THE INNOCENCE MOVEMENT AND MISDEMEANORS

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INTRODUCTION

The "Innocence Movement" has been enormously influential in criminal justice reform, to say nothing of its obvious benefits for the exonerated.[1] The Movement is a coalition of lawyers, activists, exonerated individuals, and others who have revealed the troubling reality and likely causes of erroneous convictions.[2] The Movement's core work has been exonerating wrongfully convicted individuals by proving their innocence and implementing legislative and other policy reforms designed to prevent future miscarriages of justice.[3] Most exonerations have happened in serious felony cases, especially homicide and rape cases.[4] There are good and understandable reasons for this: there may be DNA in such cases,[5] innocence projects and other organizations providing pro bono representation triage the large number of potential cases in part by focusing on individuals on death row or serving significant prison sentences,[6] and these same defendants are motivated to continue fighting their wrongful convictions because the stakes are so high.[7]

Recently, evidence that innocent people are convicted of misdemeanors has surfaced and there are now eighty-five documented cases of official

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[1] *See* Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1085 (2011) ("[T]he Innocence Movement has helped hundreds of wrongly convicted people obtain freedom.").

[2] Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1157 (2010) ("The discovery of hundreds of wrongful convictions in the past twenty years has reshaped the debate about criminal justice in this country, spawning what has become known as the 'Innocence Movement' . . . ").

[3] *See* Hughes, *supra* note 1, at 1084-85.

[4] *See* Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 85, 96 (Daniel S. Medwed ed., 2017) ("Focusing on felonies . . . skews our understanding of the scope of the wrongful conviction problem. The United States files approximately two to three million felony cases a year, of which 1 or 2 percent are homicide and rape cases—the kinds of cases that dominate DNA exonerations, innocence project caseloads, and media attention. By contrast, over ten million misdemeanor cases are filed every year, under low visibility circumstances in which appeals are rare and exonerations even rarer.").

[5] *See* Findley, *supra* note 2, at 1169; *infra* notes 62-65 and accompanying text (discussing how DNA is evidentiary gold-standard in cases where DNA is dispositive).

[6] *How We Take Cases*, INNOCENCE PROJECT NEW ORLEANS, http://www.ip-no.org/how-we-take-cases [https://perma.cc/S3GS-9WLC] (last visited Apr. 28, 2018) (including, among criteria for taking cases, that "[t]he person is serving a life sentence or a near-life sentence with at least 10 years left to be served"). In some jurisdictions, prisoners on death row or serving long sentences may have a statutory right to post-conviction counsel. *E.g.*, WASH. REV. CODE § 10.73.150(3) (2012) (providing for right to counsel on collateral attack, and sometimes on second or subsequent collateral attacks, for individuals under death sentence).

[7] *See* Brandon L. Garrett, *Convicting the Innocent Redux*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT, *supra* note 4, at 40, 51.

misdemeanor exonerations listed on the National Registry of Exonerations.[8] For example, a Topeka, Kansas, couple were convicted in 2014 of a variety of misdemeanor charges, including assault on a police officer and disorderly conduct, based on the officers' testimony.[9] After the trial, the prosecutor viewed body camera footage that contradicted the officers' testimony, and the court eventually vacated the convictions.[10] In Harris County, Texas, there have been mass exonerations after people pled guilty to misdemeanor drug possession—usually their only way to be released because they could not make bail—and subsequent laboratory testing revealed "no controlled substance."[11] There is also plenty of evidence of wrongful misdemeanor arrests. For example, charges of fleeing and evading, resisting arrest, and disorderly conduct against Deric Baize were dismissed after he had spent two weeks in jail once video surfaced that completely contradicted the police officer's account.[12] In Baltimore, "[a] number of criminal cases . . . have gone up in smoke . . . after two Baltimore police body-camera videos have allegedly shown officers planting drugs on residents of the city."[13]

Despite the growing number of individual stories of innocent people who were arrested for or convicted of misdemeanors, there has been little attention paid to wrongful misdemeanor convictions as a systemic problem. This is beginning to change, and some Innocence Movement reformers are turning to misdemeanors. In 2015, the National Registry of Exonerations posted, *Why So Few Misdemeanors?*, which discussed the small percentage of misdemeanors listed on the Registry and stated: "How many other innocent misdemeanor defendants pled guilty or were convicted at trial in cases with no lab tests or

[8] Misdemeanors, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=Group&FilterValue1=M&&SortField=County_x0020_of_x0020_Crime&SortDir=Asc [https://perma.cc/PSH9-XYYT] (last visited Apr. 28, 2018).

[9] Maurice Possley, *Jeanie Becerra: Other Female Exonerees with Misconduct in Their Cases*, NAT'L REGISTRY EXONERATIONS (June 11, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4704 [https://perma.cc/E37L-VU9H].

[10] *Id.* Although the prosecutor had the responding officer's body camera footage and "turned [it] over" an hour before trial, nobody watched the footage to see if it corroborated the testimony. The day after trial, the prosecutor viewed the footage, which showed that the couple did not attack the officers. *Id.*

[11] *See infra* Section I.B.

[12] Gil Corsey, *Good Cop Bad Cop: The Matthew Corder Story*, WDRB (Oct. 16, 2016, 10:24 PM), http://www.wdrb.com/story/33395826/good-cop-bad-cop-the-matthew-corder-story [https://perma.cc/CM5E-7Y4T].

[13] Phil McCausland, *Another Baltimore Police Body-Cam Video Shows Officers 'Plant' Drugs*, NBC NEWS (Aug. 4, 2017, 7:55 AM), https://www.nbcnews.com/news/us-news/another-baltimore-police-body-cam-video-shows-officers-plant-drugs-n789396 [https://perma.cc/B25J-P3VV].

videos to prove their innocence after the fact? We have no clue."[14] Around the same time, the Innocence Project, an early and well-respected leader in the Innocence Movement, created a position focusing on several "key areas," one of them being "the innocent who plead guilty to misdemeanors."[15]

The Innocence Movement's interest in misdemeanors could be seen as a distraction from important work to be done in more serious cases where resources are already stretched too thin.[16] On the other hand, although violent offenses and felony drug crimes dominate criminal justice news and policy debates,[17] it is misdemeanors that dominate criminal justice reality. About eighty percent of all criminal cases are misdemeanors.[18] There are approximately "13.2

[14] *Why So Few Misdemeanors?*, NAT'L REGISTRY EXONERATIONS (Oct. 6, 2015), https://www.law.umich.edu/special/exoneration/Pages/misdosoct2015.aspx [https://perma.cc/7RJX-LVKV] (noting how, at that time, "[f]ewer than 2% of the exonerations in the Registry . . . [we]re for misdemeanors, despite the fact that they ma[d]e up at least 80% of criminal convictions in the United States").

[15] *Special Counsel for New Initiatives: Job Summary*, INNOCENCE PROJECT, https://www.innocenceproject.org/special-counsel-new-initiatives/ [https://perma.cc/9TNV-ATVH] (last visited Apr. 28, 2018); *see also* Barry Scheck, *Unreliable Field Drug Tests Result in Innocent People Pleading Guilty*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/barry-scheck/unreliable-field-drug-tes_b_11016904.html [https://perma.cc/M86D-ZPKE] ("It simply didn't occur to anyone that scared, poor, overwhelmed innocent people would plead guilty, even in misdemeanor cases where the risk of innocents pleading guilty just to get out of jail is generally recognized to be greater than in felonies."); *cf.* Daniel S. Medwed, *A Quarter Century of Righting Wrongful Convictions*, WBUR (Aug. 14, 2014), http://www.wbur.org/cognoscenti/2014/08/14/dna-exoneration-gary-dotson-daniel-medwed [https://perma.cc/XU82-MQ2W] (commenting that twenty-five years after first DNA exoneration, "next phase of work in this field, then, is to implement lasting reforms to bolster accuracy in all criminal cases and to make it easier to present non-DNA innocence claims in post-conviction proceedings").

[16] *Why So Few Misdemeanors?*, *supra* note 14 ("Everyone involved in the process—innocence projects, prosecutors' offices, courts, police departments—is inundated with claims of innocence from felony defendants who were sentenced to 10 years or more in prison, or life, or death. Every post-conviction investigation is a big commitment. For misdemeanors, no one has the time.").

[17] *See Why the Public Perception of Crime Exceeds the Reality*, NPR (July 26, 2016), https://www.npr.org/2016/07/26/487522807/why-the-public-perception-of-crime-exceeds-the-reality ("[T]he news media has always over-reported violent crime. This has been something that's been pervasive even since the '70s. You know, if it bleeds it leads, particularly in local television news.").

[18] *See* Victor Eugene Flango, *Judicial Roles for Modern Courts*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/Monthly-Trends-Articles/Judicial-Roles-for-Modern-Courts.aspx [https://perma.cc/59Q8-HAPT] (last visited Apr. 28, 2018) (noting that "[a]pproximately 80 percent of criminal cases are misdemeanors, and more than 70 percent of them are handled by municipal [courts]").

million misdemeanor cases filed in the United States each year."[19] For many of the estimated seventy million people in the United States who have arrest or conviction records, those experiences played out in the lower criminal courts as misdemeanor cases.[20] But those experiences did not end in court, as the consequences of misdemeanor records now affect many critical aspects of people's lives, including employment, housing, and education.[21] This is due to a combination of technological advances that have resulted in easily accessible, publicly available criminal records and a sharp increase in the collateral consequences of criminal convictions in law (such as federal immigration law's deportation grounds, which includes many misdemeanors)[22] and practice (such as employers and landlords running criminal checks even when not required to do so by law).[23]

This Article responds to the Innocence Movement's nascent interest in misdemeanors with hope tinged with concern. There is general consensus that documented exonerations in serious felony cases are only the "tip of [the

[19] *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018). Professors Megan Stevenson and Sandra Mayson's important new empirical study of misdemeanors also shows that, "contrary to conventional wisdom, this number [of misdemeanors] is not rising. Both the number of misdemeanor arrests and cases filed have declined markedly in recent years." *Id.* (footnote omitted) At the same time, serious violent crime and felony charges have both dropped in many jurisdictions across the United States. *See* JENNIFER L. TRUMAN & RACHEL MORGAN, U.S. DEP'T JUST., BUREAU JUST. STAT., BULL. NO. NCJ 250180, CRIMINAL VICTIMIZATION, 2015, at 1 (2016), https://www.bjs.gov/content/pub/pdf/cv15.pdf [https://perma.cc/685Z-PDY8] (reporting continuously declining trend in violent crime from over seventy-five instances per thousand persons in 1993 to less than twenty-five instances per thousand persons in 2015). *See generally* NAT'L CTR. FOR STATE COURTS, *Court Statistics Project DataViewer*, CT. STAT. PROJECT, http://www.courtstatistics.org/ (last updated Jan. 11, 2017) (reporting decreasing trend in thirty states: 2,175,051 felonies filed in 2013; 2,169,226 felonies filed in 2014; and 2,114,591 felonies filed in 2015).

[20] *See A Healthcare Employer Guide to Hiring People with Arrest and Conviction Records*, NAT'L EMP. L. PROJECT (Apr. 20, 2017), http://www.nelp.org/publication/a-healthcare-employer-guide-to-hiring-people-with-arrest-and-conviction-records/ [https://perma.cc/6KLU-GZ9S] ("Every year, nearly 700,000 people reenter society from incarceration; they are among the estimated 70 million adults in the United States who have an arrest and conviction record."); *see also* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27 n.2 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf?nocdn=1 [https://perma.cc/R2MP-GVK3].

[21] *See infra* notes 187-89 and 240-45 and accompanying text.

[22] *See infra* note 188 and accompanying text.

[23] *See* Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325; *id.* at 327 ("Collateral consequences are the purportedly nonpunitive, noncriminal consequences that can flow automatically or as a matter of discretion from a criminal conviction.").

wrongful conviction] iceberg."[24] Without a doubt, the lower criminal courts convict many innocent people of misdemeanors.[25] In that respect, turning an Innocence Movement lens to misdemeanors is an encouraging development. The mere acknowledgment that innocent people are wrongfully convicted of misdemeanors and the recognition that misdemeanors matter in an individual's life are big steps forward. There are clear benefits to pulling aside the misdemeanor curtain to reveal factually innocent people convicted of low-level crimes.[26] Most obviously, innocent people should not be convicted. Further, demonstrating that innocent people are convicted in misdemeanor cases may help advance reforms in policing and in the lower criminal courts. The hope is thus that the Movement can exonerate some innocent people wrongly convicted of misdemeanors while highlighting systemic causes of such errors in reform efforts that will ultimately benefit all individuals facing misdemeanor charges.

Yet, there are a number of concerns with an innocentric[27] focus on misdemeanors. These concerns have to do with detracting attention from other more entrenched and widespread problems in misdemeanor cases; the related question of defining the "wrong" in wrongful misdemeanor conviction; determining the types of evidence that will prove actual innocence in the same definitive way that DNA evidence has done in many felony exonerations; and overcoming serious procedural and structural barriers to demonstrating post-conviction innocence.

Perhaps the most fundamental concern listed above is that advancing a narrative about innocent people convicted of misdemeanors could overtake an existing, yet still developing, narrative of the disproportionate and unfair consequences of misdemeanor convictions regardless of guilt or innocence. That narrative is now being told in the press[28] as well as in state legislatures considering decriminalization and other reforms to mitigate the consequences of a criminal record.[29] This narrative also underlies recent scholarly focus on

[24] Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2005); *see also* Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1559.

[25] *Why So Few Misdemeanors?*, *supra* note 14 ("Given their number, there is little doubt that false convictions for misdemeanors are at least several times more frequent than false felony convictions.").

[26] *Cf.* Hughes, *supra* note 1, at 1085 (critiquing definition of, and focus on, "factual[]" or "actual" innocence).

[27] Professor Daniel Medwed used the apt term "innocentrism" to label what he described as a "transformation" in "American criminal law . . . due to the increasing centrality of issues related to actual innocence in courtrooms, classrooms, and newsrooms." Medwed, *supra* note 24, at 1549.

[28] *See infra* notes 282-83 and accompanying text.

[29] *See infra* notes 289-90 and accompanying text.

misdemeanors[30] and studies of misdemeanor-related racial bias.[31] One aspect of this narrative is the sheer volume of misdemeanor convictions. Misdemeanor arrests and prosecution numbers are staggering and may have doubled in the past forty-five years.[32] While the public, reform, and legislative focus has been on mass incarceration, the terms "mass criminalization" or "criminal records crisis" better describe a country in which one in three individuals has some sort of arrest or conviction record.[33] This raises the issue of whether emphasizing innocence in misdemeanor cases will deemphasize the more immediate problem of law enforcement making too many misdemeanor arrests and prosecutors charging too many of those cases in the lower criminal courts. Similar concerns about innocentrism have long been debated in the felony context, and, to some extent, have been addressed.[34] While there are many parallels between innocence and fairness tensions in the felony and misdemeanor settings, there are also differences. These tensions have yet to be explored in the misdemeanor context, and this Article seeks to foster a dialogue about them.[35]

Another potential concern with focusing on innocence and misdemeanors is that there are a number of "wrongs" when it comes to certain types of convictions, guilt or innocence aside. Disorderly conduct, public drunkenness, minor marijuana possession, driving with a license that has been suspended for

[30] *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 286 (2011); *see also, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101 (2012).

[31] *See infra* notes 279-80 and accompanying text.

[32] *See* ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N CRIM. DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808 [https://perma.cc/E595-HPZB] (describing rise from 5 to 10.5 million misdemeanors filed per year between 1972 and 2006).

[33] *See* RODRIGUEZ & EMSELLEM, *supra* note 20, at 3; *see also* NAT'L EMP'T LAW PROJECT, *Faulty FBI Background Checks for Employment: Correcting FBI Records is Key to Criminal Justice Reform* 1, 6 (2015) (citing *Grassley Statement at the National Press Club Newsmakers News Conference*, United States Senate (Apr. 27, 2015), http://www.grassley.senate.gov/news/news-releases/grassley-statement-national-press-club-newsmakers-news-conference [https://perma.cc/YA6Q-KJ8G]), http://www.nelp.org/publication/faulty-fbi-background-checks-for-employment/ [https://perma.cc/AK6V-G8PF]. The focus on mass incarceration is, like the Innocence Movement's focus on rape and homicide cases, perfectly understandable and justified. That should not detract from recognition of the crisis in the lower criminal courts.

[34] Professor Daniel Medwed has argued persuasively that innocentrism (at least in the types of serious cases on which the Innocence Movement had focused up to that point) has complemented, rather than detracted from, criminal justice reforms that emphasize substantive and procedural rights for all defendants. Medwed, *supra* note 24, at 1566-70; *see also infra* Section III.A.

[35] *See infra* Section III.

failure to pay parking tickets, littering, and other low-level public order offenses can result in permanent criminal records and wildly disproportionate consequences for individuals and their families.[36] Should the "wrong" in at least some classes of misdemeanors be untethered from the inquiry into whether the person actually committed the act, because too many low-level misdemeanor cases themselves are largely untethered from traditional notions of culpability and punishment?[37] This raises a core definitional issue, namely, how to define the "wrong" in "wrongful misdemeanor conviction."[38] For the sake of consistency with Innocence Movement and scholarship terminology, it makes sense to use the term "wrongful misdemeanor conviction" to refer to an innocent person's conviction. However, it is important to keep in mind that even if the individual's conduct violated a state law or local ordinance, the conviction of that person may be wrong because of the unjustified or disproportionate punishment that follows (once the collateral consequences of that criminal record are factored in) and because of disparate enforcement in communities of color. This type of wrong might be called an "unfair conviction" to capture convictions that are unjustified, disproportionate, biased, or some combination of all of these common unfairnesses in misdemeanor cases.[39]

Finally, other concerns about a misdemeanor Innocence Movement are more practical and less controversial. DNA evidence has resulted in hundreds of felony exonerations thus far,[40] but a typical misdemeanor case has neither DNA nor any other scientific evidence.[41] DNA has been called the "gold standard" for evidence of innocence and is credited as giving the early Innocence Movement great momentum and credibility due to its scientific certainty.[42] A misdemeanor Innocence Movement may need similar types of evidence, and there is potential in two areas: laboratory tests of alleged unlawful drugs that reveal "no controlled substance" despite the individual having pled guilty to misdemeanor drug possession and police body camera or citizen videos that surface after a

[36] *See* Roberts, *supra* note 30, at 171-72.

[37] *See* Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 195 (2018); *see also* John B. Mitchell, *Crimes of Misery and Theories of Punishment*, 15 NEW CRIM. L. REV. 465, 471 (2012) ("[T]he current application of the crimes of misery cannot be justified under any accepted philosophical theory of punishment . . . .").

[38] *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1689-92 (2010) (discussing moral versus legal guilt in misdemeanor context); *see also* Stephanos Bibas, *Bulk Misdemeanor Justice*, 85 S. CAL. L. REV. POSTSCRIPT 73, 75 (2011) (agreeing with Bowers "that the bigger problem is not factual but moral innocence" and "that jaded police and prosecutors know and care too little about sorting out which defendants deserve punishment from those who are technically guilty under overbroad criminal laws but normatively innocent").

[39] *See infra* Section IV.B.

[40] *See infra* note 61 and accompanying text.

[41] *See* Roberts, *supra* note 30, at 286.

