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"I Did It, but . . . I Didn't": When Rejected Affirmative Defenses Produce Wrongful Convictions

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TABLE OF CONTENTS

I. INTRODUCTION

As a rule, defendants who raise an affirmative defense to a charged crime do not dispute that they intentionally harmed another person or property interest, and hence that their conduct satisfied the elements of the alleged offense. Instead, they offer reasons, in the form of justification or excuse, for why they nevertheless should be found not guilty. Affirmative defenses, including self-defense, necessity, insanity, and

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duress, thus take the form of confession ("I did it") and avoidance ("but" additional factors exist that negate guilt). To prevail on an affirmative defense, defendants must, at a minimum, satisfy the burden of producing evidence to put the defense at issue. They often are required to satisfy the burden of persuasion, as well.

Affirmative defenses may present difficult questions of fact (e.g., did the defendant actually believe that her life was in imminent danger when she shot the deceased?) as well as challenging normative issues (was her belief reasonable under the circumstances?). Some defendants will be found guilty even though their affirmative defenses were valid and should have been credited. These unfortunate individuals will have been doubly disadvantaged, if not doubly cursed: first, by being subjected to the circumstances giving rise to their affirmative defense (such as being attacked by an unlawful aggressor, or inflicted with a disabling mental illness); and second, by suffering unjust conviction for a crime. And even if their convictions are reversed and their defense later acknowledged, they may be barred from compensation despite being punished for a crime they never committed.

This Article examines wrongful convictions that result from the erroneous rejection of an affirmative defense. We begin with the premise that defendants in such cases have indeed been wrongfully convicted, because they have committed no crime. We describe several cases of wrongful conviction involving individuals whose affirmative defenses were rejected at trial. Then, with an eye toward identifying potential reform measures, we consider evidentiary and doctrinal issues associated with affirmative defenses, which may contribute to the wrongful convictions that occur when the defenses are not credited. We conclude by examining another injustice often associated with wrongful convictions resulting from the erroneous rejection of affirmative defenses: proof and other requirements that represent barriers to compensation in these cases.

II. WRONGFUL CONVICTIONS AND FAILED AFFIRMATIVE DEFENSES

Imagine the plight of an innocent person convicted of a crime after erroneously being identified as the perpetrator by the victim or an eyewitness. Such cases dominate the list of DNA-based exonerations maintained by the Innocence Project,[1] and proliferate on the National Registry of Exonerations's more comprehensive roster of wrongful con-

1. Eyewitness misidentification was a contributing factor in 69% (258/374) of the DNA-based exonerations identified by the Innocence Project through July 2, 2019. *The Cases: Contributing Causes of Conviction, Eyewitness Misidentification*, INNOCENCE PROJECT, https://www.innocenceproject.org/all-cases/#eyewitness-misidentification [https://perma.unl.edu/9VT7-4TYT] (last visited July 2, 2019).

victions.[2] In one such case, for example, Walter Snyder was convicted of a rape committed in 1985 in Alexandria, Virginia after being identified by the victim as her assailant, first while he was seated in the waiting room of a police station, and subsequently in court. Prior to viewing Snyder in the police station, the victim had been shown a photo array including his picture, and had noticed him washing his car across the street from her apartment. Snyder, who consistently maintained that he knew nothing about the rape, served seven years of a forty-five-year prison sentence before DNA testing of the vaginal swab preserved in the case definitively excluded him as the perpetrator.[3]

Walter Snyder's case, like virtually all others in which DNA analysis helped trigger an exoneration, exemplifies a "wrong person" wrongful conviction, in which a crime indeed was committed, but by someone other than the innocent individual who was erroneously blamed for it.[4] Consider the different circumstances surrounding the conviction, incarceration, and ultimate vindication of Jacob Gentry. Gentry was charged with first-degree murder in Sussex County, New Jersey for the 2008 beating death of David Haulmark. At his 2011 trial, Gentry admitted that he punched, elbowed, and kicked Haulmark in the head, causing his death. Gentry claimed that he was defending himself from a violent assault initiated by Haulmark, a former football linebacker who outweighed him by eighty pounds and harassed and physically attacked him in the past. The jury acquitted Gentry of murder but, rejecting his contention that he acted in self-defense, convicted him of aggravated manslaughter. He was sentenced to thirty years in prison. Gentry's conviction was reversed on appeal because of faulty jury instructions and other errors.[5] At his month-

2. The National Registry of Exonerations (NRE) includes both DNA-based and non-DNA-based exonerations. Through July 2, 2019, mistaken witness identification was a contributing factor in 703 of the 2,471 (28.5%) cases of wrongful conviction listed on the NRE. *The Cases, Detailed View: Mistaken Witness Identification*, NAT'L REGISTRY EXONERATIONS, bit.ly/32n0qGG [https://perma.unl.edu/AJ9E-XYSN] (last visited July 2, 2019).

3. *See* BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 45–73 (2000); *The Cases: Walter Snyder*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/walter-snyder/ [https://perma.unl.edu/DTU8-LN3A] (last visited Feb. 22, 2019); Snyder v. City of Alexandria, 870 F. Supp. 672, 675–77 (E.D. Va. 1994).

4. *See* JAMES R. ACKER & ALLISON D. REDLICH, WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY 9 (2d ed. 2019).

5. State v. Gentry, 106 A.3d 552 (N.J. Super. Ct. App. Div. 2015). The trial judge instructed the jury that self-defense was a complete defense to murder, but erroneously failed to instruct the jury that self-defense also was a complete defense to manslaughter. In addition, the prosecutor improperly referenced arguably incriminating statements attributed to Gentry's brother, who did not testify and hence was not subject to cross-examination.

long retrial in 2016, Gentry again contended that he killed Haulmark in self-defense. The jury found him not guilty and Gentry, after spending more than four years in prison, "walked out of the Sussex County Judicial Complex a free man."[6]

Cases like Gentry's, in which forensic DNA analysis is of no use in determining guilt or innocence, are absent from the Innocence Project's exoneration list. Indeed, cases involving the erroneous rejection of an affirmative defense are not "who-dunnits," rendering evidence of identity—which is at the heart of "wrong person" wrongful convictions—irrelevant. They instead concern whether "it"—a crime—occurred at all. A great many wrongful convictions eventuate not because the true perpetrator eluded detection and an innocent person was erroneously found guilty, but instead arise although a crime was never committed, which is to say there was no true perpetrator. More than one-third (910, or 36.8%) of the first 2,471 exonerations identified on the National Registry of Exonerations are "no crime" cases.[7] Such wrongful convictions occur, for example, through prosecutions in which fires with natural causes are erroneously defined as arson,[8] or

6. Joe Carlson, *Gentry, Who Once Faced 30 Years, Found Not Guilty on All Counts*, N.J. HERALD (Feb. 19, 2016), https://www.njherald.com/article/20160219/ARTICLE/302199998# (access through subscription); *Jacob Gentry*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5017 [https://perma.unl.edu/6JYE-AY93] (last visited Feb. 22, 2019).

