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Justice Scalia's Innocence Tetralogy

Lee Kovarsky[†]

For many, U.S. Supreme Court Justice Antonin Scalia's criminal-justice legacy discloses nothing more than pitched resistance to the rights of defendants and convicted offenders. Certain features of his jurisprudence, however, complicate that caricature considerably.¹ For example, he moonlighted as the Court's most ardent defender of the Sixth Amendment right to confront accusing witnesses.² His pro-defense positions formed a trial-oriented proceduralism in which he de-prioritized constitutional regulation of outside-the-courtroom behavior, such as policing or the exercise of prosecutorial discretion.³

The trial orientation of Justice Scalia's proceduralism entailed commitments to certain institutions and skepticism of others. It formed the basis of his belief that federal courts were unsuited for evaluating guilt in state criminal cases, and it reflected his distaste for *post-conviction* procedure. These two institutional preferences intersect at a relatively modern doctrinal phenomenon: the concept of "actual innocence" litigated in federal habeas corpus proceedings, and usually in capital cases. In actual innocence litigation, a convicted offender asserts a mistaken guilt determination as a constitutional error.

Justice Scalia's position on actual innocence issues was inseparable from his hostility to death penalty "abolition," and he viewed abolitionists as ringleaders of the wrongful-

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1. See generally Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005) (scrutinizing Justice Scalia's surprising pro-defendant streak).

2. See *Crawford v. Washington*, 541 U.S. 36 (2004) (writing for the Court).

3. But see *Kyllo v. United States*, 533 U.S. 27 (2001) (finding that use of heat-sensing device was surveillance that, when conducted without a warrant, violated the Fourth Amendment).

convictions movement. Sensing the threat that wrongful executions posed to the sanctity of state criminal process, he spent his latter years on the Bench arguing that estimates of such events were inflated. He was unable, however, to command a majority on his more controversial ideas about actual innocence in death penalty cases. Instead, his officially expressed views appear in a “tetralogy” of auxiliary opinions: opinions concurring with judgments in *Herrera v. Collins*⁴ and *Kansas v. Marsh*,⁵ an opinion concurring with the denial of certiorari in *Callins v. Collins*,⁶ and an opinion dissenting from the order granting a fact-finding transfer to a district court in *In re Troy Davis*.⁷

Collectively, the Tetralogy captures Justice Scalia at both his most and his least effective. His sometimes-dazzling epistemological critique forced a more analytically rigorous restatement of actual innocence doctrine. His foundational premise, however, was that the reliability of state guilt determinations was not systematically overstated. As evidence inconsistent with that premise mounted, however, he refused to acknowledge its enormous doctrinal implications. By the time of his death, his basic epistemological insight had become the most effective weapon against the deference to state criminal process that he had originally used it to promote.

I. THE TETRALOGY

In a “freestanding” actual innocence claim, a convicted offender asserts that she is factually innocent, and asserts innocence as the exclusive source of a constitutional violation. For the remainder of this article and unless otherwise indicated, I use the phrase “innocence claim” to refer to a freestanding challenge. An innocence claim alleges that an inmate is *actually* innocent of whatever crime triggered her conviction, notwithstanding that she is *legally* guilty by virtue of an adverse criminal judgment. The Tetralogy is, I submit, a meaningful unit of study insofar as it represents the full arc of Justice Scalia’s actual innocence jurisprudence.

The actual innocence claim lacks clear constitutional provenance, and it is made in federal post-conviction (habeas)

4. 506 U.S. 390 (1993).
5. 548 U.S. 163 (2006).
6. 510 U.S. 1141 (1994).
7. 557 U.S. 952 (2009).

proceedings. Concurring in *Herrera*, Justice Scalia penned what is considered by many to be the opening modern salvo against actual innocence challenges.⁸ His *Herrera* concurrence embraced a proceduralist view of guilt that appeared to strongly disfavor federal consideration of innocence claims. In subsequent Tetralogy opinions, he restated and refined the epistemological premises behind his position.