[42] *See infra* notes 61-64 and accompanying text.

misdemeanor conviction to contradict the factual basis for that conviction.[43] There are a number of other ways in which misdemeanors differ from the serious felony cases that comprise most known exonerations. For misdemeanors, the stakes are often characterized, and perceived, as low;[44] there are few lawyers, activists, or others focused on the cases and issues;[45] and, in some jurisdictions, individuals charged with misdemeanors do not even have lawyers.[46] These unfortunate realities are behind just some of the considerable barriers to uncovering and developing evidence of innocence in misdemeanor wrongful convictions.

Part I of this Article explores how the Innocence Movement gained momentum following the first DNA exonerations before moving to the broader definition of "wrongful conviction" now used by the National Registry of Exonerations. It then considers laboratory tests as well as police and citizen

[43] *See infra* Section I.B.

[44] *See generally* Roberts, *supra* note 37 (discussing how misdemeanors are not actually low-stakes, given the potentially severe collateral consequences of many misdemeanor convictions); Roberts, *supra* note 30. Other scholars have also commented on these severe consequences. *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104-05 (2014) (describing how these consequences can either be formally or informally imposed). Also, an arrest record's mere existence has lasting consequences for employment, housing, and immigration. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 812-14 (2015) ("Even as advocates, criminal law scholars, and courts have drawn greater attention to the civil consequences of criminal convictions, they have paid relatively little attention to the effects of arrests—particularly subfelony arrests, such as misdemeanors." (footnote omitted)).

[45] However, that is changing. *See* Victoria Bekiempis, *NYC to Pay out $11 Million in Legal Fees, Costs to Lawyers in 'Historic' Stop-and-Frisk Case*, N.Y. DAILY NEWS (Jan. 24, 2017, 7:01 PM), http://www.nydailynews.com/new-york/nyc-pay-11m-legal-costs-lawyers-stop-and-frisk-case-article-1.2954826 [https://perma.cc/AA5Y-RGXK]; *The Bronx Defenders Marijuana Arrest Project Announces Preliminary Review of Data Reflecting Ongoing and Systemic Constitutional and Evidentiary Problems in Marijuana Arrests by NYPD*, BRONX DEFENDERS (Apr. 2, 2012), https://www.bronxdefenders.org/the-bronx-defenders-marijuana-arrest-project-announces-preliminary-review-of-data-reflecting-ongoing-and-systemic-constitutional-and-evidentiary-problems-in-marijuana-arrests-by-nypd/ [https://perma.cc/S3MJ-4B35].

[46] *See* BORUCHOWITZ, BRINK & DIMINO, *supra* note 32, at 14-15 (quoting South Carolina Supreme Court Justice's statement, at state bar meeting, that state court judges in South Carolina regularly violated *Alabama v. Shelton* and would continue to do so because it simply was not possible to provide lawyers in so many misdemeanor cases); Gary Feuerberg, *Constitution Violated 'Thousands of Times Every Day,'* EPOCH TIMES (May 18, 2015, 11:21 AM), http://www.theepochtimes.com/n3/1359404-constitution-violated-thousands-of-times-every-day/ [https://perma.cc/6TCG-C3KL] (describing Senate Judiciary Committee hearing on violations of federal constitutional right to counsel). *See generally* ALISA SMITH & SEAN MADDAN, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS (2011), https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794&libID=20764 [https://perma.cc/RXD7-WCNW].

video that reveal wrongful convictions as compelling, but limited, methods of exoneration in misdemeanor cases—the misdemeanor Innocence Movement's potential DNA. Part II considers the myriad procedural and structural obstacles for misdemeanor exonerations, including high percentages of guilty pleas that close avenues of appeal, and the unlikelihood of misdemeanor cases reaching the post-conviction review stage (where new evidence of innocence generally surfaces). The scope of the definition of "wrongful conviction" is the focus of Part III. Part IV discusses the power of felony exoneration and misdemeanor disproportionality narratives before ending with a story that seeks to illustrate potential ways to avoid conviction of the innocent while protecting all defendants from minor convictions that disproportionately affect their lives, families, and communities. Advancing accuracy in criminal case adjudications and avoiding burdensome and unnecessary misdemeanor criminal records are not mutually exclusive goals and there are a number of reforms that address both.

I. LABORATORY TESTS AND VIDEO: THE MISDEMEANOR INNOCENCE MOVEMENT'S DNA?

As the Innocence Movement turns to misdemeanors, it will surely look for a path-breaking development that will allow it to gain traction and advance misdemeanor criminal justice reform. For felonies, that development was DNA exonerations, but DNA is almost never present in misdemeanor cases.[47] Currently, there are two types of evidence in the small number of documented misdemeanor exonerations that hold out promise as the DNA of misdemeanor wrongful convictions. First are cases where laboratory tests revealed the lack of any controlled substance after individuals pled guilty to possessing such a substance.[48] Second are cases with police or citizen video that contradicts witness testimony that was key in securing a conviction.[49] Both of these types of exonerating evidence are common in misdemeanor cases on the National Registry of Exonerations, which has broadened the list of wrongful convictions beyond those involving DNA exonerations.

Before exploring laboratory tests and video as the potential DNA of the misdemeanor Innocence Movement, it is worth noting an important distinction between the exonerations achieved thus far with these different types of evidence. Almost all DNA exonerations have led to the conclusion that, although a crime was committed, the wrong person was convicted.[50] By contrast, the small group of known misdemeanor exonerations achieved through post-

[47] *See* Roberts, *supra* note 30, at 286.

[48] *See, e.g.*, Maurice Possley, *Homer Armstrong*, NAT'L REGISTRY EXONERATIONS (2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4771 [https://perma.cc/95L2-J4AX].

[49] *See, e.g.*, Maurice Possley, *Arthur Morris*, NAT'L REGISTRY EXONERATIONS (2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4703 [https://perma.cc/AD5V-MDK2].

[50] *See infra* notes 223-24 and accompanying text.

conviction laboratory tests or video evidence, explored in the section below, have generally led to the conclusion that no crime was committed at all and no one should have been convicted of anything.[51] In working to expose "wrong person" convictions, the felony Innocence Movement emphasizes the compelling fact that getting it wrong means the real culprit is still out there, possibly committing more violent felonies.[52] There are thus two urgencies in getting it right: exonerating and freeing the wrongfully convicted person, as well as identifying and punishing the person who actually committed the crime.[53]

In the "no crime" scenario present in most known wrongful misdemeanor convictions, only the former urgency exists, as there is no other person out there to convict. And even if there were, the fact that the charge was only a misdemeanor might undermine any move to devote further resources to identifying and convicting the actual culprit. Still, exonerating a person who is likely suffering a series of obstacles to employment, housing, education, and other facets of daily life based on a wrongful misdemeanor conviction is clearly urgent.[54] After describing how DNA was the powerful tool leading to early exonerations and igniting the Innocence Movement, the remainder of this Part explores the two potentially most promising ways to exonerate those wrongfully convicted of a misdemeanor.

A. *Broadening the Innocence List: From DNA to "Official Exoneration"*

The Innocence Movement's history reaches back to 1912, when Edwin Borchard wrote an article on wrongful convictions.[55] In 1932, Borchard published his "breakthrough historical work,"[56] *Convicting the Innocent*, which documented the cases of sixty-five factually innocent people who were

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[51] *See infra* Section I.B.

[52] *See DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/D5EB-YZKL] (last visited Apr. 28, 2018). However, as Professor Keith Findley has noted:

> [T]he Innocence Movement has drawn power from the simplicity of the wrong-person story of innocence, as told most effectively by the DNA cases. The purity of that story continues to have power, but that story alone cannot sustain the Innocence Movement. It is too narrow. It fails to accommodate the vast majority of innocent people in our justice system. It fails to embrace innocence in its full complexity.

Findley, *supra* note 2, at 1207.

[53] There are also the urgencies of studying wrongful convictions' causes to advance reforms and avoid repeating the same mistakes, and advancing the legitimacy of the criminal justice system by correcting error. Both of these values exist in felony and misdemeanor cases.

[54] *See infra* notes 187-89 and accompanying text.

[55] *See generally* Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (1912).

[56] Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 11 (2009).

nevertheless convicted.[57] From that point through the late 1980s, advocacy and scholarship about wrongful convictions focused on revealing and examining cases of factual innocence.[58]

The Innocence Movement's modern era began in 1989, with the first two DNA exonerations of David Vasquez and Gary Dotson.[59] Forensic DNA technology's development and use in exposing wrongful convictions "shattered that perception of virtual infallibility—exposing the reality that error in the criminal justice system is systemic, not just freakishly rare or merely episodic."[60] Indeed, DNA exonerations have continued at a steady pace since 1989, with the total number of such exonerations now at 354.[61]

There are levels of accepted proof for determining actual innocence. DNA is the least controversial, and a DNA exoneration is treated as the evidentiary gold standard in cases where DNA is dispositive.[62] This type of "[p]rovable actual

[57] *See generally* EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932).

[58] *See* Richard A. Leo, *Has the Innocence Movement Become an Exoneration Movement? The Risks and Rewards of Redefining Innocence* 2 (Univ. of S.F. Sch. of Law Research Paper No. 2016-16, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756124 [https://perma.cc/K5YE-5AB4] ("It might be said that Borchard invented a subfield: the empirical study of wrongful convictions.").

[59] *See David Vasquez*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/david-vasquez/ [https://perma.cc/QW5Y-EPU5] (last visited Apr. 28, 2018); *Gary Dotson*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/gary-dotson/ [https://perma.cc/F6DB-P28L] (last visited Apr. 28, 2018). These exonerations occurred only two years after the first DNA-based conviction in the United States. *See generally* Andrews v. State, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988) (holding that DNA evidence was properly admitted in rape case and affirming conviction).

[60] Keith A. Findley, *Innocence Found: The New Revolution in American Criminal Justice*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 3, 4 (2014) (reporting that DNA evidence has been utilized "to prove innocence (as well as guilt) to a degree of scientific certainty that was unprecedented in the criminal justice system").

[61] *DNA Exonerations in the United States*, *supra* note 52.

[62] Leo, *supra* note 58, at 33 ("At least since 1996, the list of DNA exonerations maintained, publicized and continually expanded by the Innocence Project has been the gold standard for researching and writing about innocence, wrongful conviction and error-reducing policy reforms." (footnote omitted)); David A. Singleton, *Unmaking a "Murderer": Lessons from a Struggle to Restore One Woman's Humanity*, 47 SETON HALL L. REV. 487, 489 (2017) (describing strength of DNA-based exoneration cases and lamenting difficulties with non-DNA exoneration cases); *see also* Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 721 (using "gold standard" to describe DNA evidence). *But see* SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012, at 11 (2012), https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/ETN5-KXZK] ("[S]ome state officials continue to express doubts about the innocence of exonerated defendants, sometimes in the face of extraordinary evidence. For example, when Charles Fain was exonerated by DNA in Idaho in 2001, after

innocence" has been called "the lifeblood of the Innocence Movement."[63] The Innocence Project's website lists and analyzes DNA exonerations. The organization has played a key role in bringing exonerations to the public's attention for the past twenty-five years.[64] The Innocence Project list was—at least until recently—considered the leading source for information about exonerations and is composed of cases about which the broadest group of people would agree represent convictions of the actually, provably innocent.[65]

Recently, scholars and others began to predict that DNA exonerations would decrease drastically.[66] They based these claims on the hypothesis that most such wrongful convictions happened before DNA testing was available, that the bulk of such convictions had been exposed through post-conviction testing, and that more recent cases have benefitted from pre-trial testing and thus have lower conviction error rates.[67] These predictions—although they have yet to be realized[68]—surely played a role in focusing the Innocence Movement's and

18 years on death row for a rape murder, the original prosecutor in the case said, 'It doesn't really change my opinion that much that Fain's guilty.'").

[63] Leo, *supra* note 58, at 28 (discussing "the movement's moral legitimacy and the extraordinary power of innocence to effect meaningful criminal justice policy reform"). There are potential drawbacks to reliance on such certainty for proving innocence. Professor Keith Findley has noted how

> DNA evidence . . . runs the risk of proving too much (that is, more than is legally required), and thereby feeding the appetite for unrealistic simplicity in criminal cases. It is not unusual, in a non-DNA innocence case, no matter how compelling the evidence of innocence, for the state to respond to a motion for a new trial by arguing that no relief should be granted because the proffered new evidence is not like DNA. Courts too, sometimes reject new trial motions based on claims of innocence by comparing the new evidence to DNA and finding it lacking.

Findley, *supra* note 2, at 1189 (footnotes omitted); *see also id.* at 1190 ("While DNA results can be powerful, and in some cases can lead to conclusions about guilt and innocence that are beyond reasonable dispute, they are not always dispositive or ever truly without *any* doubt. And *without* DNA**,** the picture is almost always even murkier.").

[64] *See Our Work*, INNOCENCE PROJECT, https://www.innocenceproject.org/about/#our-work [https://perma.cc/HU8Z-ZGZJ] (last visited Apr. 28, 2018).

[65] *See* Findley, *supra* note 60, at 5 (describing Innocence Project as "first [organization] to fully seize upon DNA technology as a tool for exonerating the innocent"); Editorial Board, Editorial, *Prisoners Exonerated, Prosecutors Exposed*, N.Y. TIMES, Feb. 13, 2016, at A20 (stating that Innocence Project has shown for "more than 20 years . . . how many ways a conviction can be obtained wrongfully").

[66] *See* Leo, *supra* note 58, at 33.

[67] Medwed, *supra* note 24, at 1570 ("[P]ost-conviction DNA testing is a contemporary phenomenon, a fleeting moment in history.").

[68] *See Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx [https://perma.cc/73B5-489S] (last visited Apr. 28, 2018) (listing twenty DNA exonerations in 2012, nineteen in 2013, twenty-two in 2014, twenty-seven in 2015, and seventeen in 2016); *see also* Findley, *supra* note 60, at 4 (reporting that number of exonerations per year has "remained

scholars' attention on non-DNA based methods of demonstrating innocence.[69] In turn, this raised the issue of how to define the contours of actual innocence in cases that did not involve DNA or where DNA evidence was peripheral to the case.

In 2012, the University of Michigan and Northwestern University law schools co-founded the National Registry of Exonerations.[70] Notably, Registry exonerations currently number 2161, only 442 of which are attributed to DNA.[71] The larger number is due to the Registry's definition of "innocence," which is pegged to legal exoneration.[72] This broadened definition tracked the Innocence Movement's turn to non-DNA cases and causes of wrongful convictions, but it has not been uncontroversial. As Professor Keith Finley has noted:

> Claims of innocence in non-DNA cases can be . . . tinged with gray tones, in part because of the inherent difficulty and ambiguity in trying to prove a negative. Claims of innocence based upon challenges to convictions resting upon recantations, or resting upon inherently unreliable forensic "science" evidence, are especially complicated and increasingly common examples of such gray-shaded innocence cases.[73]

In the first Registry report, Professor Samuel Gross and Michael Shaffer acknowledged that they "do not claim to be able to determine the guilt or innocence of convicted defendants. In difficult cases, nobody can do that reliably. . . . [T]he best we can do is to rely on the actions of those who have the authority to determine a defendant's legal guilt."[74] For these reasons, and despite the limitations, the Registry relies on "official decisions," including pardons,

fairly constant," "[d]espite predictions that the rate of post-conviction DNA exonerations would begin to dwindle" in instances where DNA testing was not available when defendant was convicted).

[69] *Compare Our Work*, *supra* note 64 ("The Innocence Project . . . exonerates the wrongly convicted through DNA testing"), *with Glossary*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx [https://perma.cc/Y5YT-LZZS] (last visited Apr. 28, 2018) ("In general, an *exoneration* occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence.").

[70] Findley, *supra* note 60, at 4-5. The Registry is now "a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law." *Our Mission*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/mission.aspx [https://perma.cc/WT4F-Z9SK] (last visited Apr. 28, 2018).

[71] *Exonerations by Year: DNA and Non-DNA*, *supra* note 68.

[72] *Id.*

[73] Findley, *supra* note 2, at 1161-62; Leo, *supra* note 58, at 30 (noting "inherent epistemic problem in the study of wrongful convictions: that we often lack sufficient knowledge or evidence of what occurred to determine with absolute certainty whether someone is innocent. Given the inherent difficulty of proving a negative, it is almost impossible to demonstrate a person's factual innocence in many cases").

[74] GROSS & SHAFFER, *supra* note 62, at 6.

dismissals, acquittals, certificates of innocence, and posthumous exonerations.[75] According to the Registry:

> "Exoneration," as we use the term, is a legal concept. It means that a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered.[76]

Recently, Professor Richard Leo claimed that "[i]n less than four years, the Registry's compilation of exonerations had not only eclipsed the Innocence Project's list of DNA exonerations numerically but, for many, replaced it as the definitive go-to source on wrongful convictions in America."[77]

The National Registry of Exonerations' inclusion of non-DNA official exonerations has resulted in a much longer list of wrongfully convicted individuals.[78] This includes a small number of misdemeanor exonerations, as explored in the remainder of this Section. However, for felonies, DNA was the path-breaking development that allowed the Innocence Movement to gain traction and contribute to criminal justice reform.[79] As the Innocence Movement ventures into misdemeanor territory, it must find similarly powerful methods of proving innocence that bring certainty into the early identification of wrongful

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[75] *Id.* at 8-9, 12.

[76] *Id.* at 7; Leo, *supra* note 58, at 18 ("The theory underlying the Registry's definition seems to be that an exoneration, as defined by the Registry, is the best proxy and least biased approach for classifying wrongful convictions of the innocent that are otherwise mostly invisible."). The Registry further describes how it does

> not include any case in which there is an official determination that the defendant is not guilty of the charges in the original conviction but did play some role in the crime and may be guilty of a lesser crime that involved the same conduct. For example, a defendant who is acquitted of murder on retrial but convicted of robbery for the same event has not been exonerated. We also exclude any case in which a defendant pled guilty to any charge that is factually related to the original conviction, regardless of how minor the charge he pled to and regardless of the strength of the evidence of the defendant's innocence. We exclude any case in which a conviction was vacated and charges dismissed for legal error without new evidence of innocence—even if the conviction was reversed for insufficient evidence to prove guilt beyond a reasonable doubt. And we exclude all cases in which there is unexplained physical evidence of guilt, such as unexplained contraband in the possession of a defendant, or identifying physical trace evidence.

GROSS & SHAFFER, *supra* note 62, at 7.

[77] Leo, *supra* note 58, at 6; *id.* at 20 ("The Innocence Movement has become an exoneration movement. The currency of the realm is no longer factual innocence per se. Instead, what counts—literally and figuratively—is whether a defendant has been exonerated according to the Registry's partially innocence-based definition.").

[78] *See Exonerations by Year: DNA and Non-DNA*, *supra* note 68.

[79] Gross et al., *supra* note 24, at 523.

misdemeanor convictions.[80] In any case, there are not likely many official misdemeanor exonerations. Gubernatorial or presidential pardons or reversals on appeal with a subsequent acquittal on remand are rare in misdemeanor cases.[81] Perhaps these mechanisms will offer a path to misdemeanor exonerations in the future, after significant systemic reforms. For now, to begin an inquiry into misdemeanor wrongful convictions, a more immediate, compelling method is needed. This begs the question of the types of evidence that might prove innocence in misdemeanor cases. In short, is there a "DNA" of misdemeanor wrongful convictions?