7. *The Cases, Detailed View: No Crime*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=NC [https://perma.unl.edu/HYZ6-N36Z] (last visited July 2, 2019). A "no crime" case is defined as a case in which "[t]he exoneree was convicted of a crime that did not occur, either because an accident or a suicide was mistaken for a crime, or because the exoneree was accused of a fabricated crime that never happened." *Glossary: No Crime*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/ exoneration/Pages/glossary.aspx#NC [https://perma.unl.edu/3A6W-3WPN] (last visited Mar. 18, 2019). Nearly half (66/139, or 47.5%) of the exonerations reported in 2017 on the NRE were "no crime" cases, including sixteen for possession of drugs, eleven for child sex abuse, and nine for murder. *Exonerations in 2017*, NAT'L REGISTRY EXONERATIONS (Mar. 14, 2018), https://www.law.umich.edu/spevcial/ exoneration/Documents/ExonerationsIn2017.pdf [https://perma.unl.edu/Y7AT-5HF4].

8. Thirteen "no crime" arson cases were identified on the National Registry of Exonerations as of July 2, 2019. *See The Cases: No Crime, Arson*, NAT'L REGISTRY EXONERATIONS, bit.ly/2HMB9ft [https://perma.unl.edu/2VMX-X2SY] (last visited July 2, 2019). *See generally* Jessica S. Henry, *Smoke But No Fire: When Innocent People are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 677 (2018); Caitlin M. Plummer & Imran J. Syed, *Shifted Science Revisited: Percolation Delays and the Persistence of Wrongful Convictions Based on Outdated Science*, 64 CLEV. ST. L. REV. 483, 486–95 (2016); Andrea L. Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035, 1050–52 (2015).

when a child's accidental death or death from natural causes is ascribed to the "shaken baby syndrome" and deemed criminal.[9]

Perhaps surprisingly, considerable ambiguity surrounds the appropriate definition of a wrongful conviction[10] and, in particular, whether cases that hinge on the rejection or acceptance of an affirmative defense are appropriately classified as wrongful convictions when a guilty verdict is upset on appeal and the defendant subsequently is acquitted or otherwise exonerated. There is consensus that, in this context, wrongful convictions do not encompass cases tainted only by procedural error (sometimes referred to as "legal innocence,"[11]) but rather exclusively concern the conviction of persons who are actually innocent (or "factually innocent"[12]) of the charged crime. The crux of

9. Seventeen "no crime" cases involving shaken baby syndrome were identified on the National Registry of Exonerations as of July 2, 2019. *See The Cases, Detailed View: No Crime*, *Shaken Baby Syndrome*, NAT'L REGISTRY EXONERATIONS, bit.ly/38SQJSB [https://perma.unl.edu/M5TP-4C4L] (last visited July 2, 2019). *See generally* Henry, *supra* note 8, at 676–77; Plummer & Syed, *supra* note 8, at 511–18; Lewis & Sommervold, *supra* note 8, at 1054–56; Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1 (2009).

10. *See* Brad Smith, Marvin Zalman & Angie Kiger, *How Justice System Officials View Wrongful Convictions*, 57(5) CRIME & DELINQ. 663, 664 (2011) ("The definition of a wrongful conviction as the conviction of a factually innocent person masks the multiple meanings of 'wrongful conviction' . . . . [Convictions can be] wrongful in the factual sense (no crime was committed; the wrong person was convicted), wrongful in the culpability sense (a person performed the criminal act but is 'not culpable, either because of insanity or the absence of some other required indicium of culpability, usually a particular required mental state,'), and wrongful in the procedural sense (factually and culpably guilty defendants were convicted on the basis of constitutional or legal errors but found harmless by courts).") (quoting D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L & CRIMINOLOGY 761, 762 n.2 (2007)); Marvin Zalman, Brad Smith & Angie Kiger, *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72, 75 (2008) ("[F]actual or actual innocence . . . is typically thought of as the 'wrong person' scenario, where the convicted person did not commit the acts underlying the conviction, and was not connected to the crime by a conspiracy or the like. The definition of wrongful conviction, however, is more complex and no writing to date has systematically reviewed competing definitions.").

11. *See, e.g.*, Smith, Zalman & Kiger, *supra* note 10, at 75 ("Wrongful conviction has come to mean factual innocence. In law, a wrongful conviction also results from appellate court reversals based on procedural errors that negate the fair trial prerequisite of the Constitution. This may be called 'legal innocence.'") (footnote omitted); Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of Errors*, 53 CRIME & DELINQ. 436, 449 (2007) ("[O]ur definition [of wrongful conviction] refers to convicted individuals who are factually innocent. This is in contrast to legal innocence, which includes persons who may or may not be factually guilty but were nevertheless improperly convicted because of a prejudicial legal error at trial.") (citation omitted).

12. Smith, Zalman & Kiger, *supra* note 10, at 75; Ramsey & Frank, *supra* note 11, at 449.

the problem involves the meaning of actual innocence. No one disagrees that "wrong person" cases, such as Walter Snyder's, and "no crime" cases in which convictions were obtained although the envisioned harm did not, in fact, occur—such as when the presumed victim of a criminal homicide turns out to be alive[13]—are paradigmatic cases of actual innocence. Much murkier is whether convictions produced by the erroneous rejection of an affirmative defense qualify as "no crime" cases of wrongful conviction involving individuals who are actually innocent.

In their groundbreaking study of miscarriages of justice in potentially capital cases[14] in the United States between 1900 and 1985,

13. An early example is the 1819 conviction of Stephen and Jesse Boorn in Vermont for murdering their brother-in-law, Russell Colvin. Colvin disappeared shortly after being involved in a heated argument with the Boorns. Years passed before a relative of the Boorns reported being visited by an apparition which revealed to him that Colvin had been murdered and his body buried. An investigation discovered bones at the presumed burial site. First Jesse, and later Stephen confessed to killing Colvin. A jailhouse informant reported that Jesse had described the killing to him. Both brothers were convicted and sentenced to death following a jury trial, although Jesse's sentence later was commuted to life imprisonment. Publicity regarding the case appeared in New York City newspapers and eventually resulted in Colvin being found in New Jersey—where he was alive and well—and enticed to return to Vermont. He appeared just over a month before Stephen's scheduled hanging. Both Stephen and Jesse were exonerated following Colvin's appearance. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ERRORS OF ACTUAL INNOCENCE 14–21 (1932); GERALD W. MCFARLAND, THE "COUNTERFEIT" MAN: THE TRUE STORY OF THE BOORN/COLVIN MURDER CASE (1993); Center on Wrongful Convictions, *First Wrongful Conviction: Jesse Boorn and Stephen Boorn*, NW. PRITZKER SCH. L., http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/vt/boorn-brothers.html [https://perma.unl.edu/D29N-CRD8] (last visited Mar. 13, 2019). Other examples of "no crime" wrongful homicide convictions, in which the ostensible victim had not been killed, are provided in Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 42, 64–65 (1987); John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L.J. 781, 782–83 & n.8 (2018).

14. The category of "potentially capital cases" included murder and rape convictions resulting in death sentences; murder and rape cases in which the death penalty could have been imposed but was not; cases in which defendants were charged with capital crimes but were convicted of a lesser included offense (such as first-degree murder charges resulting in a conviction for second-degree murder); and criminal homicide cases prosecuted in non-death-penalty states that would have qualified for capital punishment in a death-penalty jurisdiction. Bedau & Radelet, *supra* note 13, at 31–36. More fundamentally, although the great majority (88%) of the 350 cases they identified as involving miscarriages of justice in potentially capital cases included official recognition of error indicating that an innocent person had been convicted, they included other cases as well. *Id.* at 48–49. They explained:

> Apart from those few cases where it was later established that no capital crime was committed, or that the defendant had an ironclad alibi, or that someone else was incontrovertibly guilty, there is no quantity or quality of evidence that could be produced that would definitively prove inno-

Bedau and Radelet adopted what they acknowledged were "relatively strict criteria"[15] for inclusion.