A. *HERRERA*

In *Herrera*, the Court inquired as to whether a freestanding innocence claim alleged a cognizable constitutional violation.⁹ In one sense, the case was an imperfect test vehicle for actual innocence theory because the inmate's new evidence was not particularly strong. The guilt determination, however, relied on categories of evidence—blood-typing, eyewitness identification, and a confession—that wrongful-conviction studies would later reveal to be deeply problematic.

Texas had capitally sentenced Herrera for the shooting deaths of two police officers. One of the slain officers had a passenger that identified Herrera and, in a dying declaration, the officer did the same.¹⁰ When police arrested Herrera, they found an inculpatory letter and keys to his girlfriend's car, which had been used in the murder.¹¹ The type of blood on Herrera's pants and in the car matched with one of the officers, and Herrera's social security card was found at the scene.¹² The case, however, still had problems. There had been enormous pressure to find the officers' killer, and police almost killed Herrera during interrogation.¹³ He had to be taken—unconscious, bleeding, and paralyzed—to the hospital.¹⁴ The press covered the murder and interrogation heavily and uniformed police packed the courtroom.¹⁵ Eyewitness identifications figured prominently in the prosecution's case,

8. See *Herrera v. Collins*, 506 U.S. 390, 428–29 (1993) (Scalia, J., concurring).

9. See *id.* at 393.

10. See *id.* at 394.

11. See *id.* at 394–95.

12. See *id.*

13. See Brief for Petitioner at 4, *Herrera v. Collins*, 506 U.S. 390 (1993) (No. 91-7328), 1992 WL 532878 [hereinafter *Herrera* Petitioner's Brief].

14. See *id.* at 9–10.

15. See *id.* at 13.

even though they were made under circumstances that modern forensic analysts would immediately flag as extremely unreliable.¹⁶

Herrera alleged freestanding innocence in the federal habeas proceeding, asserting that his recently deceased brother had actually killed both officers. Herrera introduced evidence from a former cellmate and a current state judge who both stated that Herrera's brother had told them that he had committed the murders while driving the car that belonged to Herrera's girlfriend.¹⁷ Herrera supplemented the record with an affidavit of his nephew, who said that when he was nine years old, he saw his father (Herrera's brother) kill the officers.¹⁸

Chief Justice Rehnquist wrote an opinion for the Court equivocating about whether an inmate alleging only a wrongful guilt determination was actually claiming an error of constitutional dimension—although he formally reserved the possibility that a “truly persuasive showing of innocence” might entitle an inmate to habeas relief.¹⁹ There were four auxiliary opinions, and Justice Scalia's rejection of innocence claims became a centerpiece of the case to foreclose freestanding innocence litigation entirely. He called attention to “the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate.”²⁰ Indeed, he expressed skepticism that they would ever have to answer the actual innocence question, because “it is improbable that evidence of innocence as convincing as

16. According to Herrera's briefing, Hernandez could not select Herrera in the original six-person photo array, but he narrowed it down to three people. Hernandez was shown a single photo of Hernandez days later—a mug shot—at which point he told the officers that Herrera was the person who had shot Officer Carrisalez. Hernandez subsequently picked Herrera out of another lineup. *See id.* The Carrisalez ID was a “hospital show-up,” in which Carrisalez simply nodded at the mugshot. Carrisalez never picked Herrera out of a lineup. *See id.* Hospital show-ups are “widely condemned” but in many cases permitted because there is no other way to get the information from a dying witness. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967).

17. The allegation was that Officer Rucker had been involved in racketeering with multiple members of the Herrera family, including Leonel (the convicted inmate) and Raoul Sr. (Leonel's brother). *See Herrera* Petitioner's Brief at 26.

18. *Herrera*, 506 U.S. at 397.

19. *Id.* at 417.