B. *Laboratory Drug Testing as a Frontier in Misdemeanor Wrongful Convictions*

Post-conviction laboratory testing in drug cases that reveals that there was in fact no controlled substance strongly parallels post-conviction DNA testing that exonerates an individual. A DNA exoneration proves that the wrong person was convicted, while a negative laboratory test proves that no crime was ever committed and thus a person was wrongfully convicted. Both types of evidence have accepted levels of scientific certainty,[82] which means that, at least in some

[80] For an exploration of the likely procedural and structural obstacles to raising post-conviction innocence claims in misdemeanor cases, see *infra* Part II.

[81] *50-State Comparison: Pardoning Practices*, RESTORATION OF RTS. PROJECT, http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonpardoning-practices/ [https://perma.cc/3BGP-BWCU] (last visited Apr. 28, 2018) (listing fourteen states in "Frequent and Regular" column for percentage of grants per pardon application, and thirty-six states, the federal system, and the District of Columbia in "Sparing," "Infrequent/Uneven," or "Rare"); *Policy on Pardons for Misdemeanor Federal Convictions*, DEP'T JUST., https://www.justice.gov/pardon/policies [https://perma.cc/JT68-MR4D] (last updated Feb. 22, 2018) ("It is the general policy of the Department of Justice not to process applications for pardon of federal misdemeanor convictions, since most civil disabilities imposed as the result of a federal conviction are triggered by conviction for a felony offense rather than a misdemeanor crime.").

[82] Exec. Office of the President, President's Council of Advisors on Sci. & Tech., Report to the President Forensic Science in Criminal Courts: Ensuring Scientific Validity Feature-Comparison Methods 26 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/4K2D-PLP3] ("Once DNA analysis became a reliable methodology, the power of the technology—including its ability to analyze small samples and to distinguish between individuals—made it possible not only to identify and convict true perpetrators but also to clear mistakenly accused suspects before prosecution and to re-examine a number of past convictions."); Jonathan Jones, *Forensic Tools: What's Reliable and What's Not-So-Scientific*, PBS (Apr. 17, 2012), https://www.pbs.org/wgbh/frontline/article/forensic-tools-whats-reliable-and-whats-not-so-scientific/ [https://perma.cc/H5BH-F238] ("Drug testing is the most frequent forensic function performed by publicly funded crime laboratories, which analyze biological samples for the presence of toxins present in an individual to determine whether the amount of those substances is above a harmful level. . . . Like DNA analysis, the analysis of controlled

categories of cases (drug cases for laboratory testing and cases in which DNA is dispositive for DNA testing), the evidence actually proves the wrongfully convicted person's innocence. This Section explores a group of cases in which individuals pled guilty to misdemeanor drug possession charges, sometimes after a field test erroneously indicated a positive result, but where laboratory testing later led to exonerations. While erroneous field testing was clearly a contributing factor to the wrongful convictions, half involved guilty pleas without field testing.[83] Close examination of these cases reveals that a number of deeply-entrenched facets of the lower criminal court system—most notably unfair bail practices and guilty pleas—are also intertwined with wrongful convictions. These other facets illustrate the need for broad reform to help solve both wrongful conviction and general systemic unfairness in the misdemeanor arena.

Given the lack of general data about misdemeanors and the small number of documented misdemeanor exonerations, it is difficult to discern the "stock script" of the wrongful misdemeanor conviction.[84] However, the National Registry of Exonerations, which "collects, analyzes and disseminates information about all known exonerations of innocent criminal defendants in the United States, from 1989 to the present,"[85] allows researchers to sort cases by "tag[s]," including "Misdemeanor."[86] Of the 2161 exonerations listed on the Registry as of January 2018, there are eighty-five tagged as misdemeanors—about four percent of all listed exonerations.[87] Fifty-six of these were drug

substances is a mature forensic science discipline and one of the areas with strong scientific underpinnings developed along the lines of classical analytical chemistry."). *But cf.* Eric Levenson, *Nearly 20,000 Drug Convictions Dismissed over Chemist's Misconduct*, CNN (Apr. 18, 2017, 4:42 PM), https://www.cnn.com/2017/04/18/us/annie-dookhan-drug-tests/index.html [https://perma.cc/ Y4XX-7Q6K] ("Because of a lab chemist's widespread criminal misconduct in analyzing drug samples, about 95% of 20,000 drug convictions in Massachusetts have been dismissed . . . .").

[83] *See infra* notes 263-65 and accompanying text (discussing "stock script" in felony exonerations).

[84] *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 47 (2000); *infra* note 129 and accompanying text.

[85] *Our Mission*, *supra* note 70.

[86] Misdemeanors, *supra* note 8.

[87] *Id.* It appears that five of the eighty-five misdemeanors began as felonies. Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1005 (2018). Further, fifty-eight of the eighty-five documented cases of exonerated misdemeanors

> were exonerated by drug tests conducted by police labs; . . . seven were exonerated by evidence from official sources that the officers who testified against them were corrupt; . . . four were exonerated by police videos, three from body cameras and one from a surveillance camera (and an additional three were exonerated by privately recorded videos—two by videos from commercial surveillance cameras, and one by a cell-phone video); and . . . two were exonerated by database DNA hits.

Id. at 1008-09.

convictions from Harris County, Texas (which includes the city of Houston), vacated after post-conviction state forensic laboratory testing showed "no controlled substance" in the seized items, sometimes years after the convictions.[88]

The Harris County situation was revealed when an *Austin American-Statesman* journalist "noticed a series of unusual exonerations coming out of the Texas Court of Criminal Appeals. He'd tracked 21 drug convictions across Texas that had been reversed because labs had found that the drugs in question weren't really drugs. The laboratory results came after defendants had already pleaded guilty."[89] The journalist brought these exonerations to the attention of the chief of the Harris County District Attorney's ("HCDA") Conviction Review Section. The chief contacted the local crime lab manager, who told her that for years his lab had sent numerous "No Controlled Substance" results to a HCDA Office inbox, which were either unread or led to no action. After these deeply troubling revelations, the HCDA's Office began to revisit the "No Controlled Substance" cases, and has been working to strike wrongful convictions since 2014.[90]

Notably, every one of these Harris County misdemeanor exonerations followed a guilty plea, and many involved some amount of jail time at sentencing (indicating the individuals who pled guilty were likely held on bail at the time).[91] There are also stark racial disparities in this group of wrongful

[88] *Id.* at 1009-10 ("Almost eighty percent of the misdemeanor exonerations we know about are from convictions based on guilty pleas (67/85), and eighty-five percent of those guilty pleas were by innocent misdemeanor drug defendants in Harris County, Texas.").

[89] Ryan Gabrielson & Topher Sanders, *Busted*, PROPUBLICA (July 7, 2016), https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives [https://perma.cc/4VAW-ZGQ3].

[90] *Id.* The number of Harris County misdemeanor exonerations appears to be tapering off. In 2014, there were fourteen misdemeanor exonerations from Harris County on the National Registry. Drug Misdemeanor Exonerations in Harris County, Texas, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=County_x0020_of_x0020_Crime&FilterValue1=Harris&FilterField2=Crime&FilterValue2=8_Drug%20Possession%20or%20Sale&FilterField3=Group&FilterValue3=M&SortField=Exonerated&SortDir=Asc. [https://perma.cc/7H24-5J8V] (last visited Apr. 28, 2018). That number rose to fifteen in 2015, twenty-four in 2016 and then fell to only three for 2017. *Id.* It is worth noting that Harris County is no stranger to lab scandals and has been described as "perpetually troubled." Radley Balko, *Faulty Drug Field Tests Bring False Confessions, Bad Convictions*, WASH. POST (Feb. 11, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/02/11/faulty-drug-field-tests-bring-false-confessions-bad-convictions/ (linking to number of news stories about various Harris County crime lab scandals).

[91] Gabrielson & Sanders, *supra* note 89 ("All of the 212 [No Controlled Substance] defendants struck plea bargains, and nearly all of them, 93 percent, received a jail or prison sentence."); *see also* Balko, *supra* note 90 (reporting that trace amounts of drugs can be charged as felonies in Texas, and that new District Attorney was elected in Harris County in

convictions. A *ProPublica* investigation of more than two hundred Harris County cases where a person was convicted in a case later shown to involve "No Controlled Substance" revealed that fifty-nine percent of the individuals wrongfully convicted were black, where only twenty-four percent of Houston's population is black.[92]

The Harris County debacle fits into a narrative of mass exoneration, where a large number of innocent people were convicted and later exonerated after the exposure of a scandal or miscarriage of justice.[93] In Harris County, a significant part of the scandal was that in more than half of the exonerated cases, the arresting officers conducted a field test on scene that erroneously indicated the presence of a controlled substance.[94]

A field test is essentially a glass vial that contains chemicals designed to turn a particular color if a certain unlawful substance is added.[95] For example, the "NARK II" test should turn purple when exposed to methamphetamine.[96] Field tests were first marketed in 1973,[97] the year that President Richard Nixon created the Drug Enforcement Agency and two years after he famously declared the War on Drugs.[98] Despite a 1978 Department of Justice determination that field tests were not reliable enough for evidentiary purposes (instead, laboratory analysis verification was needed),[99] and despite the fact that field tests are inadmissible in court,[100] they are commonly the only type of test ever conducted in drug cases

part because of his promise to charge trace drugs as felonies); *cf.* Gabrielson & Sanders, *supra* note 89 ("In Harris County, Tex. . . . 99.5 percent of drug-possession convictions are the result of a guilty plea. A majority of those are felony convictions . . . ."). Faced with potential felony charges, it is not surprising that so many innocent people pled guilty.

[92] Gabrielson & Sanders, *supra* note 89.

[93] *Cf.* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 176 (2011).

[94] Jessica Lussenhop, *Why Harris County, Texas, Leads the US in Exonerations*, BBC NEWS (Feb. 12, 2016), http://www.bbc.com/news/magazine-35543898 [https://perma.cc/ 5X M8-T95J].

[95] *Id.*

[96] Alysia Santo, *Jolly Ranchers, Sage and Breath Mints*, MARSHALL PROJECT (Apr. 2, 2015, 3:48 PM), https://www.themarshallproject.org/2015/04/02/jolly-ranchers-sage-and-breath-mints#.Nr5Aeg974 [https://perma.cc/Q4MA-JSGW] (describing NARK II test and problems with reliability).

[97] Gabrielson & Sanders, *supra* note 89.

[98] *DEA History*, U.S. DRUG ENFORCEMENT AGENCY, https://www.dea.gov/about/history.shtml [https://perma.cc/7N3P-D86E] (last visited Apr. 28, 2018); *Special Message to the Congress on Drug Abuse Prevention and Control: June 17, 1971*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=3048 [https://perma.cc/PUE5-3WNY] (last visited Apr. 28, 2018) (likening struggle against drugs to war).

[99] Gabrielson & Sanders, *supra* note 89.

[100] Ryan Gabrielson, *Unreliable and Unchallenged*, PROPUBLICA (Oct. 28, 2016, 11:00 AM), https://www.propublica.org/article/unreliable-and-unchallenged [https://perma.cc/5HZ 4-56KD].

across the nation.[101] A 2011 study "found that prosecutors in nine of [ten] jurisdictions . . . surveyed nationwide accepted guilty pleas based solely on the results of field tests."[102] Subsequent *ProPublica* investigative reporting "confirmed that prosecutors or judges accept plea deals on that same basis in Atlanta, Boston, Dallas, Jacksonville, Las Vegas, Los Angeles, Newark, Philadelphia, Phoenix, Salt Lake City, San Diego, Seattle and Tampa."[103] This happens despite the fact that field tests have indicated positive for a controlled substance when the substance was in fact a Jolly Rancher candy, breath mint, or sage.[104]

In addition to this mass exoneration narrative, the Harris County cases have a storyline that describes them as an admirable response to a bad situation. One Houston defense lawyer proclaimed that Harris County prosecutors were "doing an excellent job" with the exonerations.[105] The Harris County public defender told that same reporter: "[W]e were finally doing it right, all these exonerations came to light. That's why it's so dramatic . . . ."[106] The story's media coverage characterized the HCDA's Conviction Review Section chief, the local public defender, and other defense lawyers as appreciative of a problem identified and a solution in place.

These sentiments are undoubtedly genuine, and the HCDA's Office's active participation in the exonerations compares favorably to the reactions of other prosecutors faced with similar issues.[107] The Office also made significant procedural changes for pending cases in order to get full laboratory tests more quickly and before any plea that involved jail time.[108] Still, it is important to remember that hundreds of "No Controlled Substance" reports sat in an HCDA

[101] *See* Gabrielson & Sanders, *supra* note 89.

[102] *Id.*

[103] *Id.*

[104] Santo, *supra* note 96 ("Hillsborough police lieutenant conducted his own experiment on the NARK II tests, which cost between $15 and $20 for a box of ten. He found that just opening the test bag to the air produced the same shade of purple as exposure to methamphetamine, according to an internal memo.").

[105] Lussenhop, *supra* note 94.

[106] *Id.*

[107] *See What Happens When Prosecutors Refuse to Admit Mistakes?*, FAIR PUNISHMENT PROJECT (Nov. 7, 2016), http://fairpunishment.org/what-happens-when-prosecutors-refuse-to-admit-mistakes/ [https://perma.cc/3RGC-MLXS] (describing six prosecutors who refused to acquiesce to overwhelming evidence which proved innocence and mistaken convictions).

[108] Lussenhop, *supra* note 94. However, it is disturbing that this policy of awaiting laboratory test results before any plea bargaining that involves jail time could lead to innocent defendants sitting in jail longer than those who took quick pleas to get out. I would be surprised if many jurisdictions have the will or resources to test open case substances, let alone post-conviction substances. In my experience, the field test is often taken as strong evidence—although these exonerations surely undermine that scientific claim—or the plea happens even without a field test simply to move the docket along and get the defendant out of jail as soon as possible regardless of guilt or innocence.

Office email inbox without action for months and sometimes years, while hundreds of wrongfully convicted individuals served their sentences and struggled with the effects of the drug convictions on housing, employment, and other aspects of daily life.[109] It is also important to remember that the HCDA's Office became involved only after an investigative reporter from the *Austin American-Statesman* contacted the Conviction Review Section chief to ask about the negative laboratory tests in cases where individuals had already pled guilty.[110] The reporter, in turn, had been alerted to the issue by a source.[111]

There is a third narrative twist, one of financial exigency, behind Harris County's move to test substances to avoid wrongful convictions. The Conviction Review Section chief described how she started the faster-testing initiative:

> When I found out that one of those cases involved a woman who was paid a $40,000 payout from the Texas Comptroller's Office because she had served 6 months in State Jail on a drug case that turned out to not be a controlled substance, I got very concerned that we were going to bankrupt the state.[112]

The Conviction Review Section's mission is obviously consistent with avoiding wrongful convictions and exonerating innocent people who were convicted, but the quote is revealing.

It is also revealing that the Conviction Review Section chief has publicly surmised that the reason so many innocent people pled guilty was because they thought they possessed drugs (but were actually sold "turkey" or fake drugs).[113] While that is possible, if the chief had any data to support such statements, she did not share it.[114] It is also possible that many of those arrested protested that the pills they had on them were simply aspirin (as they turned out to be in some cases)[115] or some other legal substance, but that the officers ignored these protestations because they either did not believe them or did not care and just wanted to make the arrests. Indeed, a Harris County defense lawyer described the four exonerees that she had represented at the trial level as homeless

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[109] *E.g.*, Gabrielson & Sanders, *supra* note 89 (detailing Amy Albritton's loss of employment and housing after she pled guilty to drug possession because she could not make bail after her arrest, despite fact that she told police officers substance in her car was over-the-counter painkiller (their field test showed positive for crack cocaine)).

[110] *Id.*

[111] Eric Benson, *The Curious Cases of Pleading Guilty While Innocent*, TAKEPART (Nov. 20, 2015), http://www.takepart.com/feature/2015/11/20/houston-drug-war-exonerations [https://perma.cc/7KVJ-PTPT].

[112] Murray Newman, *Harris County Drug Lab Exonerations: The Good Spike*, MIMESIS L. (Feb. 16, 2016), http://mimesislaw.com/fault-lines/exonerations-a-positive-spike/6861 [https://perma.cc/NS2F-UXFA].

[113] Lussenhop, *supra* note 94.

[114] *See id.*

[115] Gabrielson & Sanders, *supra* note 89.

individuals who pled guilty to get out of jail more quickly but told her before their pleas that they were innocent.[116]

In this respect, those who applaud the Harris County laboratory testing and subsequent drug exonerations as illustrative of a system doing its job well are not fully addressing the bigger picture. If a defendant informed officers that the pills were a legal substance, such as over-the-counter pain medication, and that defendant is jailed awaiting results of a laboratory test, there is a wrong even if, ultimately, there is no wrongful conviction. Indeed, given our criminal justice system's presumption of innocence and long-standing knowledge about the unreliability of field testing, any person who is jailed on a drug possession charge based solely on a positive field test is wronged. Better science (here, in the form of a streamlined laboratory testing process) does not solve the underlying problems, which may include law enforcement misconduct or negligence and judicial decisions (such as setting unattainably high bail in low-level cases) that also contribute to the wrongful conviction.[117]

The Harris County situation is not jurisdictionally unique. An eight-part *ProPublica* investigative reporting series that detailed the problems in Harris County also documented other instances of wrongful convictions and faulty field testing.[118] The series was as much about the failings of the lower criminal courts as about the faulty testing itself.[119]

The Harris County exonerations clearly established that at least the fifty-six innocent people convicted of drug-related misdemeanors in that county and now on the National Registry of Exonerations were wrongfully convicted.[120] In drug cases, post-conviction laboratory testing could be deemed the DNA of the

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[116] Lussenhop, *supra* note 94 (quoting Harris County defense attorney as stating that "when the prosecutor offered [her innocent clients] a plea deal with relatively short jail time, they snatched the chance to get out—even after she told them that she could not advise them to take the deal. 'Some of them would then say, "OK, I'm actually guilty,"' she says. 'I can't stop them'").

[117] *Cf.* Newman, *supra* note 112 (quoting DA Conviction Review Section chief as saying, "I think the misleading aspect of it is the idea that something must be going terribly wrong with drug cases in Harris County, and I don't think that is what's going on. I think we are seeing the same amount of 'No Controlled Substance' lab results now that we've seen in years past, it's just that the mechanism for correcting those convictions wasn't streamlined in the past and it's streamlined now").

[118] *See Busted: Examining Chemical Field Tests*, PROPUBLICA, https://www.propublica.org/series/busted [https://perma.cc/FHZ3-KXDQ] (last visited Apr. 28, 2018).

[119] *See System Failures*, PROPUBLICA (July 7, 2016, 4:58 AM), https://www.propublica.org/article/chemical-field-test-wrongful-conviction-flowchart [https://perma.cc/5WXU-22CG].

[120] *See* Misdemeanor Exonerations in Harris County, Texas, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=County_x0020_of_x0020_Crime&FilterValue1=Harris&FilterField2=Group&FilterValue2=M [https://perma.cc/22P3-YLQX] (last visited Apr. 28, 2018).

misdemeanor Innocence Movement. The wrongful arrest was caused, at least in part, by an erroneous field test and a reliable laboratory test uncovered the error.