> [W]e use the term "miscarriage of justice" to refer only to those cases in which: (a) The defendant was convicted of homicide or sentenced to death for rape; *and* (b) when either (i) no such crime actually occurred, *or* (ii) the defendant was legally and physically uninvolved in the crime.[16]

Referring to Charles Black, Jr.'s lively treatise which explored the vagaries of death penalty law and practice,[17] they elaborated on their definitional choice. In the process they explicitly excluded cases involving defendants whose affirmative defenses were erroneously rejected.

> As Black observed, the "range of possible 'mistake' [in the death penalty's application] is much broader than [is usually supposed]." He identified three sorts of error—mistake of *law* and two types of mistake of *fact*. Black bifurcated the latter category into what he called mistake of "gross *physical* facts" and mistake of "*psychological* facts." As the term is used in this article, miscarriage of justice excludes Black's "mistake of law" and "psychological" errors. This results from our decision to adopt a very broad criterion for exclusion of cases that might otherwise be considered miscarriages of justice, as follows: If person *A* is convicted of killing person *B*, and *A* did in fact kill *B*, then *A* is not a victim of miscarriage of justice, even though it is later discovered that *A* was insane, acted in self-defense, or had some other legally valid excuse or justification.[18]

> cence. The most one can hope to obtain is a consensus of investigators after the case reaches its final disposition. Consensus can be measured in degrees, and the cases that we have included in our catalogue are those in which we believe a majority of neutral observers, given the evidence at our disposal, would judge the defendant in question to be innocent.

Id. at 47.

15. *Id.* at 45.
16. *Id.* (emphasis in original).
17. CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).
18. Bedau & Radelet, *supra* note 13, at 39–40 (quoting BLACK, *supra* note 17, at 24) (emphasis in original). Bedau and Radelet's reliance on Black's discussion of the many types of error that plague the death penalty's administration to exclude cases involving rejected affirmative defenses from the domain of miscarriages of justice is perhaps most understandable as a decision to avoid criticism for artificially enlarging the number of identified miscarriages. *See generally* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 126–28 (1988); Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 164 (1988). Indeed, Bedau and Radelet characterize the original conviction and death sentence of Erwin Simants in Nebraska, who was found not guilty by reason of insanity at his retrial following the reversal of his convictions on appeal, as "without doubt another miscarriage of justice in a capital case, but not the type with which we are concerned." Bedau & Radelet, *supra* note 13, at 41. Black considered "psychological" errors to be inevitable and argued that "the range of possible 'mistake' is much broader than" those involving "gross *physical* facts" such as: "Did this defendant . . . actually stab the deceased, or did somebody else do it?" Black continued,

Others who have grappled with defining wrongful convictions with an eye toward distinguishing between guilty verdicts marred only by legal or procedural error, and those involving the factually innocent, are unclear or do not explicitly address whether defendants who assert affirmative defenses while admitting to the *actus reus* of a crime are legitimately classified as actually innocent.[19] Some, at a mini-

> Having satisfied its mind as to the physical facts, the jury must then tackle the psychological facts. Did the defendant, who clearly (or admittedly) shot a man while that man was reaching for his handkerchief, believe that the man was reaching for a gun, or is the pretense that he so believed mere sham?

BLACK, *supra* note 17, at 24.

Black argued that the facts that must be determined "extend over a range both enormously wider and far more difficult than the question 'Did the defendant kill the deceased?'" *Id.* at 57. He referred to a

> case in which the critical question was not whether the defendant shot the deceased, which was conceded, but whether the deceased threatened the defendant with a knife, so that the shooting was in self-defense . . . . [T]he evidence consisted only of the defendant's own testimony, plus the reputation of the deceased for carrying a knife, and the finding of a knife—which had in the actual case *been concealed* by the prosecutor! Quite obviously, a jury can easily make a mistake in a case of that sort.

Id. (emphasis in original).

Black essentially argued that the definitional boundaries of insanity are so ill-defined that the concept of a mistaken rejection of an insanity defense is virtually meaningless, but that arbitrary decisions are inevitable. *Id.* at 59–64. Addressing the reliability of decisions involving the insanity defense, he asserted:

> [I]t is hard to apply the concept of *mistake*, of rightness or wrongness, to the application of criteria of the quality we have succeeded in expressing, criteria which we do not ourselves even pretend to understand. But what a fearful alternative faces us here! Either mistake is possible as to the application of such criteria, and therefore extremely likely to occur, given the quality of the criteria, or else the criteria themselves are quite meaningless, and mark no line. If the latter is true, then we are executing some people, and treating others medically, on an irrational basis.

Id. at 62 (emphasis in original) (quoting a lecture he previously delivered).

19. For example, Professor Givelber observed that requiring recognition of error by criminal justice system officials and "narrowly defining innocence as 'factual innocence,' meaning that the defendant was not the perpetrator . . . by implication leaves out several important categories of convicted innocents, such as those lacking the appropriate mens rea, *those possessing a complete defense*, and those erroneously convicted in an error-free trial." Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1327 (1997) (emphasis added) (footnote omitted). Poveda's study of wrongful convictions focused on "errors that result in the conviction and imprisonment of innocent persons. These are wrong-person errors . . . ." Tony G. Poveda, *Estimating Wrongful Convictions*, 18 JUST. Q. 689, 690 (2001). He continued: "The tradition of studying wrongful convictions . . . has erred on the side of a restrictive definition of wrongful conviction: evidence is required showing that someone else committed the offense or that the convicted person was uninvolved in the crime." *Id.* at 691–92 (footnote omitted) (citations omitted). However, "the concept of innocence can be broadened in a variety of ways including the counting of accidental killings, self-defense, and killings by a mentally ill offender." *Id.* at 692 n.6 (citing Bedau & Radelet, *supra* note 13, at 106–07).

mum, are skeptical. Professor Michael Risinger contrasted convictions that are wrongful "in the factual sense" with those that are wrongful "in the culpability sense."[20] In the former category are cases in which "no crime was committed or, more commonly . . . a crime was in fact committed, but by someone else."[21] The latter category concerns "the problem of convicting a person who has undoubtedly performed the actus reus of a crime for which they are not culpable, either because of insanity or the absence of some other required indicium of culpability, usually a particular required mental state."[22] In his study estimating the frequency of wrongful convictions in capital murder-rape cases, Risinger limited his focus exclusively to "factual innocence," thereby excluding "wrongful convictions based on jury misjudgments concerning mens rea, or other normatively charged determinations of the appropriate level of responsibility, including many affirmative defenses."[23]

While explaining this methodological limitation for his study, Risinger argued that "we are justified in being less concerned (though not unconcerned) about [wrongful convictions in the culpability sense] than cases of actual factual innocence."[24] Cases in which the wrong person has been convicted for a crime committed by someone else involve "brute facts of innocence,"[25] and they are "instinctive[ly]"[26] more troublesome than the conviction of people who are innocent only in the culpability sense. Why is this?

> First, if a human clearly does the acts that constitute the actus reus of an appropriately defined crime, he is, in a sense, properly at the mercy of vagaries of the resolution of those complex, no-one-right-answer, normatively charged judgments about what was going on in his head. "Errors" regarding those conclusions are thus just not of the same type or moral magnitude as errors convicting the wrong person.
>
> Second, given the often explicitly normative nature of the issues in such cases . . . a legitimate outcome is best served by allowing partisan attempts at normative contextualization on both sides. Whatever judgment the jury thereafter makes concerning the level of [a defendant's] responsibility, if any, seems legitimate and acceptable.[27]

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20. Risinger, *Innocents Convicted*, *supra* note 10, at 762 n.2.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id*. (citing D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1298–1307 (2004)).

