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*Beyond Biology: Wrongful Convictions in the Post-  
DNA World*

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## Beyond Biology: Wrongful Convictions in the Post-DNA World

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Post-conviction DNA testing first exonerated an innocent prisoner nearly twenty years ago.<sup>2</sup> During this period, we have learned many lessons from the 200 subsequent DNA exonerations,<sup>3</sup> including insight into the factors that led to those wrongful convictions at trial<sup>4</sup> and the procedural obstacles that can make it difficult for inmates whose cases contain biological evidence to procure DNA testing after conviction.<sup>5</sup> Yet, as I have often written in the past, these exonerations are just the tip of the proverbial innocence iceberg.<sup>6</sup> As a threshold matter, very few criminal investigations result in the collection of biological evidence whatsoever;<sup>7</sup> over time, moreover, such evidence often becomes lost, destroyed, or degraded.<sup>8</sup> This signifies that inmates proclaiming their innocence rarely have the benefit of utilizing the tool of DNA testing. In

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<sup>2</sup> See Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803, 829 (2002) (“Gary Dotson made history on August 14, 1989, when he became the first American to be exonerated of a criminal offense by DNA.”).

<sup>3</sup>For a current list of the number of inmates exonerated through post-conviction DNA testing, see Innocent Project Homepage, available at [www.innocenceproject.org](http://www.innocenceproject.org) (last visited Feb. 1, 2008).

<sup>4</sup> Eyewitness misidentifications appear to be the most common factor in wrongful convictions. See, e.g., Daniel S. Medwed, *Anatomy of a Wrongful Convictions: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 358 (2006) (“Virtually all of the pertinent studies since 1932 have pinpointed eyewitness misidentifications as the single most pervasive factor in the conviction of the innocent.”).

<sup>5</sup> See, e.g., Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 383 (2002) (describing some of the flaws with Post-Conviction DNA Testing Statutes).

<sup>6</sup> See generally Daniel S. Medwed, *California Dreaming?: The Golden State's Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437 (2007); 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 (2005).

<sup>7</sup> See *Death Penalty Overhaul: Congressional Testimony before the Comm. on Senate Judiciary*, 107th Cong. (June 18, 2002), at 2002 WL 20318239 (“The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing.” (testimony of Barry Scheck)). See also Liptak, *supra* note 95 (quoting Peter Neufeld as saying that “DNA testing is available in fewer than 10 percent of violent crimes”); Nina Martin, *Innocence Lost*, SAN FRANCISCO MAGAZINE, Nov. 2004, at 78, 105 (noting that “only about 10 percent of criminal cases have any biological evidence – blood, semen, skin – to test”).

<sup>8</sup> See Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 241, 245 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (“In 75 percent of Innocence Project cases, matters in which it has been established that a favorable DNA result would be sufficient to vacate the inmate’s conviction, the relevant biological evidence has either been destroyed or lost.”).

addition, the rate of DNA exonerations is bound to shrink in the future as DNA testing at the front end of the process becomes ubiquitous and thereby reduces the likelihood of miscarriages of justice in prosecutions in which biological evidence is available.<sup>9</sup> Accordingly, the prevention and correction of wrongful convictions in cases lacking biological evidence are issues of critical importance and the focus of this symposium.

Specifically, this Symposium represents an opportunity for several prominent scholars to float trial balloons testing theories related to the problem of wrongful convictions in the post-DNA world. First, Professor Susan Bandes assesses whether the term “wrongful convictions” should be reframed. That is, in Professor Bandes’s view, this phrase may have become so fraught with peril – in its implication that government officials, whether police, prosecutors or judges, have operated in bad faith – that it may be counterproductive in advancing the aims of those involved with innocence cases.<sup>10</sup> Professor Bandes also explores the extent to which the term “wrongful convictions” could embrace forms of injustice in capital cases that are not grounded in factual innocence per se, for instance, procedural unfairness.<sup>11</sup> Second, Professor George Thomas analyzes whether the partisan advocacy inherent in our adversary system of criminal adjudication amplifies the risk of wrongful convictions in this country.<sup>12</sup> That is, Professor Thomas considers whether the problems generated by prosecutors and defense lawyers becoming too wedded to their respective roles (and too cynical about questions of innocence) could be ameliorated by creating a pool of “criminal law specialists,” individual attorneys who would rotate between handling prosecutorial and defense work.<sup>13</sup>