But much has to go wrong after that field test for the arrest to result in a wrongful conviction. First, if the person is held on bail they cannot afford, they are more likely to plead guilty to unlawful possession even if actually innocent.[121] Second, if the person is offered a plea bargain at the first court appearance, particularly if that bargain will lead to release, the case may end there, before any further, more reliable, testing of the alleged unlawful substance happens.[122] Finally, even for later plea bargains—for example, a person who has come to court numerous times to fight a minor drug misdemeanor charge but can no longer skip work without losing her job—the guilty plea may come before any laboratory testing is done.[123] Indeed, a 2013 Drug Enforcement Agency survey found that about sixty-two percent of crime labs do not test drug evidence when defendants plead guilty.[124] In my own lower court experience, laboratory testing of alleged drugs is sometimes conducted on the morning of a trial date, only after a prosecutor has informed the lab that the defendant is not pleading guilty but instead going to trial. In short, many cases are effectively decided the moment the field test changes color or the judge sets bail.

The mass exonerations in Harris County are a critical development for those wrongly convicted. The immediate story behind the wrongful convictions also offers an important reminder about the unreliability of field testing and the need for laboratory testing in all drug cases, thus highlighting an area for criminal justice system reform. The story that emerges upon deeper inquiry is about the harm of existing bail schemes, highlighting another area for systemic reform. A bird's-eye view of the full picture behind these wrongful convictions teaches that a fix for this problem is multi-faceted. One facet that is often not discussed, but that is particularly relevant in the misdemeanor arena due to the sheer volume of cases in the lower criminal courts, is that law enforcement and prosecutors must be more selective about which misdemeanor cases they really want in the criminal justice system. It is simply not realistic—and perhaps not financially feasible—that already overwhelmed state forensic labs will be able to test every controlled substance in every misdemeanor case.[125] For example,

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[121] *See supra* note 91 and accompanying text; *infra* note 301 and accompanying text.

[122] *See infra* note 197.

[123] *See infra* note 308 and accompanying text.

[124] DRUG ENF'T ADMIN., OFFICE OF DIVERSION CONTROL, 2013 SURVEY OF CRIME LABORATORY DRUG CHEMISTRY SECTIONS 5 (2013) https://assets.documentcloud.org/documents/2939906/2013labsurvey.pdf [https://perma.cc/E7WP-2YMB].

[125] *See Advancing Justice Through DNA Technology: Using DNA to Solve Crimes*, U.S. DEP'T JUST. (Mar. 7, 2017), https://www.justice.gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes [https://perma.cc/W2JH-UX6Q] ("[T]he current federal and state DNA collection and analysis system needs improvement . . . In many instances, public crime labs are overwhelmed by backlogs of unanalyzed DNA samples."); *Crime in the United States, 2015: Persons Arrested*, FED. BUREAU INVESTIGATION,

prosecutors in a jurisdiction where marijuana remains a crime might decline to prosecute, or police officers might choose to confiscate the marijuana but exercise their discretion and not make an arrest or issue a ticket. The same is true of many other types of lower-level misdemeanors, where reduction of volume would be the most significant reform.

C. *Body Cameras and Citizen Videos in a Misdemeanor Wrongful Conviction Movement*

Other than the fifty-six Harris County (and one non-Harris County) laboratory test cases, there are only twenty-nine misdemeanor exonerations on the National Registry of Exonerations.[126] Most of those twenty-nine fall into two general categories: charges of assault, harassment, menacing, or stalking where the complainant is a civilian witness (and where the two individuals likely know one another) or charges of assault, harassment, or obstruction where the complaining witness is law enforcement.[127] In the first category, the defendant was often convicted after the trial judge improperly excluded evidence, such as a line of cross examination of the complaining witness that might have revealed a motive to lie or bias.[128] An appellate court reversal for the error led either to the government dismissing the case and not pursuing a retrial or to acquittal at a retrial where the evidence was finally heard.[129] In the second category of cases,

https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested [https://perma.cc/FMW4-9HQT] (last visited Apr. 28, 2018) (noting how 38.6% of 1.48 million reported "drug abuse violation" arrests in 2015 were for marijuana possession).

[126] *See* Sorted Misdemeanors, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?SortField=Crime&View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=Group&FilterValue1=M&&SortField=County_x0020_of_x0020_Crime&SortDir=Asc [https://perma.cc/YH3L-LR36] (last visited Apr. 28, 2018).

[127] *Id.* Other than these two types of cases, there are about nine cases involving different types of misdemeanors, ranging from one sex abuse exoneration, Maurice Possley, *James Strughold*, NAT'L REGISTRY EXONERATIONS (Sept. 22, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4752 [https://perma.cc/W4Q6-AAAL], to one handgun case, Maurice Possley, *Chris Truong*, NAT'L REGISTRY EXONERATIONS (Apr. 10, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5115 [https://perma.cc/U8P5-2V2R].

[128] *E.g.*, Maurice Possley, *Charles Podaras*, NAT'L REGISTRY EXONERATIONS (May 3, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5127 [https://perma.cc/LN23-ZBCQ]; *cf.* Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 726-27 (2013) (referring to "eyewitness identifications, confessions, forensic science, and jailhouse informant or snitch testimony" as "suspect evidentiary categories" that are "recurring features of wrongful convictions").

[129] *See* NAT'L REGISTRY OF EXONERATIONS, THE FIRST 1,600 EXONERATIONS 2-3 (2015), https://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf [https://perma.cc/EUW9-AM9L] (describing how new evidence of innocence, discovered post-conviction, led to 1240 dismissals and 201 acquittals after trials).

convictions were revisited after video surfaced and contradicted the officer's claim or after the officer was subsequently indicted or fired based on criminal activity while on duty.[130]

Body camera and civilian video of police-citizen encounters has become increasingly common in criminal cases. This is particularly true for misdemeanors, where a large percentage of cases (such as public order offenses and drug possession) have law enforcement officers as the main witnesses and where the cameras are often recording during the alleged offenses.[131] Cases involving post-conviction exculpatory video evidence, like post-conviction negative laboratory tests, could be characterized as the misdemeanor equivalent of DNA exoneration. In some cases, the video evidence is clear proof that the assault, harassment, or obstruction simply did not happen or was justified. This Section explores the potentials and limits of such video evidence in proving wrongful misdemeanor convictions.

After the protests in Ferguson and Baltimore following killings by police officers, the federal government pledged more funding for community policing at the local level.[132] Part of this initiative was the "Body Worn Camera Partnership Program," which promised to match funds that states and localities spent for body cameras and the storage needed for footage. The proposed $75 million in funding over three years was intended to go towards fifty thousand cameras.[133] An initial $20 million allocation went to numerous local police departments throughout the country in 2015.[134] Police departments in Pleasant Hill, Iowa, Durham, North Carolina, Del Ray Beach, Florida, and San Francisco, California, were among those to purchase body cameras.[135] The Partnership

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[130] *E.g.*, Possley, *supra* note 49.

[131] *See infra* notes 231-34 and accompanying text.

[132] *Fact Sheet: Strengthening Community Policing*, WHITE HOUSE (Dec. 1, 2014), https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing [https://perma.cc/3BTC-72NU].

[133] *Id.*

[134] Reena Flores, *Justice Department to Give $20 Million for Police Body Cameras*, CBS NEWS (May 1, 2015, 8:32 AM), http://www.cbsnews.com/news/justice-department-to-give-20-million-for-police-body-cameras/ [https://perma.cc/6GVJ-A7LN] (reporting availability of funds for at least fifty grants to purchase body cameras for police departments); *cf.* Devlin Barrett, *U.S. Urges Bodycams for Local Police, but Nixes Them on Federal Teams*, WALL ST. J. (Nov. 11, 2015, 4:10 PM), http://www.wsj.com/articles/u-s-urges-bodycams-for-local-police-but-nixes-them-on-federal-teams-1447276258 (noting how delays in adopting guidelines for federal law enforcement use of body cameras has raised problems for U.S. Marshals and other federal agency officials who cooperate closely with local law enforcement using federal funds to buy body cameras).

[135] *E.g.*, Virginia Bridges, *Durham City Council Approves Purchase of Police Body Cameras*, NEWS & OBSERVER (Nov. 22, 2016, 5:48 PM), http://www.newsobserver.com/news/local/community/durham-news/article116383958.html [https://perma.cc/NV37-P2KD] (reporting plan by city council to spend $1.4 million on 530 body cameras); Charly Haley, *Pleasant Hill Police Get Body Cameras*, DES MOINES REG., Nov. 23, 2016, at A13 (describing

Program requested $22.5 million for fiscal year 2018, which is the same amount it received for fiscal year 2017.[136]

Even before body cameras, some police departments used dashboard cameras on their cars.[137] Recently, prosecutors and defense lawyers have started to use body and dash camera footage in the courtroom. For example, in a 2015 District of Columbia assault case involving two roommates, both sides used body camera footage, ultimately leading to the conviction of the man charged.[138] In Montgomery County, Maryland, the State's Attorney's Office now regularly downloads body camera and other video to its Discovery Material Delivery portal as part of the discovery process.[139]

Body cameras "will show events from the perspective of the police officer, giving viewers a sense of what the officer sees and hears (or does not see or hear)."[140] The footage can make the policing process more transparent to the public, thus making police more accountable.[141] Body cameras can also "expose[] *bad cops*" and uncover wrongful accusations.[142] For example, in Fort Worth, Texas, footage undermined the information a police officer presented to a probation officer, who had signed an affidavit to support a man's arrest on an

purchase of eleven body cameras for $20,400); Vivian Ho, *SF Police Commission OKs Body Cameras*, S.F. GATE (June 2, 2016, 1:50 PM), http://www.sfgate.com/news/article/SF-Police-Commission-weighs-body-cameras-7958492. php (reporting vote by San Francisco Police Commission to require police officers to wear body cameras); Ryan Van Velzer, *City Agrees to Buy Police Body Cameras*, SUN-SENTINEL, Nov. 17, 2016, at A1 (describing recent allocation of $1 million to purchase body cameras for local police).

[136] U.S. DEP'T OF JUSTICE, FY 2018 PROGRAM SUMMARIES 19 (2017), https://ojp.gov/newsroom/pdfs/2018ojpprogramsummary.pdf [https://perma.cc/PX44-C6D9].

[137] *See* Wesley Lowery, *Officer's Body Camera Wasn't Activated Until After Shooting*, WASH. POST, Sept. 26, 2016, at A4 (reporting that officer's body camera was not activated until after shooting, but dashboard camera was recording, although it did not capture any significant events).

[138] *See* Keith L. Alexander, *Lawyers See New Benefit to D.C. Police Body Cameras—as Evidence for Trials; in a Recent Assault Trial in D.C. Both the Prosecution and Defense Highlighted Police Body Camera Video*, WASH. POST (Jan. 25, 2015, 10:30 PM), https://www.washingtonpost.com/local/crime/lawyers-see-new-benefit-to-dc-police-body-cameras—as-evidence-for-trials/2015/01/25/c0d89f06-9c11-11e4-bcfb-059ec7a93ddc_story.html [https://perma.cc/QYT2-KMYT] (describing use of body camera footage to prosecute man for simple assault, one of the first courtroom uses of body camera footage in Washington, D.C., area).

[139] *Welcome to eDiscovery*, OFF. ST.'S ATT'Y, https://www8.montgomerycountymd.gov/mcgjw [https://perma.cc/VGU2-PYT6] (last visited Apr. 28, 2018).

[140] Alberto R. Gonzalez & Donald Q. Cochran, *Police-Worn Body Cameras: An Antidote to the "Ferguson Effect"?*, 82 MO. L. REV. 299, 308 (2017).

[141] *Id.* at 311.

[142] *Id.* at 313.

alleged probation violation.[143] While the police officer claimed the glovebox to the man's car was open and revealed a handgun, footage from the same officer's body camera showed the glovebox was never open.[144] In New Jersey, "[a] stunning police dashboard camera video" was used to indict two officers and exonerate an innocent man.[145] Prior to the delayed release of the exonerating footage, the man was facing five years in prison on charges of aggravated assault, resisting arrest, and eluding the police. The video, instead, showed police swerving into oncoming traffic to hit the man's car, then violently breaking his car window, punching him, and pulling him to the ground while he sat behind the wheel with his hands in the air.[146]

Body camera footage has also revealed officer misconduct that, but for the footage, would not have been uncovered. In Asheville, North Carolina, investigators quickly retrieved a ten-year veteran deputy's body camera footage after he received an excessive force complaint and terminated his employment the next day. The Sheriff described the footage as "invaluable."[147] In Salt Lake City, Utah, a detective was fired from the police force after body camera footage showed him "roughly handcuffing [a nurse at University of Utah Hospital] and shoving her into an unmarked squad car after she refused to let him draw blood from an unconscious man, who had been badly injured when he crashed at the end of a police chase."[148] The police lieutenant who ordered the detective to arrest the nurse was demoted as a result of the incident.[149] Body camera footage has also been used to support a federal civil rights lawsuit in Tennessee. In that case, an officer claimed that he used his pepper spray in response to an attack, but footage from his body camera "show[ed] no such attack."[150]

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[143] *See* Deanna Boyd, *Busted by Body Cam: Fort Worth Officer Accused of Lying, Fired*, STAR-TELEGRAM (Apr. 22, 2016, 10:20 AM), http://www.star-telegram.com/news/local/community/fort-worth/article73125597.html?platform=hootsuite [https://perma.cc/TT4R-R9EK] ("A police officer has been fired after body camera footage helped reveal that he lied about a suspect's actions, prompting a charge in the case to be rejected . . . .").

[144] *Id.*

[145] Sasha Goldstein, *Police Dash Cam Video Exonerates New Jersey Man, Implicates Cops*, N.Y. DAILY NEWS (Feb. 25, 2014, 8:14 PM), http://www.nydailynews.com/news/crime/police-dash-cam-video-exonerates-nj-man-implicates-cops-article-1.1701763.

[146] *Id.*

[147] Jon Ostendorff, *Buncombe County Deputy Fired After Use of Force Complaint*, ABC 13 NEWS WLOS (Jan. 7, 2016), http://wlos.com/news/local/buncombe-county-deputy-fired-after-use-of-force-complaint#.VpL5ifkrKM8?platform=hootsuite [https://perma.cc/32MX-2J8U].

[148] *Utah Police Lieutenant Demoted over Arrest of Nurse over Blood Draw*, REUTERS, (Oct. 11, 2017, 3:50 PM), https://www.reuters.com/article/us-utah-nurse/utah-police-lieutenant-demoted-over-arrest-of-nurse-over-blood-draw-idUSKBN1CG2PZ [https://perma.cc/W7FH-CE3G].

[149] *Id.*

[150] Hayes Hickman, *Rockwood Officer Named in $1.2M Pepper-Spray Lawsuit Resigns Post*, KNOXVILLE NEWS SENTINEL (Aug. 24, 2016), http://archive.knoxnews.com/news/crime-

These examples illustrate the ways in which body cameras have potential similar to that of DNA. They bring some level of certainty to situations that could otherwise result in wrongful convictions and correct glaring inaccuracies based—in this context—largely on false statements and testimony. "[T]he cameras can provide a snapshot of the chaotic moments after a crime or during a confrontation with police, capturing the statements and emotions of those involved. Such video can help bolster—or contradict—testimony from officers, victims or witnesses."[151]

Thus, video documentation of relevant events holds out promise as a tool for uncovering wrongful convictions of innocent people. However, it also has serious limitations. Body camera, dash camera, and other footage is often not as definitive as DNA, nor as definitive as a properly-conducted laboratory test, to determine the presence or lack of a controlled substance. This is, in part, because such footage can be "far from polished, offering a choppy view from one officer's vantage point with audio that can be difficult to hear."[152] Body camera video and audio can also be turned on and off by the officer. In one incident, a New Orleans police officer turned her body camera off before initiating a traffic stop during which she shot a man in his forehead.[153] The officer claimed that she turned her camera off because her shift was about to end. The man, who survived, denied the officer's allegation that he resisted arrest.[154] In a recent Chicago incident, police shot a black teenager in the back as he ran from the police after a collision between the stolen car he was driving and a police car.[155] Although various body cameras captured early stages of the encounter, police officials reported improper functioning of the body camera worn by the officer who fired the fatal shot, so there was no video of the actual shooting.[156]

In this same shooting incident, despite a police department directive that officers keep their cameras on until an incident is fully concluded, the released footage "appeared to pick up attempts by officers warning other cops to make

courts/rockwood-officer-named-in-12m-pepper-spray-lawsuit-resigns-post-3abf30fa-3d32-7a41-e053-0100007fb7f2-391157061.html?platform=hootsuite [https://perma.cc/FN3B-PAFP].

[151] Alexander, *supra* note 138.

[152] *Id.*

[153] *Officer Involved in Monday Shooting Had Body Cam Turned off*, FOX8 (2014), http://www.fox8live.com/story/26283883/officer-involved-in-monday-shooting-had-body-cam-turned-off [https://perma.cc/MF9C-S76F].

[154] *Id.*

[155] Mitch Smith, *Body Camera Failed to Record Chicago Police Shooting of Black Teenager*, N.Y. TIMES (Aug. 1, 2016), https://www.nytimes.com/2016/08/02/us/body-camera-failed-to-record-chicago-police-shooting-of-black-teenager.html.

[156] *Id.*

sure their body cams had been turned off."[157] This includes an "officer repeatedly point[ing] to her body cam as the officer who shot [the teenager] spoke out." After that officer ignored her gestures, she "cut him off and again pointed to her body cam, saying, 'Hey, hey.'" The footage also shows a supervisor cautioning officers who shot at the stolen car to "[m]ake sure these are all off now" and warning other officers to stay away from the shooting officers "while their body cameras were operating."[158]

Recording police activities is not an action exclusive to police departments themselves. Numerous citizens and organizations throughout the country have taken up the cause of filming public encounters between police officers and private citizens.[159] The courts have recognized a right to record police officer encounters in public so long as the recording itself does not interfere with law enforcement duties.[160] As of July 2017, six of the federal circuit courts of appeal had

> issued . . . rulings, starting in 2011, to protect bystanders who record police actions. Their collective jurisdictions now amount to exactly half of U.S. states and roughly 60 percent of the American population. No federal

[157] Annie Sweeney & Todd Lighty, *Body Cams Give Close-up, Disturbing View of Fatal Police Shooting*, CHI. TRIB. (Aug. 12, 2016, 12:18 PM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-shooting-body-camera-met-20160805-story.html.

[158] *Id.* (describing video showing supervisor warning officers that "[i]f anybody's got a camera on or anything like that, don't go near him until the administrative stuff goes . . . ."). Anecdotally, I have heard the term "red alert" used to describe when an officer wants to ask a fellow officer to turn off his or her body camera. I have also watched body camera footage in a misdemeanor case handled by my clinic students where the officers say "discussing strategy" before muting the audio on their body camera or pushing the position of the camera away from a particular view, in the middle of their search of a car and its occupants.

[159] *E.g.*, *About*, COPBLOCK, https://www.copblock.org/about/ [https://perma.cc/L88Y-WYD6] (last visited Apr. 28, 2018) (describing organization's filming practices as "decentralized organization made up of a diverse group of individuals united by their shared belief that, 'Badges don't grant extra rights'"); *About*, POLICEMISCONDUCT, https://www.policemisconduct.net/about/ [https://perma.cc/9NDL-5RHG] (last visited Apr. 28, 2018) (describing organization's goal "to identify policies that consistently uphold high standards of ethics, honesty, and professionalism from police officers and critique the policies that do not"). *See generally*, Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016).