25. Risinger, *Unsafe Verdicts*, *supra* note 24, at 1298 (quoting D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 114 (2000)).

26. Risinger, *Unsafe Verdicts*, *supra* note 24, at 1299.

27. *Id.* at 1299–1300 (footnotes omitted).

Risinger does not appear to be alone in adopting this position.[28] Yet the premises are tenuous, and the conclusions disputable if not

28. *See* George C. Thomas III, *Where Have All the Innocents Gone?*, 60 ARIZ. L. REV. 865, 870 (2018) (describing cases that "can never fit the classic wrongful conviction model") (citing Risinger, *Unsafe Verdicts*, *supra* note 24, at 1295–1307). Thomas points to instances

> where the defendant admits the act but asserts a defense or claims that his *mens rea* did not meet the statutory standard. For example, X admits that he killed Y but claims justification or that his *mens rea* was less than required by the homicide statute. It makes no sense to speak of wrongful convictions here. The fact finder's judgment on the affirmative defense or the *mens rea* issue is the received truth; that a different fact finder might have reached the opposite conclusion does not mean that the first one was false.

Id.

See generally Larry Laudan, *Different Strokes for Different Folks: Fixing the Error Pattern in Criminal Prosecutions by "Empiricizing" the Rules of Criminal Law and Taking False Acquittals and Serial Offenders Seriously*, 48 SETON HALL L. REV. 1243, 1251 (2018) ("Nor are many people disturbed by the fact that in many states . . . a defendant who presents a so-called affirmative defense can be rebutted and then convicted provided the state can show by a preponderance of the evidence that the defendant's exculpatory evidence is probably false."). Some other commentators appear to conflate affirmative defense issues and issues of *mens rea*. *See, e.g.*, Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 979–80 (2002) ("Legal innocence could be invoked when the defendant admits that he killed the victim, but offers an excuse or a justification that negates the deliberateness and intentionality of the action. Since the defendant admits to killing the victim, the burden of proof shifts to him to prove his theory of action. The contention is that without mens rea, a conviction for first degree murder is inappropriate. There are two situations that will be covered under this . . . type of innocence, both of which make use of affirmative defenses: self-defense, and mental capacity or state of mind."); Bedau & Radelet, *supra* note 13, at 40 ("Killing in self-defense is, of course, only one of several subcategories of homicide in which the mens rea of murder is absent.") (footnote omitted). As a formal matter, the prosecution must affirmatively prove the mens rea element of a crime to establish guilt, and a defendant who asserts an affirmative defense such as self-defense or insanity typically will have acted intentionally or purposely, i.e., the requisite *mens rea* to support a conviction. Affirmative defenses may negate culpability, even though the defendant acted with the *mens rea* that is an element of the crime. *See id.* at 40, n.90 (citing GEORGE FLETCHER, RETHINKING CRIMINAL LAW 398–400 (1978)). Perhaps for reasons owing more to pragmatic difficulties than conceptual disagreement with claims of innocence based on rejected affirmative defenses, some innocence organizations will not take on cases in which convicted individuals assert that their affirmative defense was wrongly rejected. *See, e.g.*, *Submit a Case*, CENTURION MINISTRIES, https://centurion.org/submit-a-case/ [https://perma.unl.edu/M8R5-94DA] (last visited June 14, 2019) ("We do not take on accidental death, self-defense cases, or cases where the defendant had any involvement whatsoever in the crime for which he/she was convicted."); *Submit a Case*, MIDWEST INNOCENCE PROJECT, https://themip.org/submit-a-case/ [https://perma.unl.edu/DSG6-QXHL] (last visited June 14, 2019) ("We do NOT accept cases with claims of self-defense, intoxication, insanity, or consensual sex.") (emphasis in original); *WIP Legal Assistance*, WIS. INNOCENCE PROJECT, https://law.wisc.edu/fjr/clinicals/ip/representation.html [https://perma.unl.edu/DMK6-KHV3] (last visited June 14, 2019) ("We cannot offer help if any of the following

untenable when applied to a great many cases in which individuals are convicted of crimes after their valid affirmative defenses are not credited. The difficulties are most clearly apparent when the rejected defense is in the justification family rather than taking the form of an excuse. Conduct that otherwise would be criminal is justified, and hence lawful, when necessary to prevent a harm of greater magnitude than the harm generally proscribed by the criminal law.[29] The actor who chooses the "lesser evil" to avert a greater one from ensuing is recognized as having engaged in the socially approved course of action.[30] Excuse defenses have a different grounding. They are recognized when actors confront disabilities which negate blameworthiness, thus making their condemnation and punishment by operation of the criminal law inappropriate. Unlike with justification defenses, the acts committed and the resulting harms continue to be disapproved and are lamented. Actors are excused from criminal responsibility because the requisite culpability for punishment is lacking.[31] Although the classification of justification and excuse defenses

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are true: . . . You acted in self-defense[;] You claim an affirmative defense such as insanity, intoxication, provocation . . . .").

29. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 216–17 (1982) ("All justification defenses have the same internal structure: triggering conditions permit a necessary and proportional response. The triggering conditions are the circumstances which must exist before the actor will be eligible to act under a justification . . . . The triggering conditions of a justification defense do not in themselves give the actor the privilege to act without restriction. To be justified, the response conduct must satisfy two requirements: (1) it must be necessary to protect or further the interest at stake, and (2) it must cause only a harm that is proportional, or reasonable in relation to the harm threatened or the interest to be furthered.").

30. PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 32–33 (2006); FLETCHER, RETHINKING CRIMINAL LAW, *supra* note 28, at 774–98 (1978); Robinson, *supra* note 29, at 214; Chunlin Leonhard, *Illegal Agreements and the Lesser Evil Principle*, 64 CATH. U. L. REV. 833, 841 (2015).

31. Robinson, *supra* note 29, at 229 ("Justified conduct is correct behavior which is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the act, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him. Excuses do not destroy blame . . . ; rather, they shift it from the actor to the excusing conditions. The focus is on the actor. Acts are justified; actors are excused.") (footnote omitted); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 726 (2004) ("Justification defenses focus on the act and not the actor—they exculpate otherwise criminal conduct because it benefits society, or because the conduct is in some other way judged to be socially useful. Excuse defenses focus on the actor and not the act—they exculpate even though an actor's conduct may have harmed society because the actor, for whatever reason, is not judged to be blameworthy.") (footnotes omitted); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 218–19 (4th ed. 2006).

is not always airtight,[32] self-defense, defense of others, defense of property, and necessity commonly are considered to conform to the justification framework.[33] Insanity, duress, and infancy (or tender years) are among the defenses typically recognized as excuses.[34]

We believe that individuals found guilty of crimes after their valid affirmative defenses are rejected have been wrongfully convicted and, moreover, that the miscarriages of justice in these cases are every bit as pronounced as in "wrong person" and other "no crime" wrongful convictions.[35] Indeed, convicting and punishing a person who, for example, had to kill or be killed while warding off an unlawful imminent lethal assault, or who drowned a child in obedience to a psychosis-induced deific command delusion, arguably would compound the injustice inhering in other cases of wrongful conviction. Such individuals can fairly be characterized as doubly victimized: first by the altogether unwelcome circumstances precipitating their action (a life-threatening attack, or suffering serious mental illness), and then by the malfunctioning of the criminal justice system in discounting those circumstances, rejecting their lawful defenses, branding them as criminals, and punishing them.