20. *Id.* at 428 (Scalia, J., dissenting).

today's opinion requires would fail to produce an executive pardon."²¹

B. JUSTICE SCALIA'S POST-*HERRERA* POSITIONS

At least three distinct propositions are embedded in Justice Scalia's position. First, "actual innocence" is a misleading label insofar as innocence is not presumed; the pertinent question involves whether the Constitution entitles a legally guilty inmate to additional process when new evidence makes guilt less likely. Second, when state process is full and fair, additional federal process yields little incremental knowledge about past reality. And third, state process would screen any innocence claim with evidence sufficient to meet the Court's hypothetical threshold.

Justice Scalia would periodically return to *Herrera's* precise doctrinal question (actual innocence claims) and to the more general point about the institutional competence of federal courts conducting post-conviction review of state criminal judgments. In 1994, a year after *Herrera*, Justice Blackmun used *Collins v. Collins* to announce his practice of conscientious dissent in all capital cases; he declared that, "from this day forward, I no longer shall tinker with the machinery of death."²² Justice Scalia responded acerbically in this second Tetralogy opinion, chalking changing views of the death penalty up to the "deeply held" convictions of abolitionists and remarking that lethal injection seemed a peaceful death as compared to "the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat."²³ Justice Scalia was referencing *McCullum v. North Carolina*, a case co-pending on the Court's certiorari docket, and he used *McCullum* to argue that capital punishment schemes are necessary to permit "such brutal deaths to be avenged."²⁴

Kansas v. Marsh occasioned Justice Scalia's third Tetralogy opinion,²⁵ which he used to contest the empirical risk of wrongful executions. He wrote: "[Justices flagging the possibility of wrongful executions do] not discuss a single

21. *Id.*

22. 510 U.S. 1141, 1145 (Blackmun, J., dissenting).

23. *Id.* at 1143 (Scalia, J., concurring).

24. *Id.*

25. 548 U.S. 163 (2006).

case—not one—in which it is clear that a person was executed for a crime he did not commit.”²⁶ He saw exonerations not as evidence of dysfunction, but as proof that the system was working.²⁷ He argued that the empirical studies suggesting elevated rates of wrongful executions were ivory work product of abolitionist academics.²⁸ He concluded: “One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. . . . But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum.”²⁹

The proposition that innocence claims lack constitutional provenance surfaced most recently in the *Davis* case (2009),³⁰ the final piece of the Tetralogy. As explained in Section II.C, *Davis* had been convicted primarily on the basis of cross-racial eyewitness identification, and there was substantial post-trial recantation.³¹ The Supreme Court ultimately remanded *Davis* for fact-finding on the actual innocence question.³² Justice Scalia objected to the remand as a “fool’s errand,”³³ emphasizing the integrity of the state proceedings and the non-cognizability of innocence claims. *Davis* shows that, between 1993 and 2009, Justice Scalia believed nothing about the actual innocence calculus had changed.

II. THE EPISTEMOLOGY OF GUILT

The Tetralogy captures the arc of Justice Scalia’s critique, as he fought ferociously, and at times scornfully, against both the doctrinal innovation necessary to facilitate innocence litigation and the empirical premises upon which such innovation was based. The Supreme Court decided *Herrera* in the spring of 1993, a year after Peter Neufeld and Barry Scheck founded an organization called the “Innocence Project” and before hundreds of DNA exonerations extinguished the comfortable fiction that wrongful convictions were rarities in

26. *Id.* at 188.

27. *See id.* at 193.

28. *Id.* at 198.

29. *Id.* at 199.

30. *In re Davis*, 557 U.S. 952 (2009).

31. *See* Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 100 (2011).

32. *See Davis*, 557 U.S. at 952.

33. *Id.* at 957 (Scalia, J, dissenting).

American criminal punishment. Workable criminal justice administration undeniably entails some wrongful guilt determinations, but the tolerance for such error should relate inversely to its frequency.