[160] *See* Gericke v. Begin, 753 F.3d 1, 6-8 (1st Cir. 2014) (noting also how order to disperse for public safety purposes might "incidentally impact an individual's exercise of the First Amendment right to film"); *see also* Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017) ("[U]nder the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.").

appeals court has ruled to the contrary; the Supreme Court has not weighed in on the subject.[161]

Citizen videos have been used to draw attention to violations of police department policy[162] and to discipline officers.[163] Prosecutors have also dropped charges once citizen camera footage has uncovered untruthful police accounts.[164] To the chagrin of some police departments, citizen videos have also been used and released when police departments are reluctant (or refuse) to release body camera footage.[165] To this effect, citizen video can serve as a check on the police in the absence of footage from a dashboard or body camera or when that footage is incomplete.[166] Private recordings have also been used to

[161] Matt Ford, *A Major Victory for the Right to Record Police*, ATLANTIC (July 7, 2017), https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031/ [https://perma.cc/26V3-WJD6].

[162] *See* Andy Jechow & Robert Maxwell, *Officers' Actions in Viral Video Were 'Self-Inflicted Stupidity,' Says Chief Acevedo*, KXAN NBC (Nov. 15, 2016), http://kxan.com/2016/11/14/officers-actions-in-viral-video-were-egregious-chief-acevedo-says/ [https://perma.cc/MFH2-UMZU] (describing incident where two police officers used flashlights to preclude lawful recording of traffic stop).

[163] *See* Claire Ricke & Andy Jechow, *APD Officer Suspended for 45 Days for SXSW Pepper Spraying*, KXAN NBC (Aug. 30, 2016, 10:44 PM), http://kxan.com/2016/08/30/austin-officer-attends-disciplinary-hearing-after-sxsw-pepper-spraying/ [https://perma.cc/HP86-V2JW] (reporting incident where officer was suspended without pay and subsequently demoted after citizen video showed officer pepper spraying handcuffed man restrained in police van).

[164] *See* Eli Rosenberg, *Suit Accuses New York Police of Violating Citizens' Right to Film*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/08/nyregion/suit-accuses-new-york-police-of-violating-citizens-right-to-film.html?_r=0 (reporting case of Ruben An, twenty-four-year-old man whose obstruction of government administration charge was dropped after video taken from his cell phone eliminated any underlying evidence sufficient to support charge).

[165] *See* Pablo Lopez, *Video Shows Last 2 Shots Fired at Dylan Noble by Fresno Police*, FRESNO BEE (July 7, 2016, 1:33 PM), http://www.fresnobee.com/news/local/crime/article88000527.html [https://perma.cc/F432-JCKL] (reporting incident where citizen video recorded police officers shooting nineteen-year-old Dylan Noble four times, with significant lapses of time between each shot).

[166] *See* Julian Kimble, *Footage Shows St. Louis Police Officer Advising Fellow Cops to Shut Dashboard Camera off During Arrest*, COMPLEX (Feb. 17, 2015), http://www.complex.com/pop-culture/2015/02/footage-shows-st-louis-police-telling-officers-to-turn-dash-cam-off-during-arrest [https://perma.cc/2MUN-QCGT] (describing instance where officer warned his fellow officers of presence of active dashboard camera, which was subsequently turned off, thus leaving several minutes of encounter unrecorded).

exonerate innocent persons.[167] In some instances, such recordings undercut the police version of events in cases involving law enforcement witnesses.[168]

While body and dashboard cameras, as well as citizen video, have understandably received more attention in fatal shootings and serious felony cases, they are also present in many misdemeanor cases.[169] The number of misdemeanor exonerations on the National Registry of Exonerations involving some sort of video footage is currently too small to allow for much analysis. However, this handful of cases generally involves police body camera video that does not align with the police witnesses' version of events.[170] Surely, as more police departments draw on federal and local funding to buy body cameras and as citizens continue to record police-citizen encounters, the footage will become more widely available and lend itself to more rigorous analysis. Still, as the next Part discusses, it is one thing to highlight exoneration stories based on field tests proven faulty by later laboratory tests or untruthful testimony uncovered by video. It is another matter to overcome the myriad structural, procedural, and practical barriers to using that evidence to exonerate an innocent person convicted of a misdemeanor.

II. PROCEDURAL AND STRUCTURAL OBSTACLES TO PROVING INNOCENCE IN MISDEMEANOR CASES

Most exonerations occur in high-stakes cases for structural, procedural, and practical reasons. Someone serving a long prison sentence or on death row is more likely to pursue all appeals and every potential avenue of post-conviction review.[171] In capital cases, there may be a statutory right to counsel for post-

[167] *E.g.*, Maurice Possley, *Devon Ayers*, NAT'L REGISTRY EXONERATIONS (Apr. 22, 2012), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4075 [https://perma.cc/AQ3D-PKXS] (reporting existence of privately-recorded video which directly refuted testimony from prosecution's key witness).

[168] *E.g.*, Maurice Possley, *Edwin Rodriguez*, NAT'L REGISTRY EXONERATIONS (June 22, 2016), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4922 [https://perma.cc/P6L8-QAM9] (reporting case where citizen recording was excluded, but on appeal video revealed underlying lack of evidence to substantiate charges).

[169] *E.g.*, Alexander, *supra* note 138.

[170] *E.g.*, Possley, *supra* note 9 (describing how, one day after Becerra and co-defendant were convicted of various misdemeanors relating to allegedly disobeying police order and assaulting police officer "prosecutor watched the video [from police officer's body camera] and reported to the police that the evidence contradicted the police testimony. The video showed that Morris and Becerra had not attacked the officers").

[171] *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 20 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/SY3D-HRPA] (finding that in sample of 368 capital cases, "[a]ll capital petitioners in [the] sample had appealed their state judgments prior to starting their federal cases [and a]ll but three of these had pursued state post-conviction review"). *See generally* Eve B. Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010).

conviction review.[172] If not, an organization or law firm providing pro bono representation may focus their efforts on individuals on death row or who still have many years left to serve out their sentences. Some large corporate law firms donate significant lawyer hours as well as financial and other resources to the cases of individuals alleging wrongful convictions.[173] Law and journalism students, lawyers doing pro bono work, social workers, and others are drawn to representation of the wrongfully convicted.[174] And a group of high-quality innocence projects receive generous financial support from a variety of donors.[175] Of course, exonerations even in high-stakes cases are difficult to achieve and there are surely many innocent people left behind.

These difficulties are amplified for misdemeanors due to numerous barriers to exoneration. It is unusual for a misdemeanor to reach direct appeal, let alone post-conviction review,[176] where most felony exonerations happen.[177] There are a number of reasons for this. In most jurisdictions, almost all misdemeanor

[172] *E.g.*, WASH. REV. CODE § 10.73.150(3) (2012) (providing for right to counsel on collateral attack, and sometimes on second or subsequent collateral attacks, for individuals under sentence of death).

[173] *See, e.g.*, *Murder Conviction Dismissal for Imprisoned Man*, HUGHES, HUBBARD & REED, https://www.hugheshubbard.com/news/hughes-hubbard-wins-murder-conviction-dismissal-for-imprisoned-man-1 [https://perma.cc/V6D2-9UKU] (last visited Apr. 28, 2018).

[174] *See, e.g.*, Janan Hanna, *Law Students Help Free Wrongfully Convicted Inmates*, UNIV. OF CHI., http://www.uchicago.edu/features/20120618_exoneration_project/ [https://perma.cc/Z23M-REAL] (last visited Apr. 28, 2018).

[175] *See Frequently Asked Questions*, INNOCENCE PROJECT, http://www.innocenceproject.org/contact/ [https://perma.cc/7TDA-RC7J] (last visited Apr. 28, 2018) ("We receive 44% of our funding from individuals, 31% from foundations, 12% from our annual benefit dinner, 3% from the Cardozo School of Law, and most of the rest from corporations.").

[176] *See* KING, CHEESMAN II & OSTROM, *supra* note 171, at 20 (finding, in study of federal habeas corpus litigation in federal district courts, that in sample of 1512 non-capital cases, only "[f]ive . . . had a misdemeanor as the most serious offense of conviction"); JOHN SCALIA, U.S. DEP'T OF JUSTICE, NCJ 185055, FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985-99, at 2-3 (2001) (noting that in 1999, there were only five appeals for every hundred misdemeanor convictions in federal courts); Roberts, *supra* note 30, at 337-40 (discussing structural obstacles to post-conviction ineffective assistance of counsel claims in misdemeanor cases). Indeed, for the misdemeanors (excluding the mass Harris County exonerations) listed on the National Registry of Exonerations, only one appears to have gotten to the post-conviction review stage. Maurice Possley, *Benjamin Seeland*, NAT'L REGISTRY EXONERATIONS (June 11, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4700 [https://perma.cc/L7LJ-QLUU] (noting how Seeland's family hired private counsel to handle post-conviction petition). Some cases involved reversal on direct appeal, but a number of the exonerations appear to have happened on a motion to vacate by the prosecution, sometimes after new video evidence surfaced. Misdemeanors, *supra* note 8.

[177] *See* Findley, *supra* note 2, at 1188 (suggesting that post-conviction challenges to convictions have contributed to "sharp rise in exonerations"). *See generally* Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

convictions come through guilty pleas rather than trials.[178] In some of these cases, prosecutors insist on waiver of the right to appeal in exchange for a plea bargain.[179] Even without such a waiver, a guilty plea forecloses many avenues for appeal and post-conviction review.[180]

In the rare misdemeanor case where there is a potential avenue for post-conviction review, it is highly unlikely the convicted person will have counsel. Although there is a constitutional right to appointed counsel for direct review,[181] that right does not extend to post-conviction review. Those states that offer a statutory post-conviction right to counsel may limit this to capital or other serious cases.[182]

Even when there is a misdemeanor trial or a guilty plea that raises appellate issues, many misdemeanor sentences are effectively "time served," often resulting in release from custody at sentencing.[183] Some misdemeanor sentences are simply fines or community service hours; other misdemeanors end in probationary sentences.[184] In all of these situations, the individual may feel little incentive to file a notice of appeal, something that generally has to happen within thirty days of the entry of judgment and that is a prerequisite to pursuit of many post-conviction avenues of relief.[185] Even if the person convicted of a

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[178] *See* Kohler-Hausmann, *supra* note 30, at 650 (citing New York City data showing that misdemeanor "trials are extremely rare, constituting no more than *two- to five-tenths of one percent* of misdemeanor case dispositions" from 2002 through 2012); *see also* Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 690 (2016) (claiming that prosecutorial discretion has led to proliferation of misdemeanor guilty pleas).

[179] *E.g.*, United States v. Jemison, 237 F.3d 911, 917 (7th Cir. 2001) ("An appellate waiver will be enforced if: (1) its terms are clear and unambiguous; and (2) the record demonstrates that it was entered into 'knowingly and voluntarily.'" (quoting Jones v. United States, 167 F.3d 1142, 1144 (7th Cir. 1999))).

[180] Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 36-38 (1994)) ("Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed." (footnote omitted)). There are a variety of reasons for this, such as the fact that most issues for appeal arise during trials. *See, e.g.*, Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 957 (1998) (stating that erroneous jury instructions are "greatest single source of reversible error").

[181] Douglas v. California, 372 U.S. 353, 357-58 (1963).

[182] *See* Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 326 (2009) (noting that "majority of states appoint counsel in collateral proceedings in non-capital cases and thirty-three states provide counsel in capital cases" (footnote omitted)).

[183] *See* Roberts, *supra* note 30, at 308.

[184] *See id.* at 285.

[185] *E.g.*, OR. REV. STAT. § 138.071 (2011).

misdemeanor has incentive to appeal, defense counsel and the court may fail to inform them of the short timeline for filing an appeal.[186]

Perhaps the greatest incentive to seek review of a misdemeanor conviction is the realization, after the case has ended, that a seemingly low-level misdemeanor conviction can lead to permanent, severe collateral consequences.[187] For example, a single misdemeanor drug possession conviction—other than for possession of thirty grams or less of marijuana for personal use—leads to mandatory deportation under federal immigration law.[188] Yet, it is unlikely that an individual who pled guilty to drug possession (perhaps because it was the only way to get out of jail, and perhaps there was a positive field test) without knowing about deportation would learn of that critical fact in time to file a direct appeal.[189]

Further, even if the person knows about their appeal and post-conviction review rights, many misdemeanor charges are based on the word of a police officer, and thus involve credibility judgments by the fact-finder.[190] That fact-finder is often a judge rather than a jury.[191] The officer's account generally

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[186] *See* SMITH & MADDAN, *supra* note 46, at 19 ("After sentencing at arraignment, only 23.7% of defendants were advised of their right to an appeal, and only 23.2% the right to an attorney for that appeal. In-custody defendants were less likely to be advised of their right to appeal than released defendants." (footnote omitted)); *cf.* FLA. R. CRIM. P. 3.670 (requiring Florida trial judges to inform defendants of their right to appeal).

[187] *See, e.g.*, Commonwealth v. Abraham, 62 A.3d 343, 344 (Pa. 2012), *cert. denied*, 133 S. Ct. 1504 (2013) (detailing claim of former school teacher who sought post-conviction relief from misdemeanor conviction after learning that it would lead to loss of his pension); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 958 (2018) ("Low-level arrests and convictions can trigger significant collateral consequences, such as sex offender registration, license suspension, pension loss, loss of public housing, and deportation. Some of these penalties are imposed by civil regulatory agencies, while others are imposed by private actors, such as employers. This dynamic means that even old or minor arrests and convictions can pose a barrier to accessing and retaining work." (footnotes omitted)).

[188] 8 U.S.C. § 1227(a)(2)(B) (2012).

[189] *See, e.g.*, Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd and remanded sub nom*, Padilla v. Kentucky, 559 U.S. 356 (2010) (describing how Padilla first sought to withdraw his guilty plea by filing for post-conviction relief some two years after he pled). In some jurisdictions, on certain types of claims, the individual might be able to file a writ of *coram nobis* to avoid bars to state or federal habeas relief. *Compare* Kovacs v. United States, 744 F.3d 44, 54 (2d Cir. 2014) (permitting petitioner to raise ineffective assistance of counsel claim in federal writ of *coram nobis* ten years after sentence was completed, noting that **"**[n]o statute of limitations governs the filing of a *coram nobis* petition"), *with* Commonwealth v. Morris, 705 S.E.2d 503, 508 (Va. 2011) ("[A] claim of ineffective assistance of counsel does not constitute an error of fact for which coram vobis will lie . . . .").

[190] *See* Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. SOC. SCI. 255, 259-60 (2015).

[191] *See, e.g.*, MINN. R. CRIM. P. 23.04, 23.05 (stating that there is no right to jury trial for "petty misdemeanors," which are charges designated as such upon certification that prosecutor does not seek incarceration, with consent of defendant and approval by court);

prevails, particularly if a defendant exercises her right not to testify.[192] In domestic violence and misdemeanor assault cases, the fact-finder generally judges the credibility of one civilian witness unless the defendant testifies. Appellate courts defer to the trial court's credibility judgments, making appeals or post-conviction review in these common misdemeanor scenarios quite difficult. An exception to this is when new evidence of innocence, such as body camera or citizen video, surfaces.

Finally, ineffective assistance of counsel is the most common ground for post-conviction review,[193] yet most state and the federal statutes governing post-conviction review require a defendant to be "in custody" to file such a claim.[194] Although courts have interpreted "custody" to include individuals on probation, serving a suspended sentence, or participating in court-ordered treatment in the community,[195] most individuals convicted of misdemeanors will be long past serving any part of their sentences by the time they exhaust direct appeals and seek post-conviction relief.[196]

It is an understatement to say that these procedural and structural obstacles make it unlikely that a misdemeanor case will reach post-conviction review, which is the stage where felony exonerations generally happen. An organized and well-resourced approach to surmount these obstacles might change that likelihood for misdemeanors. For example, Innocence Movement or other advocates—as some of them now start to turn to misdemeanors—might focus their attention on a particular type of misdemeanor case in a particular

N.C. GEN. STAT. §§ 7A-271(a)(5)-(c), -272(a) (2017) (setting out de novo misdemeanor system, under which most misdemeanor trials are bench trials); N.C. GEN. STAT. § 15A-1201(a) (2015) (stating that "[i]n the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court").

[192] *But see* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 425-28 (discussing study on "silence penalty" for defendants who do not testify, suggesting that even testifying with criminal record, and having that record come out, may lead to better outcome than remaining silent).

[193] *See* Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 438 (2011) ("Confirming the trend of the last thirty years, the researchers [of a 2007 study] found that ineffective assistance of counsel was far and away the most frequently raised claim in federal habeas corpus litigation.").

[194] 28 U.S.C. § 2254(a) (2012) (limiting federal habeas avenue to individuals who are "in custody"); Place, *supra* note 182, at 326 n.203 (listing twenty-four state habeas statutes and court rules that have "in custody" requirement for collateral attacks). *But see* United States v. Orocio, 645 F.3d 630, 635 n.4 (3d Cir. 2011), *abrogated on different grounds by* Chaidez v. United States, 133 S. Ct. 1103 (2013) (allowing federal writ of *coram nobis* as avenue of relief for individuals no longer "in custody" and thus unable to access federal habeas corpus relief).

[195] *See* Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 153 (2000).

[196] *See* Roberts, *supra* note 30, at 285.

jurisdiction, working to uncover wrongful convictions.[197] This would surmount right-to-counsel (or incompetent counsel) obstacles, and might also incentivize more innocent people convicted of misdemeanors to seek review of those convictions. Defense community collaboration with a conviction integrity unit in a prosecutor's office is another way to surmount some procedural and structural obstacles.[198]

As with felonies however, post-conviction findings of wrongful misdemeanor convictions in a handful of cases are not the solution to the problem of convicting innocent people. Rather, it is a method of exposing that such convictions actually happen, to better understand why they happen, and ultimately to use that information to reform the system so that they no longer happen.[199]

This brief description of the procedural and structural obstacles in misdemeanor cases illustrates the complex and challenging road for misdemeanor innocence claims. Opening up or creatively accessing avenues for review of wrongful misdemeanor convictions is perhaps the first big challenge for Innocence Movement advocates interested in misdemeanor exonerations.

Innocence Movement scholars have also noted how the lack of data relating to wrongful felony convictions is a major obstacle to ending such convictions:

> We cannot study an event if we cannot tell when it happens. This is a severe problem for false convictions because, by definition, we do not know when they occur. If we did, innocent defendants would not be convicted in the first place. The frequency of false convictions is sometimes described as a

[197] *Cf.* BRONX DEFENDERS, NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS 2-3 (2013), https://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf [https://perma.cc/3TES-KPWR] (describing how Bronx Defenders partnered with private firms to help motivated clients litigate "manufactured" misdemeanor marijuana cases and unlawful stops, but prosecutorial delay tactics and court congestion resulted in guilty pleas and deferred prosecution dispositions after clients came to court average of five times over eight months, with not one suppression hearing or trial); *Our Work*, BRONX DEFENDERS, https://www.bronxdefenders.org/programs/the-marijuana-arrest-project/ [https://perma.cc/S8L4-LJXH] (last visited Feb. 4, 2018) ("The Bronx Defenders Marijuana Arrest Project . . . , launched in collaboration with Cleary Gottlieb Steen & Hamilton, addresses the devastating consequences of the NYPD's enforcement of New York's marijuana laws.").

[198] *See supra* Section I.B (describing Harris County drug exonerations).