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32. For instance, duress "straddles the line between an excuse and a justification" and is not recognized uniformly as either type of defense in different jurisdictions. Madeline Engel, *Unweaving the Dixon Blanket Rule: Flexible Treatment to Protect the Morally Innocent*, 87 OR. L. REV. 1327, 1331 (2009); Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 389 (2005). Likewise, self-defense based on mistaken facts is sometimes considered to be an excuse, and sometimes a form of justification. *See* Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57 (2010); Kyron Huigens, *The Continuity of Justification Defenses*, 2009 U. ILL. L. REV. 627 (2009). In addition, affirmative defenses, which defendants often have the burden of establishing, are distinct from elements of the crime (such as *mens rea*, for example, which may be at issue in mistake-of-fact cases), which the prosecution of course must prove beyond a reasonable doubt. *See, e.g.*, Paul H. Robinson & Michael T. Cahill, *supra* note 30, at 208 ("A line of [U.S. Supreme Court] cases from the 1970s indicates that the government must bear the burden of persuasion for any issue defined as an offense element—though importantly, the cases do not impose such a requirement for issues characterized as 'defenses' or 'mitigations.'").

33. Milhizer, *supra* note 31, at 812–16; Robinson, *supra* note 29, at 214–16.

34. Milhizer, *supra* note 31, at 816–20; Robinson, *supra* note 29, at 223–29. With respect to the infancy defense, see generally Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1586–87 (2018); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1007–10 (1932).

35. *See* Paul G. Cassell, *Overstating America's Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 819–20 (2018) (while limiting the focus of his article to "wrong person" and "no crime" cases of actual innocence, Professor Cassell observed: "To be sure, situations where a defendant presents a legal claim (e.g., self-defense) that the jury mistakenly rejects are tragedies in their own right—and 'wrongful convictions' in some general, moral sense.") (footnote omitted).

In the following section we identify several individuals who were convicted of crimes after their affirmative defenses were rejected, only to be subsequently exonerated. Of course, an exoneration[36] does not invariably signify factual innocence.[37] The inexact correspondence between an exoneration and actual innocence is not unique to cases that hinge on the acceptance or rejection of affirmative defenses. Whatever ambiguities attach to exonerations in cases involving affirmative defenses should not undermine the conclusion that the erroneous rejection of a meritorious affirmative defense represents a fundamental

36. The National Registry of Exonerations defines the terms "exoneration" and "exoneree" as follows:

> **Exoneration**—A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt.
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> **Exoneree**—A person who was convicted of a crime and later officially declared innocent of that crime, or relieved of all legal consequences of the conviction because evidence of innocence that was not presented at trial required reconsideration of the case.

Glossary, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#NC [https://perma.unl.edu/VLP2-KLPQ] (last visited Mar. 19, 2019) (emphasis in original). *See also* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1162, 1184–85 (2010–2011) (providing standard definition of "exoneration" and contrasting this definition with the narrower meaning of "innocent").

37. *See, e.g.*, Daniel H. Benson, Hans Hansen & Peter Westfall, *Executing the Innocent*, 3 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 1, 9 (2013) ("Exonerations are the few cases out of the many, many wrongful convictions that are rectified and in which defendants are granted some type of relief. For the purposes of this article, we do not take exoneration as an indication of innocence. It is a necessary, but not sufficient, criteria [sic] to be included in our count of 'actual innocents.' For example, even though a defendant was exonerated, prosecutors might not have pursued retrial for a myriad of reasons, making a hard decision to instead dismiss the charges. Sometimes, key witnesses are no longer willing to testify, making it almost impossible for prosecutors to retry the case. For these reasons, we do not simply count 'exonerated' as innocent."); Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L & CRIMINOLOGY 501, 508 (2005).

miscarriage of justice involving a person who, in the eyes of the law, has not committed a crime.

III. WHEN REJECTED AFFIRMATIVE DEFENSES PRODUCE WRONGFUL CONVICTIONS: CASE STUDIES

A. Exonerations in the Wake of Rejected Justification Defenses

Narcisse Antoine. Narcisse Antoine shot and killed Brandon Hammond and wounded Jeffrey Thompson during a 2009 pre-dawn affray in the parking lot of a West Palm Beach, Florida nightclub. Hammond and Thompson had been ejected from the nightclub after repeatedly harassing patrons. The two men were haranguing a group in the parking lot when Antoine exited the establishment and attempted to intercede as a peacemaker. Thompson and Hammond responded with profanity and racial slurs, followed by Hammond's punching Antoine in the jaw. At that point, Antoine drew a pistol and told the men to leave. When Hammond reached into his pants or shirt, Antoine shot him multiple times, claiming he was afraid that Hammond was retrieving a gun. He then shot Thompson, asserting that he feared Thompson was reaching for a gun while advancing on him. Antoine was charged with murdering Hammond and with the attempted murder of Thompson. He pled not guilty at his 2011 trial, contending that he acted in self-defense. The jury was unable to reach a verdict on the murder charge but convicted Antoine of attempting to murder Thompson. Antoine was sentenced to twenty-five to forty years imprisonment.[38]

On appeal, the Florida District Court of Appeal ruled that the trial judge erred in declining to instruct the jury that Hammond's reputation for violence could be considered relevant to the self-defense claim even if Antoine was unaware of it.[39] Two trial witnesses, both bounc-

38. Antoine v. State, 138 So. 3d 1064, 1067–72 (Fla. Dist. Ct. App. 2014); *Narcisse Antoine*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4681 [https://perma.unl.edu/V2K2-KD37] (last visited Apr. 12, 2019) [hereinafter *Narcisse Antoine*]. The appellate court subsequently ruled that Antoine's sentence exceeded the maximum of twenty-five to thirty years permitted by Florida law. *Antoine*, 138 So. 3d at 1077–78.

39. Over objection, the trial court relied on a Florida Standard Jury Instruction to charge the jury:

> If you find that Brandon C. Hammond had a reputation of being a violent and dangerous person, *and that their [sic] reputation was known to the defendant*, you may consider the fact in determining whether the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation.

Antoine, 138 So. 3d at 1072 (emphasis added). The appellate court explained that the defendant's knowledge of the victim's reputation for violence may be required when relevant to the defendant's reasonable belief that it was necessary to use

ers at the club where the night's events began, testified that Hammond had a reputation for violence.[40] The appellate court concluded that although the reputation testimony was limited to Hamilton, Thompson had "acted in concert" with Hamilton, which could help "explain why [Antoine] felt apprehensive regarding Thompson's conduct"[41] as well. Antoine was awarded a new trial. The prosecution revived the murder charge against Hammond, which resulted in a hung jury at the original trial, in addition to the attempted murder charge against Thompson. At his 2015 retrial, Antoine again claimed that he shot the men in self-defense. After deliberating for more than eleven hours, the jury found Antoine not guilty of both charges.[42]

Jacob Cash. Jacob Cash claimed that he shot and killed Willie McCloud, a hitchhiker he picked up in Ybor City, Florida, while defending against McCloud's attempted carjacking. Law enforcement authorities maintained that Cash stole the car he was driving and shot McCloud in a dispute over drugs. Hillsborough County prosecutors charged Cash with second-degree murder and shooting into a vehicle. Jeremy Fields, an employee at the automotive dealer that owned the car Cash was driving, testified at Cash's 1998 trial that Cash indeed stole the car. A detective testified that bullet cartridges were found outside of the vehicle, suggesting that, contrary to Cash's trial testimony, Cash was not inside the car and attempting to climb out the window to escape an attempted carjacking when he fired his gun. Cash further denied that he stole the car, claiming that Fields loaned him the vehicle.[43] The jury found Cash guilty and the trial judge imposed a fifty-year prison sentence for the murder conviction. That sentence was vacated on appeal because it exceeded the governing guidelines without written justification.[44]

After the case was remanded for resentencing, the Florida District Court of Appeal ordered the trial court to conduct an evidentiary hearing on Cash's post-conviction allegations that Fields lied when he testified that Cash stole the car and that the prosecutor knew that the testimony was false. These claims were supported by the sworn affidavit of the owner of the automotive dealer where Fields had been em-

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defensive force, but it was not necessary concerning whether the victim was the unlawful aggressor. *Id.* at 1075–76.