Justice Scalia's position was grounded in an epistemology associated with law professor Paul Bator and philosopher Karl Popper.³⁴ Stated generally, Justice Scalia believed that humans (and their institutions) cannot "know" the pure metaphysical truth of past events. Human institutions, lacking such epistemological privilege, instead use reliable process to produce estimates and make decisions. Criminal process therefore assigns guilt through a series of factual determinations that merely estimate reality. Justice Scalia perceived no reason why the truth-approximating process of state legal institutions would be inferior to that of federal ones, and so he saw no need for the doctrinal innovation necessary to facilitate actual innocence litigation.

When Justice Scalia penned his *Herrera* concurrence, his epistemological critique combined with contemporaneous assumptions about the reliability of evidence to produce profound skepticism about whether courts should entertain freestanding innocence claims. Prior to DNA testing, almost nobody asserted actual innocence claims, and relief was non-existent.³⁵ When the data behind the assumptions changed, however, Justice Scalia's position did not. In later decisions, Justice Scalia was simply unwilling to go where his preferred framework took him.

A. THE EPISTEMOLOGY OF TRUTH

When Justice Scalia wrote about actual innocence, he always put the term in quotation marks. The scare quotes betray something surprisingly post-modern in his view of innocence. Specifically, his position reflects epistemological uncertainty that is largely ignored by the formalism with which he is frequently (and superficially) associated. Indeed, he inherits his epistemological premises from Professor Paul Bator, who in turn leans heavily on those of Karl Popper.³⁶

34. See Seth F. Kramer and David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 519 n.217 (2000).

35. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61 (2008).

36. See Kramer and Rudovsky, *supra* note 34, at 519 n.217.

Absolute truth in the natural world might exist, the theory goes, but humans cannot “know” it with metaphysical certainty. A state criminal conviction is an index of truth that might reflect subordinate indicia that we call evidence—things like confessions, eyewitness testimony, and forensic evidence. That evidence can create inferences about historical fact, and those inferences range from extremely reliable to pure guesswork. As *Herrera* itself explains, a subsequent forum might be uniquely disadvantaged in drawing reliable inferences about unknowable facts because “the passage of time only diminishes the reliability of criminal adjudications.”³⁷

If one admits to the imperfection of human observation and assessment, Justice Scalia believed, then there is no compelling reason to have federal courts review pure questions of guilt. State and judicial institutions are both made up of imperfect human actors, and one is not necessarily a better truth approximator than the other. To the extent that new evidence permits new inferences about unknowable facts, the opportunity to draw those inferences trades off with the ability to reliably draw others. Witnesses may have disappeared, memories may have faded, and physical evidence from trial might be degraded or unavailable.

The undeniable appeal of Justice Scalia’s position resides in its suggestion that to accommodate actual innocence litigation is to deny the most basic tenets of post-modernism. Actual innocence theories might appear to embrace a quaint, pre-postmodern view of some observer-independent truth. Justice Scalia would have argued that we do not—that we *cannot*—determine *actual* innocence. Instead, we can just have rules about when institutions treat a sufficient approximation of guilt as binding.

The problem with the argument is that a universe in which absolute truth is unknowable can also be one with substantial variation in the reliability of scientific, social, and institutional devices that we use to imperfectly assign guilt. Justice Scalia’s scare-quoting made sense when the most reliable indicia of metaphysical truth were not uniquely available in a subsequent forum. *Herrera* posed certain challenges, but not others. Although the case certainly stood for a broader institutional question about the availability of a federal habeas forum to test new evidence, there was a nagging sense that the

37. *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

new evidence in the case itself was not particularly reliable. Affidavits exculpating the condemnee and assigning guilt to a deceased alternative are common, and there were serious questions about the incentives of Herrera's nephew.