[199] This Article does not take a position on whether the diversion of scarce resources from wrongful felony conviction work to the misdemeanor arena is justified. Some organizations have already made the decision to do misdemeanor work. *See Special Counsel for New Initiatives: Job Summary*, *supra* note 15. Further, misdemeanor wrongful convictions have been uncovered almost by happenstance or due to the proliferation of recording of citizen-police interactions and are now listed on the National Registry of Exonerations. Given these realities, this Article focuses on the potential benefits, pitfalls, and challenges of discovering and highlighting misdemeanor wrongful convictions.

> "dark number"—an unknown quantity—and it is. Worse, it cannot be estimated from any information we do know.[200]

While this observation was not made about misdemeanors, it is particularly apt in the misdemeanor context. The lack of data about misdemeanors sets these cases apart. We do not even know exactly how many misdemeanors are prosecuted each year.[201] Worse, some lower courts do not record proceedings (no audio, no court reporter, no video, and no record at all).[202] In the felony context, there is at least a denominator to sit below the admittedly under-representative exoneration numerator. Although the wrongful conviction literature has debated the interpretation of these numbers for felonies,[203] in the misdemeanor setting, there is not even full data to discuss.[204]

III. DEFINING "WRONGFUL MISDEMEANOR CONVICTION"

Thus far, this Article has worked from the assumption that a "wrongful misdemeanor conviction" means the conviction of a person who is actually innocent (and it will eventually work its way back to that meaning of the term). In that respect, this Article acknowledges the value of exonerating innocent individuals who were convicted of misdemeanors and the related value of exposing, studying, and remedying the systemic and institutional problems that

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[200] Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 175 (2008) (citation omitted).

[201] *See supra* note 32 and accompanying text. Although that lack of data is changing. *See generally, e.g.*, Stevenson & Mayson, *supra* note 19.

[202] *See, e.g.*, Lea Rizzo, *Long-Time Jasper Court Clerk Ending 27-Year Career*, DAILY MOUNTAIN EAGLE (Feb. 18, 2018), http://mountaineagle.com/stories/long-time-jasper-court-clerk-ending-27-year-career,14867 [https://perma.cc/6LMV-KKCG] (stating that "[u]nless an attorney brings in a court reporter, the Jasper Municipal Court [in Jasper, Alabama] is a court of non-record"); *cf.* Anna Merlan, *Las Vegas Judge Handcuffs Public Defender in the Courtroom to Teach Her About 'Decorum,'* JEZEBEL (May 25, 2016), http://theslot.jezebel.com/las-vegas-judge-handcuffs-public-defender-in-the-courtr-1778607140 [https://perma.cc/D96F-JB94] (reporting how, in one Las Vegas Justice of the Peace's courtroom, "cameras and microphones . . . are habitually kept turned off").

[203] *See* Findley, *supra* note 2, at 1166-72. *See generally* Gross, *supra* note 200 (discussing debate over numerator (and in some instances even denominator), including his critique of other scholars' use of data).

[204] The lack of data on misdemeanor cases is slowly changing, at least at the local level. *E.g.*, *Mission Statement*, MISDEMEANOR JUST. PROJECT, http://misdemeanorjustice.org/about-us/mission-statement-mjp/ [https://perma.cc/SU7H-BMTL] (last visited Apr. 28, 2018) ("The Misdemeanor Justice Project is fully committed to working with criminal justice practitioners to obtain accurate data, provide objective analyses, and disseminate our findings to key stakeholders in the community, scholars, and policy-makers to spur a national discourse on the effectiveness and fairness of law enforcement and criminal justice responses to lower-level offenses."). There are also important efforts underway to develop reliable national estimates, despite the paucity of local data. *See generally* Stevenson & Mayson, *supra* note 19.

lead to such convictions. Yet, there are potential drawbacks to defining "wrongful misdemeanor conviction" as the conviction of a person in a case where evidence of actual innocence, sufficient to secure an official exoneration, later surfaces.[205] The previous Part considered the structural and other barriers that make post-conviction review of misdemeanor convictions so rare and difficult, as one such drawback.

The remainder of this Article examines a more fundamental question, namely whether an innocence-based definition of "wrongful misdemeanor conviction" will detract from a powerful, yet still emerging, narrative of non-innocence based "wrongs" in the misdemeanor system. These wrongs can be described, broadly, as rooted in the unfair distribution and disproportionate harshness of a misdemeanor arrest or conviction in an era of easily-accessible electronic records and myriad collateral consequences for even the most minor charges.[206] Some of these non-innocence based wrongs exist in felony cases (mainly lower-level, nonviolent felonies), but they are particularly pervasive and salient in the lower criminal courts. These wrongs are also driving, as explored in Part IV, the emerging narratives about the fundamental unfairness of the misdemeanor system—narratives that are themselves finally beginning to drive some reform in that system.[207]

A. *Definitional Debates About the Term "Wrongful Conviction" Are Not New*

There has long been tension between the general defense community and Innocence Movement about the scope of the term "wrongful conviction."[208] Professor Daniel Medwed has described "actual innocence as a major focal point of the criminal justice discourse in the twenty-first century."[209] Yet, an important body of scholarship examines the potential pitfalls or unintended consequences of a movement that focuses on factual innocence.[210] For example, Professor Emily Hughes has noted two "dangers" that emerge from this focus. First is "the creation of an 'us' versus 'them' mentality, whereby the public identifies with the actually innocent 'good' people and vilifies other wrongly convicted 'bad' people who have been convicted in violation of their constitutional rights."[211]

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[205] *See supra* notes 72-76, 81 and accompanying text.

[206] *See infra* Section III.B.

[207] *See infra* notes 289-93 and accompanying text.

[208] *See* Medwed, *supra* note 24, at 1555.

[209] *Id.* at 1558.

[210] Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 610-11 (2005).

[211] *See* Hughes, *supra* note 1, at 1089-90.

The second danger "is that pitting actual innocence against legal innocence dilutes what innocence means."[212]

Professor Abbe Smith surfaced a related concern when stating that:

> Convictions are wrongful even if the convicted person is guilty when there is demonstrable unfairness. Imprisonment is wrongful if the person in prison is serving a sentence disproportionate to the circumstances of the crime or who the person is or has become. Factual innocence has never been the gravamen of a wrongful conviction, and should not be.[213]

Smith thus concluded that "[t]he dominance of the rhetoric of [the Innocence Movement] also comes at the expense of the not-quite-so-innocent but equally unfairly treated."[214] Professor Margaret Raymond, in an early critique of the Innocence Movement, similarly articulated a threat to the presumption of innocence for all when the spotlight is on those few who can prove factual innocence.[215] She noted that jurors exposed to narratives of factual innocence might raise the bar for acquittal, effectively shifting the burden of proof to defendants and off of the government.[216] She also raised the concern that high-profile exonerations appear to suggest the criminal justice system is working well (after all, the innocent person was exonerated) rather than revealing how it is beset with problems and urgently needs reform.[217]

Medwed responded to these critiques by arguing that "innocentrism, while far from a panacea to the criminal justice system's many ills, is a positive, bipartisan occurrence . . . that ultimately can complement, rather than replace, the emphasis on substantive and procedural rights that . . . rest at the core of

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[212] *Id.* ("This Article reclaims an unmodified vision of innocence in order to protect the rights of people who *did* commit crimes and are nevertheless wrongly convicted because of constitutional violations."). For a well-reasoned response to the critiques of "innocentrism," see Medwed, *supra* note 24, at 1558 ("The criticisms outlined above, while having some validity, fall short in justifying the rejection of actual innocence as a major focal point of the criminal justice discourse in the twenty-first century. Innocentrism should have a significant place in this discourse, and it can do so in concert with other time-tested criminal law values.").

[213] Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PENN. J.L. & SOC. CHANGE 315, 325 (2010).

[214] *Id.* at 324; *see also* David Feige, *The Dark Side of Innocence*, N.Y. TIMES, June 15, 2003, § 6 (Magazine), at 15.

[215] Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 457 (2001).

[216] *Id.* at 456-57.

[217] *Id.* at 451; Steiker & Steiker, *supra* note 210, at 619 ("Despite the undisputable fact that the work done by the original Innocence Project and many of its progeny has been extraordinary in its quality and absolutely breath-taking in its results, the proliferation of the institutional form of the law school-based 'innocence project' raises some troubling issues within the larger world of criminal and capital defense.").

American criminal law."[218] For example, Medwed described how juror exposure to exonerations may help criminal defense lawyers who are advancing theories of defense that the prosecution failed to prove its case or charged the wrong person, by having previously exposed those jurors to actual stories of such wrongful convictions.[219] He also noted how some reforms tied to the Innocence Movement—such as providing more resources for indigent defense service providers and curbing the misuse of jailhouse informants—are equally beneficial to all defendants (although he acknowledged that this is certainly not true of all proposed reforms).[220]

The failure to include constitutional violations—such as police stops that lead to illegally-obtained evidence in drug possession charges—in the definition of "wrongful conviction" was an important early critique of the Innocence Movement. Despite this critique, the Movement has quite deliberately remained focused on a definition of wrongful conviction that is limited to factual innocence.[221] Should the misdemeanor Innocence Movement do the same?

B. *Identifying the "Wrong" in "Wrongful Misdemeanor Conviction"*

As the Innocence Movement turns to misdemeanors, it is worth revisiting the definitional debate about the "wrong" in "wrongful conviction." In the rape and murder conviction context that underlies the majority of felony exonerations,[222] there is usually no question that punishment of the right person is a just outcome.[223] Although there may be disagreement over the appropriate amount of punishment or whether the methods used to secure particular evidence were lawful, the core issue in almost all wrongful felony convictions is that the wrong person was convicted.[224]

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[218] Medwed, *supra* note 24, at 1552; *see also* Keith Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 257 (2006) ("Experience suggests that in fact the overriding effect of work on innocence cases heightens, rather than diminishes, students' concern about adequate representation for all criminal defendants, and for fairness in all aspects of criminal cases, even for the guilty.").

[219] Medwed, *supra* note 24, at 1567.

[220] *Id.* at 1567-68.

[221] *See* Findley, *supra* note 2, at 1158 n.7 (noting that even though "'[e]xoneration' and 'innocent' are not always synonymous . . . given our imperfect access to truth, innocence for most purposes depends on exoneration").

[222] NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 6 (2017), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf [https://perma.cc/X6J8-ECTD] ("Most exonerations in 2016 were for violent crimes, especially homicide (34%) and adult and child sexual assaults (14%).").

[223] The exception to this would be when someone is convicted despite a valid justification or excuse defense.

[224] *See, e.g.*, *Keith Allen Harward*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/keith-allen-harward/ [https://perma.cc/9XUC-HTHD] (last visited Apr. 28,

The misdemeanor exonerations thus far documented on the National Registry are not "wrong person" exonerations.[225] Rather, they are exonerations based on the fact that no crime happened. For example, the white substance in the bag was actually flour, not cocaine, according to post-conviction laboratory tests.[226] Or the public order offense the police officer described at trial never happened, as exposed by body camera or citizen video.[227] In these cases, the core wrong is that people were falsely convicted because there were no underlying crimes. This is a fundamental difference between felony and misdemeanor wrongful convictions that will need further thought and attention as the Innocence Movement develops strategies for revealing and analyzing wrongful misdemeanor convictions. Still, despite this significant difference, these "no crime" misdemeanor cases fit squarely into a definition of "wrongful conviction" that focuses on "provable actual innocence."[228]

Yet, there is another large category of "wrongs" in misdemeanor cases. This includes charges so minor and victimless that there is no underlying theory of punishment to justify the conviction. It also includes cases where the full consequences of the conviction, direct and collateral, are so disproportionately harsh that they call into question the very legitimacy of those convictions. Finally, these wrongs include conviction numbers that fall disproportionately on poor communities and communities of color, due in large part to choices about where to police (and also prosecutorial and judicial discretion choices). Some of these wrongs exist in felony cases, especially lower-level, nonviolent felonies, but they are particularly pervasive and salient in the lower criminal courts. These wrongs are also driving the emerging narratives about the fundamental unfairness of the misdemeanor system, as explored in Part IV—narratives that are themselves driving some reform in that system. The remainder of this Section explores these other, non-innocence based misdemeanor wrongs.

2018). *But see* Keith A. Findley et al., *Shaken Baby Syndrome*, *Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 HOUS. J. HEALTH L. & POL'Y 209, 303 (2012) ("Given the changes in the science, old [Shaken Baby Syndrome/Abusive Head Trauma] convictions are now being challenged based on newly discovered evidence, actual innocence, ineffective assistance of counsel and other similar claims."); *Gary Dotson*, *supra* note 59 (noting how Dotson's conviction was eventually overturned after forensic tests "revealed that the spermatozoa on the victim's undergarments could not have come from Dotson but could have come from the victim's boyfriend" and after victim recanted her trial testimony and stated that "she had fabricated the rape to hide a legitimate sexual encounter with her boyfriend").

[225] *See generally* Misdemeanors, *supra* note 8.

[226] *See supra* notes 88-90 and accompanying text.

[227] *See, e.g.*, Maurice Possley, *Tony Diaz*, NAT'L REGISTRY EXONERATIONS (Sept. 18, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5199 [https://perma.cc/S4GB-3J8Q] (describing exoneration case where Diaz was charged with sleeping in his van, but police officer's own body camera later showed Diaz was exiting the bathroom when officer gave him ticket, contradicting officer's testimony).

[228] *See supra* note 63 and accompanying text.

Although punishment theory and policy in the United States is in flux and its current state has been described as a "muddle,"[229] there is at least broad agreement that punishment must be both morally legitimate and serve an articulated purpose.[230] Some types of misdemeanors, such as those relating to domestic violence assaults or drunk driving, clearly meet moral legitimacy and articulable punishment purpose requirements. Yet, many misdemeanor cases are truly minor and do not easily fit into this theoretical framework. For example, while driving with a suspended license charges can make up a significant part of the caseload in many jurisdictions, the suspensions often "result from failure to pay fines or fees, such as tickets for a broken tail light . . . parking tickets, or even failure to pay child support."[231] And the failure to pay the underlying fine or fee often results from a financial inability to pay, rather than willful refusal.[232] Other lower criminal court dockets are clogged with charges like possession of an open container of alcohol, public drunkenness, disorderly conduct, and trespassing.[233] Approximately ten percent of all misdemeanor and felony arrests in the FBI's 2015 *Crime in the United States*—a publication that does not include traffic cases, which would drive the percentage much higher—were in the categories of "Liquor laws," "Drunkenness," "Disorderly conduct," and

[229] Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 2 (2006) (noting, however, that "[m]uddles are not necessarily bad").

[230] *Id.* at 8 ("The primary functions of sentencing, most people would agree, are imposition of appropriate punishments and prevention of crime."); *see also* Mitchell, *supra* note 37, at 475 (noting that definition of "crime" includes both prohibited conduct and prescribed penalty, interpreting that penalty to mean "legitimate penalty," and stating that such legitimacy means that punishment must be "justified by condemnation (retribution) or general or specific deterrence" and must "fulfill any of the five traditional purposes of punishment").

[231] BORUCHOWITZ, BRINK & DIMINO, *supra* note 32, at 26.

[232] *See* Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor (detailing comprehensive NPR survey on fees and fines); *see also* Beth A. Colgan, *Fines, Fees, and Forfeitures*, *in* REFORMING CRIMINAL JUSTICE: VOLUME 4 PUNISHMENT, INCARCERATION, AND RELEASE 205, 216 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_4.pdf [https://perma.cc/BC5A-DGGE] ("[E]xisting research and an ever-increasing pool of anecdotal evidence suggest that imposing and collecting fines, fees, and forfeitures can undercut important governmental aims by increasing the precarious financial condition of its most vulnerable constituents, increasing crime rates, contributing to jail overcrowding, and depleting government funds.").

[233] *See, e.g.*, Complaint at 26-27, Davis v. City of New York, No. 1:10-cv-00699, 2010 WL 9937605 (S.D.N.Y. Oct. 18, 2011) (noting that number of trespass arrests in New York City Housing Authority residences has surged); GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, THIRD REPORT TO THE STATE OF MARYLAND UNDER CHAPTERS 504 AND 505 OF 512: 2015 CRIMINAL CITATIONS DATA ANALYSIS 2 (Aug. 31, 2016), http://www.jrsa.org/pubs/sac-digest/vol-25/md-criminal-citations-report-2016.pdf [https://perma.cc/WUM4-QQHD] (noting 39,636 criminal citations issued in Maryland in calendar year 2013, mostly for minor offenses); Bowers, *supra* note 38, at 1666 ("Many of the cases in the[] [lower] courts (perhaps the majority in most urban jurisdictions) are petty public order cases.").

"Vagrancy."[234] It is challenging to situate punishment for these numerically significant categories of misdemeanors into the accepted justifications of retribution, deterrence, rehabilitation, or incapacitation.[235] As Professor John Mitchell has noted, because the definition of a crime includes both a legitimate basis for punishment and proscribed conduct, when that basis is missing there is only the proscription without any legitimate crime.[236] In this light, the mere fact of conviction for truly low-level misdemeanors could be seen as a wrongful conviction.

This type of misdemeanor wrong is aggravated because many of these low-level convictions—which may not result in much, if any, direct penal sanction—result in collateral consequences that far outweigh direct consequences.[237] The stakes in a misdemeanor case appear low, with many misdemeanor convictions ending with little to no jail time.[238] This is particularly true in busy urban courthouses with high volumes of misdemeanors, a situation that forces prosecutors and judges to hand out seemingly low-impact sentences if they want to continue churning people through the system.[239] Yet, a misdemeanor can follow a person from the courthouse to just about every aspect of life.[240] A misdemeanor conviction can lead to deportation[241] and loss of firearm rights.[242]

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[234] *Crime in the United States: Table 29*, FED. BUREAU OF INVESTIGATION (2015), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29 [https://perma.cc/2DQG-6MXP]. These numbers are underinclusive, because "[o]f the 18,439 city, county, university and college, state, tribal, and federal agencies eligible to participate in the [FBI's Uniform Crime Reporting] Program, [only] 16,643 submitted data in 2015." Press Release, Fed. Bureau of Investigation, FBI Releases 2015 Crime Statistics (Sept. 26, 2016), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2015-crime-statistics [https://perma.cc/74N6-5ASA].

[235] *See* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67-70 (1933) (contrasting "true crimes of the classic law" against "new type of Twentieth Century regulatory measure involving no moral delinquency").

[236] Mitchell, *supra* note 37, at 475; *id.* at 471 (observing that "current application of the crimes of misery [e.g. offenses such as begging or sleeping in a public place] cannot be justified under any accepted philosophical theory of punishment").

[237] *See supra* note 187 and accompanying text.

[238] *See infra* note 302 and accompanying text.

[239] *Cf.* Kohler-Haussman, *supra* note 178, at 662 (stating that in high-volume jurisdictions like New York City, processing of misdemeanor cases might lead to more deferred prosecutions or other non-conviction dispositions, intended to mark individuals for a ratcheting-up of consequences in any later contacts with criminal justice system).

[240] MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE §§ 2:1-2:79 (2016) (devoting entire chapter to "Types of Consequences" and listing broad range of consequences).

[241] *Id.* at § 2:51.

[242] *Id.* at §§ 2:29-36.