40. *Id.* at 1072.

41. *Id.* at 1076.

42. Marc Freedman, *Man Acquitted of Murder, Attempted Murder in Double Shooting*, SOUTH FLA. SUN-SENTINEL (Apr. 27, 2015), https://www.sun-sentinel.com/local/palm-beach/boynton-beach/fl-shooting-death-acquittal-20150424-story.html [https://perma.unl.edu/GB5U-FC6S]; *Narcisse Antoine*, *supra* note 38.

43. *Jacob Cash*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3093 [https://perma.unl.edu/AJJ8-XG5F] (last visited Apr. 19, 2019) [hereinafter *Jacob Cash*]; Cash v. State, 875 So. 2d 829 (Fla. Dist. Ct. App. 2004).

44. Cash v. State, 779 So. 2d 425 (Fla. Dist. Ct. App. 2000).

ployed. The appellate court additionally directed a hearing on Cash's allegation that his trial attorney provided ineffective assistance by failing to request a self-defense instruction for carjacking rather than for aggravated battery.[45] Cash was granted a new trial, which took place in 2008, ten years after his original trial and conviction. He again maintained that he shot McCloud to defend against the attempted carjacking. His lawyer presented evidence that Cash was left-handed, thus offering an explanation for why the spent cartridges were found outside of the car that was consistent with Cash's claim that he was inside of the vehicle when he discharged his gun. The jury found Cash not guilty and he was released from custody.[46]

Anthony Chambers. In February 2008, Anthony Chambers stabbed Edward Quiles in the neck, causing his death, during an altercation in an apartment in the South End section of Boston. The fight capped "eighteen hours of close-quartered and drug-soaked friction."[47] It erupted after Quiles was unable to locate a bag of heroin and accused Chambers of taking it, which Chambers denied. Chambers's 911 call to report that Quiles was threatening to kill him included background noise of the attack. Chambers later told the police that Quiles swung at him, threw him on a bed, pulled out a knife, and tried to stab him. Chambers claimed that he defended himself by pushing back Quiles's hand, resulting in Quiles being stabbed. Chambers was arrested and charged with manslaughter.[48]

To support Chambers's justification defense, Chambers's attorney announced during his opening argument at trial that he would call a witness to testify about Quiles's prior violent conduct. Under Massachusetts law such evidence was admissible to help substantiate that the victim was the initial aggressor in cases in which self-defense was raised.[49] Although the trial judge ruled at the outset of the trial that Chambers's witness would be allowed to offer such testimony, she later excluded it because the evidence was uncontroverted that Quiles was the initial aggressor in the fight with Chambers.[50] At the end of the five-day trial, the jury convicted Chambers of involuntary manslaughter and he was sentenced to five to seven years in prison.[51] The Massachusetts Court of Appeals affirmed Chambers's conviction in

45. *Cash*, 875 So. 2d at 829.

46. *Jacob Cash*, *supra* note 43.

47. Commonwealth v. Chambers, 966 N.E.2d 816, 824 (Mass. App. Ct. 2012), *rev'd*, 989 N.E.2d 483 (Mass. 2013).

48. Commonwealth v. Chambers, 989 N.E.2d 483, 486–89 (Mass. 2013).

49. Commonwealth v. Adjutant, 824 N.E.2d 1 (Mass. 2005).

50. *Chambers*, 989 N.E.2d at 485, 489.

51. *Id.*; *Anthony Chambers*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4985 [https://perma.unl.edu/NEW7-MJC2] (last visited Apr. 23, 2019) [hereinafter *Anthony Chambers*].

2012[52] but the Supreme Judicial Court reversed the following year and remanded for a new trial, ruling that the excluded evidence was admissible[53] and that the error was especially prejudicial because defense counsel was precluded from fulfilling his promise to the jury that he would present testimony from a witness to help demonstrate Quiles's propensity for violence.[54] Chambers was released from custody on bond in late 2013 and was acquitted at his 2014 retrial.[55]

Gabriel Drennen. While moving out of the Riverton, Wyoming mobile home in May 2010 that he rented from Gabriel Drennen, Leroy Hoster sought access to tools he stored in a locked storage unit that Drennen owned. Hoster needed the tools to change a flat tire on his car. Drennen refused to help and the men exchanged words. After Hoster and his friend Michael Adams returned to the trailer, Drennen approached carrying "No Trespassing" signs and tape, with a gun holstered on his hip. Further words were exchanged and Hoster, infuriated, "grabbed [Drennen], and threw him from the porch over a three to four foot high fence into the yard."[56] Drennen landed on his back and tried to slide backward as Hoster began climbing the fence and, according to Drennen, threatened to kill him. Drennen thereupon fired five shots at Hoster, striking him four times. Drennen then pointed his gun at Adams, who was standing behind Hoster's car. Drennen and Adams each called 911 and attempted to minister to Hoster, who died from his wounds after being taken to a hospital. Drennen was arrested and charged with the first-degree murder of Hoster and with aggravated assault and battery for pointing his gun at Adams.[57] Drennen claimed he acted in self-defense.

The prosecutors at Drennen's 2011 trial represented to the jury, during both their opening statements and closing arguments, that

52. *Chambers*, 966 N.E.2d at 824.
53. *Chambers*, 989 N.E.2d at 490–91 ("Where a victim's prior act or acts of violence demonstrate a propensity for violence, we conclude that *Adjutant* evidence is as relevant to the issue of who initiated the use or threat of deadly force as it is to the issue of who initiated an earlier nondeadly assault, and such evidence may be admitted to assist the jury where *either* issue is in dispute, because the resolution of both issues may assist the jury in deciding whether the prosecution has met its burden of proving that the defendant did not act in self-defense.") (emphasis in original).
54. *Id.* at 492–95.
55. *Anthony Chambers*, *supra* note 51.
56. Drennen v. State, 311 P.3d 116, 121 (Wyo. 2013).
57. *Id.*; Associated Press, *Riverton Police: Landlord-Tenant Dispute Led to Shooting*, BILLINGS GAZETTE (May 6, 2010), bit.ly/2SR5HDd [https://perma.unl.edu/R2GU-XRE6]; Megan Cassidy, *Fremont County, Wyoming, Attorney Moves to Dismiss Charges in Homicide Case*, CASPER STAR-TRIB. (Dec. 20, 2013), bit.ly/2wEKP9y [https://perma.unl.edu/2Z2X-MK9S]; *Gabriel Drennen*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4335 [https://perma.unl.edu/2PCC-QMB6] (last visited Apr. 23, 2019) [hereinafter *Gabriel Drennen*].