If the question is not about whether someone is "actually" innocent and is instead about when new evidence of innocence requires a new forum to consider inferences, then there may be good institutional reasons to refuse such incremental process. What Justice Scalia ultimately failed to acknowledge, however, was that such an argument works only when one can make pre-DNA-era assumptions about the reliability of the inferences themselves. If, for example, inferences drawn from a DNA exclusion are many orders of magnitude more powerful than inferences drawn from a criminal conviction, then Justice Scalia's proceduralist framework does not just seem to *permit* a new forum for reconsideration—it seems to *require* it. The requirement is not because an inmate has "actually" shown innocence, but because the investment in new inferential approximation is worth the return.

B. CHANGING ASSUMPTIONS

The problem for Justice Scalia, and for *Herrera* enthusiasts generally, was two-fold. First, jury verdicts and guilty pleas are now known to be *less reliable* estimates of historical truth than we previously thought. Second, other types of evidence (DNA) capable of being introduced in subsequent legal proceedings have emerged as *more reliable* ones.

Rejecting the idea that humans and their institutions can "actually" know (verify) innocence is distinct from the proposition that they should not entertain what are euphemistically called actual innocence claims. The latter proposition ignores a circumstance that is perfectly compatible with post-modern assumptions about the absence of epistemological privilege. If advances in scientific knowledge establish certain evidence as more reliable indicia of objective historical truth than is a criminal conviction, then the empirical complement to Justice Scalia's doctrinal critique vanishes.

DNA evidence is not available in most cases, and even in cases where it is available, it may be only one piece of a broader culpability puzzle. In select cases, however, it is capable of showing, with extraordinarily high probability, that a convicted offender could not have committed the crime in question.

Insofar as DNA evidence flags wrongful convictions, academics can work backwards to understand what types of evidence produce them. The major culprits are eyewitness testimony, shoddy forensic science, and, to a lesser extent, false confessions and informants.³⁸ In other words, DNA does not just show likely innocence in specific cases, but it also performs a broader diagnostic function insofar as it provides clues about the unreliability of *other types of evidence*.

Justice Scalia refused to attribute such diagnostic significance to DNA exonerations. Indeed, perhaps the most troubling aspect of his actual innocence position was his insistence that the doctrine was a solution in search of a problem. When faced with mounting DNA evidence that wrongful convictions happen frequently, Justice Scalia attempted to parry the concern by arguing that the wrongful-conviction data showed that the system was *working*, not *failing*. In *Marsh*—the second to last case in the Tetralogy (2006)—he wrote:

[The dissent] speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than as *a consequence of the functioning of our legal system*. Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success.³⁹

Whatever its rhetorical appeal, this argument confuses—probably intentionally—two different functions that DNA exonerations perform. Exonerations are obviously instances of post-conviction “success,” but equally obvious is that they *also* indicate substantial “failure” in the vast majority of cases where DNA evidence is unavailable.

DNA exonerations show what sorts of evidence produce wrongful convictions, but there is not DNA available in every case. Confessions, informants, junk science, and faulty eyewitness testimony do not discriminate—they produce unreliable estimates of guilt even where DNA evidence cannot exclude a defendant. In Brandon Garrett’s landmark study of the first 250 DNA exonerations, 89 percent of the exonerees had been convicted of rape.⁴⁰ That figure exists not because

38. See Garrett, *supra* note 35, at 60–61; see generally BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011) (providing a book-length exploration of the causes).

39. *Kansas v. Marsh*, 548 U.S. 163, 193 (Scalia, J., concurring).

40. See GARRETT, *supra* note 38, at 5.

rape convictions are disproportionately wrongful relative to convictions for other types of crimes, but because rape convictions disproportionately involve biological material necessary to conduct a DNA test and exclude guilt.

The relative unreliability of prior process, however, is only half of the actual innocence calculus. The other half is the reliability of the subsequent proceeding. In this respect, DNA evidence also altered basic assumptions behind Justice Scalia's position. DNA evidence introduced after a trial might not satisfy demands for pure metaphysical truth, but it can be a far more reliable approximation than a criminal conviction based on other types of information. As the gap between the reliability of inferences in prior and subsequent proceedings grew, the link between the empirical assumptions and Justice Scalia's preferred doctrinal rule deteriorated.