Third, Professors Ron Wright and Marc Miller offer their own take on the impact of DNA exonerations on the work of prosecutors.<sup>14</sup> According to Wright and Miller, altering the adversarial nature of the prosecutorial function is not the answer to the dilemma posed by evidence of wrongful convictions; rather, efforts should be made to enhance accuracy in the initial

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<sup>9</sup> See BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 323 (2001) (“In a few years, the era of DNA exonerations will come to an end. The population of prisoners who can be helped by DNA testing is shrinking, because the technology has been widely used since the early 1990s, clearing thousands of innocent suspects before trial”);

<sup>10</sup> See generally Susan Bandes, *After Innocence: Framing Wrongful Convictions*, 2008 UTAH L. REV. ##.

<sup>11</sup> *Id.*

<sup>12</sup> See generally George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice System*, 2008 UTAH L. REV. ##.

<sup>13</sup> *Id.*

<sup>14</sup> See generally Ronald F. Wright & Marc L. Miller, *Dead Wrong*, 2008 UTAH L. REV. ##.

charging decisions rendered by prosecutors.<sup>15</sup> To that end, Wright and Miller express skepticism about prosecutorial reliance on guilty pleas and urge for a more consistent and appropriate application of the criminal code. Fourth, Professor Manuel Utset addresses the topic of wrongful convictions from the vantage point of behavioral law and economics, contending that any attempt to improve the accuracy of the criminal justice system requires an understanding of how the behavior of an innocent person can be confused with that of the actual culprit in the eyes of a jury.<sup>16</sup> To further this understanding, Professor Utset creates an “observational equivalence model of guilt and innocence” in which he argues that successful prosecutions essentially establish that more than one possible defendant can be “guilty” of a particular crime.<sup>17</sup> Last but not least, Creighton Horton, a prosecutor in the Utah State Attorney General’s Office, affords a glimpse into one state’s reaction to the fast-approaching post-DNA era, namely, the drafting of an innovative Exoneration and Innocence Assistance Bill in Utah.<sup>18</sup> In particular, Horton discusses how a bipartisan committee of prosecutors, defense lawyers, and professors drafted a comprehensive bill that not only provides for compensation for prisoners exonerated of their crimes in Utah, but also institutes a procedural mechanism for inmates whose cases lack biological evidence to seek to prove their innocence.<sup>19</sup> Horton’s tale has a happy ending – in early 2008, on the eve of the publication of this symposium volume, the Utah Legislature passed the bill by an overwhelming margin.<sup>20</sup>

In sum, the aforementioned essays in this volume contribute significantly to the scholarship in the field of wrongful conviction. Even more, my hope is that these contributions bring some of the issues wrought by the coming dawn of the post-DNA age into the light of day.

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<sup>15</sup> *Id.*

<sup>16</sup> See generally Manuel A. Utset, *Telling Differences: Observational Equivalence, Externalities, and Wrongful Convictions*, 2008 UTAH L. REV. ##.

<sup>17</sup> *Id.*

<sup>18</sup> See generally Creighton Horton, *Working Together for Justice: Utah’s Exoneration and Innocence Assistance Bill*, 2008 UTAH L. REV. ##.

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Cathy McKittrick, *Life after Wrongful Conviction: Fund Would Help Exonerated Start Over*, SALT LAKE TRIB., Feb. 1, 2008 (discussing how the House of Representatives voted in favor of the bill).