Drennen's actions could not be justified as self-defense because Hoster was unarmed when he was shot. One prosecutor asked the jury in his closing argument to "return with a verdict of guilty, because you see: in the state of Wyoming, there is a law against shooting an unarmed man."[58] The other argued that Drennen "didn't know the law. He thinks he's justified. He thinks he can shoot and kill someone even though they are unarmed."[59] Drennen was found guilty of both charges. He was sentenced to life imprisonment for Hoster's murder and ten years for the aggravated assault and battery against Adams.[60]

The Wyoming Supreme Court reversed, ruling that the prosecutors committed plain error by misrepresenting that the law flatly prohibited shooting an unarmed person in self-defense. The court explained that whether the victim was armed when shot may be relevant to whether the defendant acted reasonably when using deadly force in ostensible self-defense, but it is not determinative. Rather, the jury must consider the totality of the circumstances in assessing the reasonableness of both the defendant's perception that he was threatened with immediate bodily injury and the manner in which he defended himself.[61] The court concluded that the murder and the aggravated assault and battery convictions were both "tainted,"[62] and granted Drennen a new trial. Following the remand, the county attorney—who did not prosecute the charges originally—dismissed both counts, explaining that his review of the case "shows a prosecution based on disregard for the evidence, the law, and this office's commitment to justice."[63]

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58. *Drennen*, 311 P.3d at 122. Similar assertions were made during the opening statement and closing arguments. *Id.* In addition, when Drennen's attorney said during his opening statement, "There's nothing in the law that says you can't shoot an unarmed man," one prosecutor objected, asserting, "That is improper at this point to make a statement like that and I would submit it's a misstatement of the law." Without directly ruling on the objection, the trial judge simply stated, "Let's move on, counsel." *Id.* at 123.

59. *Id.* at 122.

60. *Id.* at 121.

61. *Id.* at 122. Under Wyoming law, "[t]he defendant has an initial burden of making a prima facie case that he acted in self-defense; however, once that minimal burden is satisfied, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." *Id*. at 124–25.

62. *Id.* at 124.

63. Cassidy, *supra* note 57 (quoting Fremont County Attorney H. Michael Bennett's media release). Bennett cited two factors as being "crucial" to the decision to dismiss the charges against Drennen. First, forensic evidence indicated that Drennen and Hoster "were in very close proximity to one another when the shots were fired," thus preventing Drennen from escaping Hoster's aggressive charge. Additionally, Drennen's firing multiple shots at Hoster was not inconsistent with a claim of self-defense because "[e]xperts say that humans are wired to continue to shoot until the threat is neutralized." *Id.*

Harold Fish. While hiking in a National Forest near Strawberry, Arizona in May 2004, fifty-seven-year-old Harold Fish, a retired high school teacher, observed a man some thirty yards ahead lying on the ground alongside the foot trail. With the man—forty-three-year-old Grant Kuenzli—were three sizeable unleashed dogs, two of which charged toward Fish, growling and barking. Fish yelled in an attempt to get Kuenzli to control the dogs. When Kuenzli took no action and the dogs advanced to within a few feet of him, Fish fired a warning shot into the ground from the semiautomatic handgun he was carrying. The shot caused the dogs to veer to the side of the trail. Kuenzli proceeded to rush toward Fish "with his eyes crossed and looking crazy and enraged, cursing at [Fish] and yelling that he was going to hurt" him.[64] Fish warned Kuenzli to leave him alone and to stop or he would shoot, but Kuenzli "continued to race toward him, accelerating, yelling profanities and swinging his arms."[65] With Kuenzli within five to eight feet of him, and the dogs still to his side and thus constraining his movement, Fish shot Kuenzli three times in the chest. Fish placed his backpack under Kuenzli's head, covered him with a tarp, and then walked to a nearby road and asked a passing motorist to summon help. Paramedics soon arrived but Kuenzli had already died.[66]

Fish was charged with second-degree murder. He pled not guilty, claiming he acted in self-defense. The shooting generated national attention. As described in an *NBC Dateline* broadcast, "Dog lovers were pitted against gun lovers. [The case] fueled the debate on gun control versus self control. The National Rifle Association even got involved, partially sponsoring Harold Fish's defense fund."[67] At his trial, Fish sought to introduce testimony from several witnesses about similar encounters they had with Kuenzli and his dogs along the hiking trail, specifically that Kuenzli become enraged and acted erratically and aggressively, frequently involving confrontations concerning his dogs. Although the trial court admitted evidence regarding Kuenzli's general reputation for violence, it excluded testimony about the specific acts of violence witnesses were prepared to describe, reasoning that such testimony was irrelevant because Fish lacked personal knowledge of the prior violent acts.[68]

64. State v. Fish, 213 P.3d 258, 262 (Ariz. Ct. App. 2009), *appeal denied*; *Harold Fish*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4266 [https://perma.unl.edu/MS7U-KM33] (last visited Apr. 25, 2019) [hereinafter *Harold Fish*].

65. *Fish*, 213 P.3d at 262.

66. *Id.*

67. John Larson, *Trail of Evidence*, NBC DATELINE (Oct. 9, 2006), http://www.nbcnews.com/id/15199221/ns/dateline_nbc-crime_reports/t/trail-evidence/#.XMHegdh7kkI [https://perma.unl.edu/5645-HLB5].

68. *Fish*, 213 P.3d at 263–64.

In 2004, when Fish shot Kuenzli, Arizona law required defendants to persuade the jury by a preponderance of the evidence that they acted in justifiable self-defense.[69] Owing in part to the interest generated by Fish's case, the law was changed in 2006 to require the prosecution to prove beyond a reasonable doubt that the defendant did not act in self-defense under designated circumstances, including defense against aggravated assault.[70] Although Fish's trial was in progress when this revision took effect, the new law did not apply retroactively to his case.[71] The trial jury heard fifteen days of testimony. During deliberations, the jury asked the judge to define "attack" as used in a portion of the self-defense instructions, but the judge declined to explain that an "unlawful attack" under Arizona law subsumed the offense of aggravated assault, which does not require a physical touching.[72] The jury ultimately found Fish guilty of second-degree murder and he was sentenced to ten years in prison.[73]

The Arizona Court of Appeals reversed. It instructed the trial court to consider on remand whether testimony concerning Kuenzli's prior violent acts was admissible. Even though Fish lacked knowledge of the prior conduct at the time of their confrontation, his account of Kuenzli's actions, made immediately after the shooting, so closely mirrored the description others gave that the evidence was logically relevant as bearing on Fish's credibility.[74] The appellate court further determined that the trial court's failure to define aggravated assault when it instructed the jury on the law of self-defense when a defendant is subjected to unlawful attack was reversible error.[75] Citing "a lack of evidence and witnesses to the shooting,"[76] the prosecution declined to retry Fish and the charges against him were dismissed.[77]

Larry Gurley. A struggle involving Larry Gurley and Felix Miranda outside of a Brooklyn apartment in 1971 culminated with Gur-

69. *Id.* at 262 n.4 (citing ARIZ. REV. STAT. ANN. § 13-205(A) (2001)).

70. ARIZ. REV. STAT. ANN. §§ 13-205(A), 13-411 (2006). *See* Larson, *supra* note 67 ("Arizona law was changed recently, in part because of this case. Now, instead of a defendant having to prove he acted in self-defense, the burden is on the prosecutors.").