C. THE DAVIS LOSS

The Tetralogy expresses Justice Scalia's position as a doctrinal rule against actual innocence litigation, supported by a set of assumptions about the relationship between evidence and human knowledge. That doctrinal rule also followed from the familiar originalist position that there exists no string of constitutional text in which to localize a freestanding claim. Justice Scalia could hold out for a Supreme Court majority as long as empirical assumptions complemented the doctrinal position.

By 2009, the empirical assumptions had shifted dramatically and the window for Justice Scalia to forge a winning coalition on the actual innocence position seemed closed. In *Davis*⁴¹—the last opinion in the Tetralogy and in many ways a denouement for the Scalia position—the Court cut through all sorts of procedural obstacles to remand the case for an actual innocence determination. *Davis* was, in many ways, a litmus test for how severely wrongful-conviction data had undermined confidence in the reliability of convictions. Except for a shell casing connected to a gun that law enforcement never located, Davis was convicted on the basis of eyewitness testimony—most of it cross-racial.⁴² (Cross-racial eyewitness testimony is particularly unreliable.⁴³) Seven of the

41. *In re Davis*, 557 U.S. 952 (2009).

42. See Kovarsky, *supra* note 31, at 100.

43. See *id.*

nine eyewitnesses had recanted, and one of the non-recanting witnesses was the alternative suspect.⁴⁴

Because *Davis* involved the circuit court's denial of authorization to pursue a successive habeas petition and because there is no certiorari review of such orders,⁴⁵ the Court actually ordered the remand by way of an original habeas power that had been dormant for decades.⁴⁶ Given the unusual procedural posture, the remand actually required five votes, including at least two (and perhaps all) of Justices Roberts, Kennedy, and Alito. The unsigned per curiam order prompted a dissent from Justice Scalia—joined only by Justice Thomas—underscoring the uncertain status of actual innocence claims. The per curiam order signaled that the majority was more interested in the bottom line than in the doctrinal details; it instructed the district court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence.”⁴⁷ In light of the Justices whose support was necessarily for such an order, *Davis* represented a death knell for the position that Justice Scalia had cultivated so assiduously since *Herrera*.

CONCLUSION

Davis and its rejection of Justice Scalia's position is the clearest signal of the Supreme Court's increasing receptivity to actual innocence litigation. In *Herrera*, when Justice Scalia began to use actual innocence cases to explain that the Constitution permitted systematic criminal punishment in the face of some imperfection, many fairly viewed him as a candid realist. As wrongful-conviction data mounted, however, he clung to the notion that the inevitability of imperfection released courts from any obligation to renew scrutiny of convictions.

Recall Justice Scalia's rejoinder to Justice Blackmun in *Callins*—chastising Justice Blackmun for announcing his refusal to “tinker with the machinery of death” in “one of the

44. *See id.*

45. *See* 28 U.S.C. § 2244(b)(3)(E) (1996).

46. *See generally* Kovarsky, *supra* note 31 (discussing development and obsolescence of original habeas jurisdiction).

47. *Davis*, 557 U.S. at 952.

less brutal of the murders that come before us”⁴⁸ Justice Scalia mocked Justice Blackmun’s moral equivocation by describing a gruesome murder for which Henry Lee McCollum had been convicted in a co-pending case.⁴⁹ Just before Justice Scalia passed away, North Carolina freed Mr. McCollum after a DNA test showed that he had spent 30 years on death row for a crime he did not commit.⁵⁰

48. See *Callins v. Collins*, 510 U.S. 1141, 1143 (Scalia, J., concurring).

49. See *id.* at 1145 (Blackmun, J., dissenting); *id.* at 1143 (Scalia, J., concurring).

50. See Dahlia Lithwick, *A Horrifying Miscarriage of Justice in North Carolina*, SLATE (Sept. 3, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/henry_lee_mccollum_cleared_by_dna_evidence_in_north_carolina_after_spending.html.