where there is no trial). The presumption of innocence at a criminal trial therefore does not sufficiently protect against wrongful convictions and unfairness. Where the trial is not the main event, there must be some avenue to revisit convictions to correct errors that occurred during criminal investigations, interrogations, and plea bargaining. The transition from states adopting innocence claims as a matter of practical necessity to adopting them as a legal obligation is an ongoing process.<sup>243</sup> Recognition of such an obligation by international bodies or in treaties may assist in that process.<sup>244</sup> For the moment, however, the time is ripe to begin to think of the right to claim innocence as a general and consistent practice that deserves consideration as a legal obligation, one that should over time become recognized as customary international law.

#### CONCLUSION

Why have some countries dramatically altered traditional rules surrounding newly discovered evidence of innocence in reaction to new forms of scientific evidence, while others have not? I have described how some legal systems were traditionally more open than others to post-conviction review of innocence—yet all systems include some form of finality that attaches to a conviction after the appeal is complete. Concepts of finality can be tied to concerns about double jeopardy. Reopening cases to litigate new evidence of innocence can encourage criminal justice actors to litigate new evidence of guilt. Some may view common law systems as more characteristically adaptive to innovation because common law judges can more flexibly interpret procedural standards. But there is no neat

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rights,” see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 818 (1997).

242. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. (b) (“[T]here is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become ‘particular customary law’ for the participating states.”).

243. *Id.* § 102 cmt. (c) (“A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.”).

244. *Id.* § 102 cmts. (f)–(h).

divide between civil and common law systems. Civil law countries have readily adopted new statutes to guide judges. Common law countries, like the United Kingdom, have adopted sweeping changes to innocence claims through statutes, lacking any constitutional or common law authority for appeals or post-conviction review. In the United States, habeas corpus has constitutional authority and some common law status, but post-conviction remedies in state and federal courts are also tightly regulated by statutes.<sup>245</sup> Traditional divisions between common and civil criminal justice systems do not provide a reason to avoid considering a uniform international law human rights principle. Such divisions, if they existed, have been unsettled, along with traditional rules of finality, as a result of high-profile wrongful conviction cases.

To be sure, the ability to claim innocence depends on far more than on the existence of a legal avenue to pursue such a claim. New evidence can only surface if evidence was carefully collected and preserved before a conviction, and exonerations will only occur in a system that is open to carefully reinvestigating cases that may have been mistaken. Further, new standards for claims of innocence themselves may be written in broad terms that crucially depend on how judges interpret them. Whether new standards designed to remedy miscarriages of justice result in lasting change may depend less on the written legal rules in a jurisdiction than the adaptability of the criminal justice system to new practical problems. Not only are the forces that have promoted legal change broader than legal procedure, but the impact of new approaches towards finality and innocence claims is also more complex and dependent on legal and cultural attitudes. The precise language of a legal standard governing review of new evidence of innocence may not matter as much as its use and interpretation by the judiciary. Although every state in the United States now has post-conviction mechanisms to litigate new DNA evidence, the vague but flexible “unsafe” convictions standards in the United Kingdom, Australia, and Hong Kong may be just as effective in addressing the wide range of flaws in evidence that can lead to a wrongful conviction.

This discussion is limited to international standards for litigating newly discovered evidence of innocence. Examining other approaches to improve the accuracy of criminal investigations and sentencing or punishments like the death penalty would raise still broader and more complex issues. But even confined to this subject, the legal changes observed suggest criminal justice standards can change in complex ways. To improve the handling of innocence claims, it may take more than a legal system that is open to considering new evidence of innocence. It may also take a legal system that is open to considering scientific evidence more broadly. It may take a legal system that carefully investigates evidence before a conviction, that invests in DNA and forensic technology, and

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245. See generally Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47 (2012) (describing statutory regulation of post-conviction habeas litigation).

that is open to reinvestigating cases that may have been mistaken. While high-profile examples of wrongful convictions have often provided the impetus for adopting new standards for claims of innocence, whether those miscarriages of justice result in lasting change may depend less on the traditional legal rules in a jurisdiction than the adaptability of that system to new practical problems.

Finally, the development of claims of innocence should not be seen as confined to particular jurisdictions. There is a new international dialogue about wrongful convictions and about how to better remedy them. The United States initially spearheaded an innocence movement by combining traditional use of broad post-conviction remedies and remarkable innovation of innocence claims in state courts. The influence of that approach has been notable around the world. However, the interest in preventing wrongful convictions is now international and not confined to any region or type of criminal justice system. The spread of DNA technology, the growing movement to create innocence projects to investigate claims of innocence, the administrative models provided by the CCRC and related statutes adopted in particular countries, the work of scientists and legal scholars who study wrongful convictions, and the role of international institutions like the European Court of Human Rights all have contributed to this international dialogue. While in the past, claims of innocence evolved in response to local examples of wrongful convictions, the practical problem of reviewing the accuracy of convictions is increasingly seen as a common global problem about which countries can learn from each other.

The time is ripe to begin to think of the right to claim innocence as a general and consistent practice that deserves international recognition, and perhaps eventually as a matter of legal obligation and a principle of customary international law. The United Nations has expressed greater interest in recent years on the problem of wrongful convictions, as part of discussions concerning the future of the death penalty. Perhaps the United Nations will issue more guidance on how to remedy wrongful convictions in the future. Individual states and international bodies may provide further clarification that, alongside fair trial rights and the presumption of innocence, supplies an important companion principle: that any just legal system must not only make available some avenue for appeal of a conviction, but also some adequate avenue for litigating newly discovered evidence of innocence post-conviction. The ability to revisit facts and introduce evidence of innocence is particularly crucial where so many criminal cases are resolved long before trial or, in the case of plea-bargaining, without a trial.

Absent the ability to claim innocence, high profile wrongful convictions will continue to plague countries, particularly as DNA and other technology spread. Wrongful convictions are tragic, they can occur anywhere, and they are a serious human rights problem. Whether international rights norms shift over time to explicitly recognize a right to claim innocence post-conviction or not, the convergence that has already occurred across so many diverse criminal justice

systems around the world in the span of three decades is already a remarkable event. The decades to come promise to be an important time for development of innocence claims internationally.