It can result in an entire family losing its public housing,[243] and will lead to some mandatory, and many discretionary, bars to employment.[244] Once the full set of consequences that an individual experiences upon a misdemeanor conviction are considered, the "wrong" of a "wrongful conviction" can be the heavily disproportionate effective punishment for the conviction.[245]

Finally, while class and particularly racial bias are problematic in the felony context, these injustices are amplified with misdemeanors. This is because most misdemeanor convictions flow from discretionary arrests made by police officers on the street.[246] Those officers make decisions about which neighborhoods to police and who to arrest.[247] As one judge who sat on the criminal court bench in Manhattan liked to point out when someone appeared before him for arraignment after spending the night in jail for having an open container of alcohol in public: "Hmm, another open container case from East 117th Street?! Interesting that the police once again chose not to arrest people in Central Park drinking wine at that classical music concert last night."[248] Beyond anecdotes, there is ample evidence of systemic racial bias in the misdemeanor arena.[249] As just one example, of the 1.48 million reported "drug abuse violation" arrests in 2015, over one-third were for marijuana possession.[250] Public health surveys and other sources have long demonstrated that blacks and whites use marijuana and other unlawful substances at equal rates, yet in some jurisdictions blacks are arrested and charged in marijuana cases at a ratio of eight

[243] *Id.* at § 2:17.

[244] *Id.* at §§ 2:8-11.

[245] I recognize that, as a matter of constitutional law, many collateral consequences fall on the civil, rather than criminal, side of the divide. *See* Smith v. Doe, 538 U.S. 84, 105-06 (2003) (providing Ex Post Facto Clause analysis in Alaska Sex Offender Registration Act ("SORA") case); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7-8 (2003) (providing procedural due process analysis in SORA case); *see also* Padilla v. Kentucky, 559 U.S. 356, 364 n.8 (2010) (noting, in Sixth Amendment right to counsel analysis, that "disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case").

[246] Bowers, *supra* note 38, at 1699.

[247] *See* Nate Raymond, *Massachusetts Top Court Rejects Police Traffic Stop Challenge*, REUTERS (Feb. 14, 2018), https://www.reuters.com/article/us-massachusetts-court-police/massachusetts-top-court-rejects-police-traffic-stop-challenge-idUSKCN1FY307 [https://perma.cc/TV2W-QEYA] ("Massachusetts' top court ruled . . . that police can carry out traffic stops for motor vehicle violations as a pretext to probe for other crimes, but the justices expressed concerns about how racial bias could influence such stops.").

[248] This story comes from my time as a public defender, a first-hand account I heard more than once.

[249] *See, e.g.*, Bowers, *supra* note 38, at 1699.

[250] *Crime in the United States, 2015: Persons Arrested*, *supra* note 125.

to one compared to whites.[251] Here, the "wrong" of a "wrongful conviction" is the racially biased application of misdemeanor laws.

In short, some misdemeanor convictions are "wrong" because no crime occurred. Other misdemeanor convictions are "wrong" because they are unjustified, skewed by bias, or result in disproportionate consequences. It is helpful to differentiate between the various types of wrongs, because as discussed throughout this Article, there may be different reforms aimed at the different wrongs (albeit with significant overlap). Because the term "wrongful conviction" is so closely associated with conviction of the innocent, it makes sense to use that term in the same way for misdemeanors. Terms like "unjustified conviction," "disproportionate conviction," or "biased conviction"—or "unfair conviction" to include all three—accurately describe the other wrongs and draw a sufficient distinction. The challenge is to address wrongful misdemeanor convictions of innocent people while remaining attentive to the unfair convictions of so many others.

IV. INNOCENCE NARRATIVES AND MISDEMEANORS

In the felony context, narratives about unfair, disproportionate punishment and conviction of the innocent already co-exist. For example, there has long been debate, and recently some reform, around disproportionately harsh and unfair felony sentences.[252] This debate and reform has not been tied to innocence but rather applies to all defendants.[253] At the same time, the Innocence Movement has exposed wrongful felony convictions and studied their causes.[254] Advocacy for reforms relating to these causes often advances the goal of protecting the innocent while also advancing general goals of fairness to all individuals charged with a crime. For example, requiring reliable identification procedures

[251] AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 18 (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white [https://perma.cc/2CCZ-MJFD].

[252] *E.g.*, Marisa Lagos, *Jerry Brown Signs Criminal Justice Reform, Eases Prison Terms*, KQED NEWS (Oct. 11, 2017), https://ww2.kqed.org/news/2017/10/11/jerry-brown-signs-criminal-justice-reforms-eases-prison-terms/ [https://perma.cc/MGU2-UVSG] ("[California Governor Jerry] Brown also signed bills that take on so-called sentencing enhancements—years added automatically to the sentences of people with criminal histories who are convicted of a new crime. Senate Bill 180 eliminates extra jail time for people convicted of minor drug crimes; SB 620 will allow judges to decide whether extra jail or prison time should be added on if someone uses a gun in a crime. Previously, judges did not have that discretion."); Gray Rohrer, *Senators Push for Criminal Justice Reform*, ORLANDO SENTINEL (Dec. 8, 2017), http://www.orlandosentinel.com/news/politics/political-pulse/os-criminal-justice-reform-stalled-20171206-story.html (noting that Florida Senate Bill 694 "would allow judges to give lighter sentences to nonviolent convicts who would otherwise fall under Florida's mandatory minimum sentencing laws").

[253] *See* Lagos, *supra* note 252; Rohrer, *supra* note 252.

[254] *See supra* notes 1-3 and accompanying text.

applies across the board to all defendants facing charges,[255] as does mandated audio or video recording of defendants' statements.[256]

Legal scholarship has been critiqued for failing to "delve deeply or systematically into the multifactorial, interactive, and complex nature of human and institutional causation in wrongful conviction cases."[257] In particular, a heavy reliance on narrative "tends to oversimplify causation" of wrongful convictions.[258] The causes of wrongful misdemeanor convictions are surely also multi-faceted, and social scientists will undoubtedly delve into empirical study of important questions of causation as more misdemeanor exonerations are added to the National Registry. However, narrative has played a role not only in the study of wrongful conviction causation, but has also been a critical part of reform efforts.[259] Similarly, narratives of the disproportionate, life-long effects of a misdemeanor criminal record have been central to the debate about reform in the lower criminal courts.[260]

After comparing felony exoneration narratives to narratives about disproportionate and unfair misdemeanor consequences, this Part considers how the Innocence Movement might uncover, study, and seek reform based on wrongful misdemeanor convictions of the innocent while continuing to advance narratives and reforms rooted in disproportionality and unfairness.

A. *Felony Exoneration Narratives*

A news story entitled *When Justice Makes You Gasp* notes how, "[t]en years after its New York premiere [the play] 'The Exonerated' still has the power to unsettle."[261] The article describes audience members' "sharp exhale, part incredulous, part angry, and delivered with a wince or a shake of the head."[262]

Although as far from trivial as imaginable, there is a "stock script"[263] that emerges from wrongful convictions in felony cases. Professor Samuel Gross has

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[255] *See generally* Nicholas A. Kahn-Fogel, Manson *and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L. L. REV. 175 (2012) (advocating for legal tests requiring more reliable identifications).

[256] *See Recent Administrative Policy*, 128 HARV. L. REV. 1552, 1552 (2015).

[257] Leo & Gould, *supra* note 56, at 16.

[258] *Id.*

[259] Frank Stasio & Alex Granados, *Exonerees Share Stories of Wrongful Conviction at Innocence Network Conference*, BCC NEWS HOUR (Apr. 23, 2013), http://wunc.org/post/exonerees-share-stories-wrongful-conviction-innocence-network-conference#stream/0 [https://perma.cc/FE4B-CLZ4] ("The goal of the Innocence Network Conference is to bring exonerees together to share their stories and also to identify holes in the legal system that allow wrongful convictions to occur.").

[260] *See infra* notes 289-93 and accompanying text.

[261] *See* Ken Jaworowski, *When Justice Makes You Gasp*, N.Y. TIMES, Sept. 19, 2012, at C3.

[262] *Id.*

[263] *See* AMSTERDAM & BRUNER, *supra* note 84, at 47.

described this script as "one that fits most of those [exonerations] we know about. It describes (at least roughly) many of the worst cases, in which the consequences are most severe . . . ."[264] In Gross's words:

> A horrendous crime is committed, a murder or a brutal rape. The police and prosecutors work hard, under pressure, to identify and arrest the criminal; along the way they may cut corners or break rules. At some point they are misled by false evidence against the defendant: an eyewitness misidentification, a false confession under coercive interrogation, fraud or error by a forensic technician, perjury by an informant or by the real criminal. From then on, the case spirals downward: The authorities become committed to their mistake; other evidence, misleading or false, congeals around the initial error. Despite his protestations of innocence, the defendant is tried, convicted, and sentenced—perhaps to death or life imprisonment, or to many years behind bars. If the innocent defendant is one of the exonerated, then years later—after terrible suffering and endless disappointments—he is cleared and freed by DNA, or by overwhelming evidence that someone else was the perpetrator. If not, he lives out his life in prison or in disgrace, or is put to death.[265]

The tragic narratives of individuals who lost decades behind bars have been a driving force in the Innocence Movement. Most exonerees were convicted of rape, homicide, or both.[266] The wrongful conviction is often revealed only after the person spent many years in prison, sometimes on death row.[267] There are many news articles, books, plays, movies, and documentaries that tell the chilling, yet often ultimately uplifting, stories of the exonerated.[268] These narratives are recounted during legislative and policy debates about eyewitness identification and confession reforms, the death penalty, and other criminal justice policies and practices.[269]

The certainty of a DNA exoneration provides another powerful narrative strain in felony exonerations. Although there are actually more non-DNA

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[264] Gross, *supra* note 200, at 179.

[265] *Id.*

[266] Gross & Shaffer, *supra* note 62, at 19.

[267] *Id.*

[268] *See generally* JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009) (co-written by rape victim and man who served eleven years in jail for her rape before being exonerated by DNA evidence, which revealed inaccuracy of victim's eyewitness identification).

[269] *See* Amy Alderman, *Man Cleared in '92 Killing to Speak Publicly*, CHI. TRIB., Apr. 3, 2012, at C11 (reporting on exoneree speaking at "innocence panel" after he served twenty years); Anthony Graves, *Solitary Confinement Brings No Benefit to Prison Inmates*, CHRON (Apr. 24, 2013, 7:31 PM), http://www.chron.com/opinion/outlook/article/Solitary-confinement-brings-no-benefit-to-prison-4460674.php [https://perma.cc/2TWM-YTPM] (recommending state legislation to change solitary confinement after describing exonerated man's experience of being on death row for eighteen-and-a-half years).

exonerations,[270] the latter garner far more attention. This is likely because DNA offers a definitive account. It is science telling a story of what really happened.[271] It promises to bring truth into a criminal justice system plagued by faulty witness memory,[272] "testilying" police officers,[273] evidentiary rules that can be seen as hiding the ball,[274] incompetent lawyers,[275] and other forces that work—or appear to work—against the truth.[276] Professor Susan Bandes notes the appeal (and warns of the danger) in the simplicity of the DNA exonerations story:

> Simple categories and clear dichotomies are reassuring in their promise of stability and verity; they absolve us of the difficult job of sifting facts, evaluating competing perspectives, and making value judgments. A notion like innocence that boils down to either he did it or he didn't is attractive for its apparent lack of factual or moral ambiguity.[277]

Whether obtained by DNA or official exoneration,[278] felony exoneration stories are stark, wrenching accounts of human suffering. They sometimes end happily, but always dramatically. The stories of those wrongfully convicted and later exonerated of high-level felonies have played a significant role in driving criminal justice reform over the past two decades.

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[270] *Exonerations by Year: DNA and Non-DNA*, *supra* note 68 (comparing 454 DNA exonerations to 1642 non-DNA exonerations for period from 1989 through 2017).

[271] *See* THOMPSON-CANNINO, COTTON & TORNEO, *supra* note 268. *But see generally* Matthew Shaer, *Reasonable Doubt: The False Promise of DNA Testing*, ATLANTIC (June 2016), https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/ [https://perma.cc/Z3LS-QWJ6] (highlighting misuse of DNA to convict Josiah Sutton in 1999).

[272] *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 29 (1996) (describing eyewitness experiment, results of which were so dismal it led proctor to lament that results would be useful only to "emphasize the worthlessness of many hundred casual observations as compared with one measurement").

[273] *See generally* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008). "Police lying persists, even amid an explosion of video evidence that has allowed the public to test officers' credibility." Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html.

[274] *See, e.g.*, FED. R. EVID. 609 (governing admissibility of prior convictions).

[275] *See generally* EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 225 DNA EXONERATION CASES (2010), http://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf [https://perma.cc/NM79-AP7T] (investigating number of poorly litigated cases due to ineffective assistance of counsel).

[276] *See generally* GARRETT, *supra* note 93.

[277] Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 9-10.

[278] *See supra* notes 72-76 and accompanying text (describing National Registry of Exonerations' definition of "official exoneration").

B. *Disproportionate and Unfair Misdemeanor Conviction Narratives*

A misdemeanor wrongful conviction narrative has emerged over the past decade, but it is not one of innocence and the need for exonerations. Rather, it is a narrative of disproportionately harsh consequences, permanence, and racial bias. The story is about black teenage boys stopped for minor infractions, sometimes leading to tragic consequences.[279] It is about white people using marijuana at equal rates as black people, yet suffering a fraction of the arrests and prosecutions for marijuana possession.[280] The story is about a minor indiscretion years ago marking a person for life, haunting them in future job and housing searches.[281]

Recently, these stories have been told in the press, from the *Wall Street Journal* and *New York Times* to coverage in local papers across the nation.[282] Major media websites have published multiple stories on the struggle to overcome a minor misdemeanor conviction.[283] Government officials have

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[279] *See, e.g.*, Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), http://www.gq.com/story/tamir-rice-story [https://perma.cc/D39W-DBZS] (describing how twelve-year-old Tamir Rice was playing with BB gun in public park when police shot and killed him).

[280] *See* AM. CIVIL LIBERTIES UNION, *supra* note 251, at 18.

[281] *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 58-72 (2007).

[282] *See, e.g.*, Shaila Dewan, *The Collateral Victims of Criminal Justice*, N.Y. TIMES, Sept. 6, 2015, at SR3; Gary Fields, *Retiree's Phantom Arrest Record Is Finally Expunged; Woman Succeeds in Quest to Clear Name of 1963 Report No Court Could Find; Study Wants Low-Level Convictions Sealed*, WALL ST. J. (Dec. 1, 2014), https://www.wsj.com/articles/retirees-phantom-arrest-record-is-finally-expunged-1417478846 (describing how woman was denied part-time job as school cafeteria worker in Maryland's school system when routine check turned up arrest record from 1963 that did not result in conviction); Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime; Even if Charges Were Dropped, a Lingering Arrest Record Can Ruin Chances of a Job*, WALL ST. J. (Aug. 19, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402; Sweeney & Todd, *supra* note 157.

[283] *See* Julia Craven, *This State Might Give Nonviolent Criminal Offenders a Second Chance*, HUFFINGTON POST (Apr. 13, 2016, 5:18 PM), http://www.huffingtonpost.com/entry/nonviolent-offenders-pennsylvania_us_570e9ce0e4b08a2d32b8d444 [https://perma.cc/CG78-VSJV] (reporting on Pennsylvania's Clean Slate Act, which would preclude many employment-related barriers tied to misdemeanor convictions); *How This Beloved NYC Teacher's Life Was Turned Upside down by a Bogus, Petty Marijuana Arrest (VIDEO)*, HUFFINGTON POST (Jan. 25, 2014), http://www.huffingtonpost.com/2013/12/09/alberto-willmore_n_4412610.html [https://perma.cc/XV9E-N8T2]; Janell Ross, *Criminal Background Checks Upend Job Search for Some Unemployed*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2011/03/24/criminal-background-check_n_840195.html [https://perma.cc/J4AG-8E6T] (reporting on employment difficulties experienced by "65 million Americans . . . [that] have an arrest or conviction that can show up on a routine criminal background check").

spoken out about the need to look beyond a mistake from years past[284] and have put forth policies or guidance regarding criminal records in areas including housing, employment, and immigration.[285]

As described above, although the so-called collateral consequences of misdemeanors can render a "mere" misdemeanor conviction effectively quite punitive, such consequences are largely invisible.[286] Defendants are usually unaware of them, although that is slowly changing.[287] Even when defendants are aware of some collateral consequences that might flow from a misdemeanor conviction, these consequences are usually not immediate. Before contemplating the long-term consequences of a misdemeanor conviction to employment, housing, and education prospects, the natural human reaction of dealing with the immediate harm first—getting out of jail, getting out of the courthouse—kicks in. Further, the process costs of fighting a misdemeanor case

[284] *See, e.g.*, George W. Bush, President of the U.S., State of the Union Address (Jan. 20, 2004), http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html [https://perma.cc/ND65-SQHY] ("America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life."); Eric Holder, *Attorney General Eric Holder Delivers Remarks at the Annual Meeting to the American Bar Association's House of Delegates*, U.S. DEP'T JUST. (Aug. 12, 2013), https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [https://perma.cc/36XT-HED5] ("The bottom line is that . . . [t]o be effective, federal efforts must also focus on prevention and reentry.").

[285] *See* U.S. DEP'T OF HOUS. & URBAN DEV., REENTRY MYTH BUSTER! 13, http://portal.hud.gov/hudportal/documents/huddoc?id=REENTRY_MYTHBUSTERS.pdf [https://perma.cc/2CDX-N62M] (last visited Apr. 28, 2018) (reporting that "it is not HUD policy" to "ban ex-offenders from participating in public housing" but that "Public Housing Authorities have great discretion in determining their admissions policies"). *See generally* EQUAL EMP'T OPPORTUNITY COMM'N, CONSIDERATION OF ARREST AND CONVICTION RECORD IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [https://perma.cc/6XJW-KDM4]. Although these policies are not specifically directed towards misdemeanors, and some of the speeches focus more on reentry of prisoners rather than the struggle to reenter after a minor misdemeanor conviction, many of the individual stories cited above involve misdemeanor convictions.

[286] *See supra* notes 237-45 and accompanying text (describing collateral consequences of misdemeanor convictions).

[287] *See Holistic Defense, Defined*, BRONX DEFENDERS, https://www.bronxdefenders.org/holistic-defense/ [https://perma.cc/8RH6-M6W4] (last visited Apr. 28, 2018); *Our Vision and Mission*, NEIGHBORHOOD DEFENDER SERV. OF HARLEM, http://www.ndsny.org/index.php/about-us/our-vision-and-mission/ [https://perma.cc/3YYG-MLST] (last visited Apr. 28, 2018) (noting how, through holistic approach, the Neighborhood Defender Service of Harlem seeks to address underlying issues, minimize future incidents, and provide referral services to problems arising out of collateral consequences); Mark Stephens, *Criminal Justice Is a Community Issue*, KNOX COUNTY PUB. DEFENDER'S COMMUNITY L. OFF. (May 12, 2016), https://www.pdknox.org/2016/05/12/criminal-justice-is-a-community-issue/ [https://perma.cc/VCS3-SYYB] (explaining Knox County Public Defenders' holistic representation model).

are high, prohibitively so for many people.[288] The harsh reality hits later, when the person finds himself struggling to secure employment, suspecting but unable to confirm that the seemingly minor conviction—now publicly available on a free website with a mere name search—is the reason.

The narrative about the disproportionate and unfairly permanent consequences of misdemeanor convictions is playing out in state legislatures that are broadening sealing and expungement laws to include more misdemeanor (and even some low-level felony) convictions[289] and reforming bail.[290] It is the narrative underlying the Obama Administration's action in banning the criminal history box on many federal job applications and of those states and localities that already ban the box (moving such inquiries to a later stage of the hiring process).[291] It is the narrative of a land of second chances,[292] and of the waste of allowing one small mistake to ruin a life. The narrative of disproportionate consequences and the mark of a permanent criminal conviction are also woven into efforts to decriminalize marijuana, to move minor offenses like driving with

[288] *See* MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 30 (1992); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 405 (2011); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 293-99 (2009).

[289] *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 10-110 (LexisNexis 2017) (adding variety of misdemeanors to list of eligible convictions for expungement); Michael Dresser, *Hogan Signs Bill to Overhaul Criminal Justice System in Md.*, BALT. SUN, May 20, 2016, at A1 (describing Maryland's Justice Reinvestment Act, which includes "single largest expansion of expungement possibly in this state's history"); Ryland Barton, *Felony Expungement Bill Signed into Kentucky Law*, 89.3 WFPL (Apr. 12, 2016), http://wfpl.org/felony-expungement-bill-signed-into-law/ [https://perma.cc/2ZRF-WSV6] (reporting on passage of expungement bill which expands coverage to felonies and "most frequently committed offenses," for example, failure to pay child support and possession of controlled substance).

[290] Katie Lannan, *Pretrial Reforms Focus on Bail Costs*, BOS. GLOBE, Aug. 8, 2017, at B3 ("In 2016, 44 states and the District of Columbia passed 118 new pretrial laws, reflecting what [one] summary describes as 'continued interest in making changes to the front end of the criminal justice system.'").

[291] *See* Bourree Lam, *Obama's Proposal to 'Ban the Box' for Government Jobs*, ATLANTIC (May 2, 2016), http://www.theatlantic.com/business/archive/2016/05/obama-memorandum-opm/480909/ [https://perma.cc/E9MC-7QHZ] (describing President Obama's recently proposed rule to preclude federal agencies from inquiring whether applicants have criminal records until final phase of hiring process); *see also* Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Jan. 1, 2018), http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ [https://perma.cc/L8K7-UHH7] (reporting that thirty states and over one hundred fifty cities and counties have adopted "ban the box" legislation).

[292] Bush, *supra* note 284.

a suspended license into diversion and out of criminal court, and to cut down stop and frisk and other often-counterproductive street policing tactics.[293]

These are all criminal justice reforms that can be attributed, at least in part, to the current focus on how unnecessary misdemeanor arrests and convictions can lead to disproportionately harsh and lasting consequences. The next Section turns to reforms that might get at the problem of innocent people convicted of misdemeanors, recognizing that these two sets of reforms are not mutually exclusive and may have significant areas of overlap.

C. *Advancing Values of Accuracy, Proportionality, and Fairness in Misdemeanor Cases*

It is difficult to determine if the Innocence Movement's focus on felony exoneration narratives has detracted from reforms driven by narratives of unfair and unduly harsh felony sentencing, though this has certainly been one critique of the Movement.[294] Concerns about such "innocentrism" in the felony context are amplified with misdemeanors because in many misdemeanor cases, the underlying moral culpability is thin. The issue is not whether the wrong person was convicted for the murder or rape, but rather whether *any* person should have been convicted. For example, whether a person is technically guilty of the elements of driving with a suspended license, or those of disorderly conduct, becomes relatively insignificant when considering whether that person should be saddled with a misdemeanor conviction for the rest of her life for such conduct—one that employers, landlords, and others can easily access online. In this respect, the Innocence Movement's focus on facts, evidence, and accuracy of convictions is not always a particularly good fit in the misdemeanor context.[295]

Still, the fact that some reform has resulted from both narratives about the felony system—disproportionate punishment of the guilty and inaccurate outcomes through conviction of the innocent—is encouraging and suggests that the same can happen in the misdemeanor context. The Innocence Movement must be attentive to the different critiques of the misdemeanor system and to the varying systemic reforms that would flow from these critiques, particularly when proposed reforms overlap. A singular focus on conviction of the innocent in misdemeanor cases—such as a focus only on erroneous laboratory tests that reveal wrongful drug possession convictions—could detract from the emerging narrative of disproportionality and unfairness that has just started to fuel important reforms in policing and the lower criminal courts.

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[293] *See generally* BORUCHOWITZ, BRINK & DIMINO, *supra* note 32.

[294] *See supra* Section III.A.

[295] Further, the Innocence Movement's focus on reforms relating to discrete pieces of evidence (e.g., line-ups, interrogations) on the theory that "if those discrete pieces of evidence were stronger, the convictions would be sound[, is an approach that] . . . is not equipped to grapple with the vast world of petty offenses in which the system often does not require much evidence for conviction at all." Natapoff, *supra* note 30, at 135-36.

Arguably the most promising way to advance values of accuracy, proportionality, and fairness in misdemeanor cases is to have far fewer misdemeanor cases come through the criminal justice system. In particular, there should be fewer low-level, thinly-justified misdemeanors.[296] Law enforcement and prosecutorial restraint when it comes to moving forward on cases involving offenses such as public disorder will certainly mitigate disproportionate punishment problems.[297] Such restraint may also help avoid conviction of the innocent, as these types of low-level, victimless misdemeanors are among the cases listed on the National Registry.[298]

Consider the following example to illustrate the need for reform in these areas.[299] A young man is charged with misdemeanor trespassing. The charging document alleges that a police officer encountered the defendant in a public housing building at midnight. The defendant allegedly could not provide the name or apartment number of anyone in the building. His identification listed a different address, which he confirmed as his to the arresting officer. The charging document does not include the fact that the young man told the officer that he had a friend in the building, someone he went to school with and had visited in the past. It does not include how the young man knew the friend's nickname, the floor on which he lived, and how to find the apartment. Nor does it include how, when he offered to bring the police up to the apartment for confirmation, they declined.

After his arrest and a night in jail, the young man appears in front of a judge. The judge tells him that he can ask for an assigned lawyer, in which case he would either have bail set or be released, in both instances to come back to court

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[296] *See supra* notes 231-36 and accompanying text (discussing public order, marijuana possession, and other very minor misdemeanor offenses).

[297] Ryan Sit, *Philly DA Drops Dozens of Marijuana Criminal Charges, Joins Other Big Cities in Decriminalization*, NEWSWEEK (Feb. 16, 2018), http://www.newsweek.com/marijuana-charges-dropped-philadelphia-pennsylvania-district-attorney-809172 [https://perma.cc/3VRA-DYAM] ("A Pennsylvania district attorney announced . . . that his office dropped 51 marijuana charges last week, becoming the latest major city to wipe away weed charges en masse.").

[298] *See supra* notes 226-27 and accompanying text.

[299] This example is constructed from a variety of clients that I (or my students) have represented, in a variety of jurisdictions. It is a realistic example. *See* M. Chris Fabricant, *Rousting the Cops*, VILLAGE VOICE (Oct. 30, 2007), http://www.villagevoice.com/news/rousting-the-cops-6419395 [https://perma.cc/KZ82-8GQL] (stating that "Operation Clean Halls"—program allowing NYPD to "stop, search, question, and arrest" anyone near certain residential buildings—has resulted in increase of trespassing arrests by twenty-five percent, despite the absence of "crime wave" or "trespassing epidemic"). *See generally* Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); Complaint at 2, Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) (No. 12 Civ. 2274), 2012 WL 1031760, at *2 (claiming routine NYPD practices result in detainment of persons "without individualized suspicion of unlawful activity" and arrest of persons "without probable cause of criminal activity").

in a few weeks with his lawyer. Another option, the judge explains, is to discuss his case now with the prosecutor in court to see if they can come to an agreement. Not surprisingly, the young man takes the latter option. As he sits handcuffed on a chair in the courtroom well, the prosecutor stands over him for a two-minute discussion. The case is called and the young man pleads guilty to the charge. He serves no further jail time, but owes $150 in fines and court fees and must do twenty-four hours of community service. No one informs him of his right to appeal, and despite the fact that he is not guilty of the crime charged (or of any crime), he now has a misdemeanor trespass conviction on his record for the rest of his life.[300]

It is not at all surprising that this innocent young man pled guilty to get out of jail. Unattainable bail combined with the pressure to plead guilty as the quickest avenue to release is a much-needed area of reform that gets at both fairness and accuracy. The most significant predictor of whether a defendant enters a guilty plea is his custodial status; in-custody defendants are more likely to enter guilty pleas than out-of-custody defendants.[301] A study of nonfelony cases resulting from arrests in New York City in 2008 found that "one in five detained nonfelony defendants . . . will not be convicted" and "eight out of ten convicted misdemeanor arrestees receive sentences that do not include jail time."[302] Despite this, judges set bail in almost twenty-five percent of nonfelony cases.

[300] Assume that this jurisdiction does not allow sealing or expungement of any convictions.

[301] SMITH & MADDAN, *supra* note 46, at 9; Megan Stevenson and Sandra G. Mayson, *Pretrial Detention and Bail*, *in* REFORMING CRIMINAL JUSTICE: VOLUME 3 PRETRIAL AND TRIAL PROCESSES 21, 21-2 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf [https://perma.cc/VP5M-5UBU]; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713-14 (2017) (observing that "large majority" of defendants with misdemeanors experience pretrial detention because of inability to post bail, and there is "substantial reason" to believe that this causally affects case outcomes); Megan Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes 3 (Jan. 12, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2777615 [https://perma.cc/8EGD-DN45] (finding that "pretrial detention leads to a 6.2 percentage point increase in the likelihood of" conviction, and concluding that increased likelihood of conviction is attributable to increased likelihood of defendants detained pretrial pleading guilty); *see also* Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 938-44 (2013).

[302] HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 1 (2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf [https://perma.cc/35 A9-2FEE] (using "[p]reviously unpublished data provided to Human Rights Watch by the New York City Criminal Justice Agency (CJA)—covering all cases (117,064) of nonfelony defendants arrested in New York City in 2008 that proceeded past arraignment"). It is worth noting that this study only examined post-arraignment nonfelonies. *Id.* In New York City, many misdemeanor guilty pleas happen at arraignment. If those were considered, the picture of the driving forces behind innocent people pleading guilty to get out would be even more bleak.

Although bail was $1000 or less in most of these cases, eighty-seven percent of defendants could not afford it and remained in pretrial detention.[303]

The Harris County mass exonerations—where every single person was convicted after a guilty plea—are a stark illustration of the need for reform in the tightly interrelated areas of bail and plea bargaining.[304] Almost eighty percent of the eighty-five misdemeanors on the National Registry were convictions that came about after guilty pleas, and only twenty percent after trials.[305] Conversely, only eighteen percent of the 2168 felony cases on the Registry were guilty-plea convictions.[306] Defendants who cannot afford bail will often accept plea bargains—even unfavorable ones—as the only way to get out.[307] However, many people—including innocent people—accept plea offers even when out of jail, to avoid coming back to court (and thus losing work days and possibly their jobs).[308]

Even if the young man were able to make bail and come to court as many times as necessary for a trial date, it would not be surprising if he were convicted by a judge or jury. The main witness against him would be a police officer and the defense would likely be barred, under evidentiary rules, from bringing out the young man's exculpatory statement to the officer. If the young man testified, it would be his word against the officer's. A number of issues arise when a police officer is the only witness to the alleged incident (this is the case for most quality-of-life crimes, as well as resisting arrest and failure-to-obey charges).

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[303] *Id.* at 2. Pretrial detention lasted an average of 15.7 days. *Id.* This number is likely so low because in New York, most misdemeanor defendants who do not make bail at arraignment have another court date about seven days later (under state law). Most are offered another plea at this point, often one that will result in their release, and many accept even if they had turned down a similar or more favorable plea at arraignment.

[304] Gabrielson & Sanders, *supra* note 89 ("All of the 212 [No Controlled Substance] defendants struck plea bargains, and nearly all of them, 93 percent, received a jail or prison sentence.").

[305] Misdemeanors Alphabetical Order, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=M [https://perma.cc/2QFF-EXH8] (last visited Apr. 28, 2018) (listing sixty-seven guilty pleas among eighty-five misdemeanor exonerations).

[306] Felonies, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P [https://perma.cc/ZDE7-LBC2] (last visited Apr. 28, 2018) (listing 399 felony guilty-plea cases).

[307] *See* Stevenson, *supra* note 301, at 22 (concluding that pretrial detention results in greater chance of pleading guilty, even in instances where defendant would likely have been acquitted or had his charges dropped).

[308] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2465-66 (2004) (noting how avoiding court can be driving force in plea bargaining); *supra* note 288 and accompanying text; *see also* Nick Pinto, *The Bail Trap*, N.Y. TIMES, Aug. 13, 2015, at MM38 (discussing plight of indigent defendants who cannot afford bail).

For example, judges and prosecutors are subject to cognitive and overt biases in favor of believing police officers.[309] There is immense institutional pressure on judges to avoid questioning the officer's credibility, even if only implicitly through an acquittal when the officer is the main witness.[310] Related to this is the phenomenon labeled "testilying," which is when an officer lies on the witness stand.[311] Untruthful police testimony is one cause of wrongful convictions documented in misdemeanor cases on the Registry, where body camera or citizen video directly contradicted the officer's account.[312] Clearly, both innocent people charged with misdemeanors and the criminal justice system more generally would benefit from reforms designed to get at the pernicious problem of police officers testifying untruthfully.

The failure to provide the young man with defense counsel is an unfortunately common occurrence in the lower criminal courts and is likely a contributing factor in both wrongful and unfair misdemeanor convictions as well as disproportionate punishment. Defense counsel appointed at the initial appearance might be able to secure a statement from the friend or other witnesses to confirm the young man was an invited visitor in the building, and could use that to persuade the prosecution to drop the charges (or, if that approach were unsuccessful, would have witnesses to call at trial).[313] Counsel in misdemeanor cases can also make the client, prosecutor, and judge aware of the full set of consequences, direct and collateral, that flow from a conviction.[314] This can lead to prosecutorial or judicial diversion of a charge, or a direct sentence that takes the collateral consequences of the conviction into account.[315] Yet the federal right to counsel extends to misdemeanors only where there is incarceration or a suspended sentence.[316] Although most states confer a more generous right to

[309] *See* Anna Lvosky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2075-77 (2017).

[310] *See id.* at 2053-56.

[311] Capers, *supra* note 276, at 836; Joseph Goldstein, *Brooklyn Judge Seeks to Examine Prevalence of Police Lying*, N.Y. TIMES, Oct. 18, 2017, at A23 (discussing New York federal district court judge's decision to hold hearings on untruthful police testimony); Nathan Levy, *Bringing Justice to Hearne*, TEX. OBSERVER (Apr. 29, 2005, 12:00 AM), https://www.texasobserver.org/1935-bringing-justice-to-hearne-residents-and-the-national-aclu-team-up-to-bring-justice-to-hearne/ [https://.perma.cc/V954-ASDE] (describing Hearne County, Texas, scandal involving false testimony by confidential informant and police officers, as well as Tulia, Texas, scandal that "ultimately resulted in pardons, a conviction of the informant[, a police officer,] for perjury, and a $6 million settlement divvied up among those arrested in the bogus sting").

[312] *See* Possley, *supra* note 9.

[313] It would have to be a competent defense attorney with the resources necessary to undertake the investigation, including a workload that is not overwhelming.

[314] *See generally* Roberts, *supra* note 30.

[315] *See id.* at 365-66.

[316] Alabama v. Shelton, 535 U.S. 654, 662 (2002) (finding that Sixth Amendment bars imposition of suspended sentence when defendant did not have counsel in case); Scott v.

counsel by state constitution or statute, that right is too often honored in the breach. This can mean that defense counsel is simply not provided even where the right to counsel applies,[317] or it can mean that defendants are pressured to waive their right to counsel, usually in order to negotiate directly with the prosecutor and quickly enter a guilty plea.[318] When defense counsel is provided, she too often has an overwhelming workload and scarce investigative resources.[319] Right to counsel violations is an area ripe for reforms that could address all types of wrongs in the misdemeanor system.

This example has illustrated how the goals of advancing accuracy in the lower criminal courts and avoiding the burden of an unnecessary minor criminal conviction when it does not advance public safety are not mutually exclusive. Though they can be, they are not always in tension. If careful, deliberate exploration and promotion of an innocence narrative for misdemeanors can help advance reforms that are responsive to widespread, pervasive problems of unfairness, racial bias, and disproportionality in our current misdemeanor system, then the two approaches will be mutually enhancing.

CONCLUSION

The power of DNA exonerations in capital and serious felony cases is the power of certainty of factual innocence. The Innocence Movement continues to struggle with the definition of "exoneration," as it moves beyond DNA to other methods of revealing wrongful convictions of innocent people. That challenge will surely be amplified as the Movement turns to misdemeanors, both as a

Illinois, 440 U.S. 367, 371-73 (1979) (holding no right to counsel exists when sentence is monetary fine); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

[317] *See* BORUCHOWITZ, BRINK & DIMINO, *supra* note 32, at 9 (quoting South Carolina Supreme Court Justice's statement, at state bar meeting, that state court judges in South Carolina regularly violated *Alabama v. Shelton*, and would continue to do so, because it simply was not possible to provide lawyers in so many misdemeanor cases).

[318] SMITH & MADDAN, *supra* note 46, at 14 (concluding that Florida misdemeanor courts are consistently "sacrificing due process for case-processing speed," which results in defendants "waiv[ing] their rights to counsel"); *cf.* Ian Duncan, *Md. Courts Aim to Provide Lawyers at Bail Hearings by Summer*, BALT. SUN (May 6, 2014), http://articles.baltimoresun.com/2014-05-06/news/bs-md-bail-lawyers-close-20140506_1_maryland-court-lawyers-bail-hearings [https://perma.cc/43GG-8UDD] (describing investment of $10 million to provide defendants with representation at initial bail hearings following 2013 Maryland high court decision requiring indigent defendants to have access to representation during initial bail hearings).

[319] *See* BORUCHOWITZ, BRINK & DIMINO, *supra* note 32, at 20-22; *cf.* Irene Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 750 (2017) ("Some public defender agencies . . . allocate attorney experience in a manner such that it is disproportionately dedicated to clients charged with felony offenses.").

definitional matter and in making strategic decisions regarding how to focus resources to uncover misdemeanor convictions of innocent people. The context in which the Innocence Movement has operated thus far is quite different from the context in which misdemeanor convictions unfold. The model that the Innocence Movement has developed is not easily translated or transported to the lower criminal courts.

Laboratory testing of controlled substances in misdemeanor drug possession cases may be the most certain and fruitful avenue for exposing wrongful misdemeanor convictions. Police body and dashboard cameras and citizen video may also serve this purpose, although there are limitations to such evidence.

However, a singular focus on innocent people convicted of misdemeanors could detract from exposing and reforming overall injustice in the misdemeanor system, which is already a difficult task. This will be a core challenge for the Innocence Movement and reformers focused on other misdemeanor injustices. One thing that will mitigate this challenge is that many of the already well-documented causes of injustice in the misdemeanor system are also likely to cause wrongful convictions of innocent people in misdemeanor cases, and indeed are already surfacing on the limited list of misdemeanors on the National Registry of Exonerations. Hopefully, the Innocence Movement can meet the challenge of uncovering powerful narratives of misdemeanor convictions of innocent people while leaving intact the existing narrative of disproportionate and unfair consequences of misdemeanor convictions—regardless of guilt or innocence.