71. *Fish*, 213 P.3d at 262 n.4 (citing Garcia v. Browning, 151 P.3d 533, 537 (Ariz. 2007)). In 2009, a statute was enacted making the legislative change regarding the burden of proof retroactive. *See* State v. Montes, 245 P.3d 879 (Ariz. 2011) (citing S.B. 1449, 2009 S., 1st Reg. Sess. (Ariz. 2009)).

72. *Fish*, 213 P.3d at 278–79.

73. *Id.* at 263.

74. *Id.* at 271–75.

75. *Id.* at 276–79.

76. Christian Palmer, *Harold Fish Wins Another Legal Battle over 2004 Killing*, ARIZ. CAPITOL TIMES (Dec. 3, 2009), https://azcapitoltimes.com/news/2009/12/03/harold-fish-wins-another-legal-battle-over-2004-killing/ [https://perma.unl.edu/N3LA-GMDF].

77. *Harold Fish*, *supra* note 64.

ley shooting and wounding Miranda and shooting and killing Jose Moreno, who was standing nearby. Gurley was charged with the attempted murder of Miranda and with murdering Moreno. A week prior to the double shooting, Miranda, who was described by his wife as a "stick up artist" who frequently carried guns,[78] shattered Gurley's right arm with a gunshot, causing the right-handed Gurley to be fitted with a cast extending to his knuckles.[79] Regarding the incident that led to the charges against him, Gurley maintained that when they reached the stoop of the apartment they just exited, Miranda pistol-whipped him in the head. Gurley grabbed the pistol barrel with his left hand and swung his right arm, encased in the cast, at Miranda. The gun discharged and a single bullet fatally wounded Moreno, who was standing below at street level. The gun fell to the ground as Miranda and Gurley spilled downward to the street and continued fighting. Gurley grabbed the gun and shot Miranda while defending himself.[80]

The prosecution's theory was quite different, asserting essentially that Gurley had been armed and, without provocation and while using his left hand, fired multiple shots from the sidewalk at Miranda and Moreno, who stood above him on the elevated apartment stoop. Moreno's autopsy report indicated that the fatal bullet ("estimated to be a .25 caliber"[81]) had taken a *downward* path through his body, thus casting doubt on the scenario envisioned by the prosecutor and tending to support Gurley's claim that he was on the stoop and Moreno was below him on the street when the gun discharged. However, Gurley's ballistics expert conceded on cross-examination that a .25 caliber bullet could have deflected downward after striking Moreno's sternum, thus coinciding with the prosecution's version of events.[82] The prosecution's case was bolstered by the testimony of Miranda's wife, who had separated from Miranda, and her friend who lived in the apartment below. Miranda did not testify at Gurley's trial; he had been shot in an unrelated incident and died a week before the trial.[83]

Rejecting Gurley's claim that Moreno's shooting was accidental and that he shot Miranda in self-defense, the jury at Gurley's 1972 trial found him guilty of murder and attempted murder. Gurley was

78. People v. Gurley, 386 N.Y.S.2d 640, 641 (N.Y. App. Div. 1976), *aff'd*, 369 N.E.2d 1183 (N.Y. 1977), *motion for reargument denied and motion to amend remittitur granted*, 373 N.E.2d 287 (N.Y. 1977).

79. *Id.*

80. *Id.*

81. *Id.* at 642.

82. People v. Gurley, 602 N.Y.S.2d 184, 184–85 (N.Y. App. Div. 1993).

83. *Gurley*, 386 N.Y.S.2d at 642.

sentenced to twenty years to life imprisonment.[84] In a 3–2 decision, the Appellate Division of the New York Supreme Court affirmed,[85] with one of the dissenting judges strenuously arguing that the evidence was insufficient to establish guilt beyond a reasonable doubt and, moreover, that the judge's jury instructions on self-defense were erroneous.[86] The New York Court of Appeals affirmed in a one-paragraph memorandum opinion.[87]

In 1991, Gurley filed a motion for a new trial based on newly discovered evidence. He secured access to a previously undisclosed supplemental police report which concluded that the bullets used in the 1971 shootings were .22 caliber, and not .25 caliber as had been speculated at Gurley's trial. This discrepancy was significant. In contrast to the larger .25 caliber bullet, evidence elicited at the trial indicated that "a .22 caliber bullet . . . would have fragmented had it struck a bone in the victim's body."[88] The new evidence thus undermined the prosecution's suggestion that the downward path taken by the bullet that killed Moreno was consistent with Gurley firing upward at him from street level because the bullet's trajectory could have been altered by the bullet striking Moreno's sternum. The post-conviction hearing court vacated Gurley's convictions, reasoning that a more favorable verdict was probable had the newly-discovered evidence been available and considered at his trial. The Appellate Division affirmed.[89] In 1994, the Kings County District Attorney's Office dismissed the charges against Gurley.[90]

Matthew Holbrook. Chris Wirth told his friend Matthew Holbrook that a group of five or six people attacked him after someone threw a rock at the truck he was driving. He announced that he was going to get a gun and confront the individual who threw the rock. After hearing from Wirth that none of his attackers had weapons, Holbrook removed the clip from Wirth's gun and returned the unloaded gun to him. Holbrook then drove Wirth and another friend to the Detroit neighborhood where Wirth had been attacked. Wirth spotted Kryice Higgins, one of his attackers, sitting on the porch in front of a house. Holbrook remained in his car while Wirth exited the vehicle and advanced toward Higgins. At that, Holbrook noticed movement on the porch, heard a "pop," and saw a muzzle flash. Apparently believing

84. *Larry Gurley*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4312 [https://perma.unl.edu/UZ7G-2RFS] (last visited Apr. 26, 2019) [hereinafter *Larry Gurley*].
85. *Gurley*, 386 N.Y.S.2d at 641.
86. *Id.* at 640–43 (Margett, J., dissenting).
87. People v. Gurley, 369 N.E.2d 1183 (N.Y. 1977), *motion for reargument denied and motion to amend remittitur granted*, 373 N.E.2d 287 (N.Y. 1977).
88. People v. Gurley, 602 N.Y.S.2d 184, 185 (N.Y. App. Div. 1993).
89. *Id.*
90. *Larry Gurley*, *supra* note 84.

that someone was shooting in their direction, Holbrook, who had a permit to carry a concealed weapon, fired his gun toward the muzzle flash. He told Wirth, who had been shot in the ankle, to get into his car and they drove away. Holbrook later learned that his shot struck and killed Lavaile Manciel, who had been on the porch. He was arrested in December 2005, several months after the July 1 shooting, and was charged with second-degree murder and unlawful possession of a firearm during the commission of a felony.[91]

Holbrook claimed at his June 2006 trial that he fired his gun in self-defense. Higgins, however, testified for the prosecution that Manciel, the shooting victim, was unarmed and had never fired a gun. A medical examiner testified that the bullet that struck Manciel would have paralyzed him and since his body lay in the driveway it was unlikely that he would have been shot while on the porch of the house. Holbrook was convicted and sentenced to seventeen to twenty-seven years in prison.[92]

The Michigan Court of Appeals granted Holbrook a new trial in 2008. The court ruled that Holbrook's trial attorney provided ineffective assistance because he failed to have Manciel's clothing tested for gunshot residue. Holbrook's "self-defense theory depended, inter alia, upon the jury believing that Manciel fired the first shot, and because defense counsel had the means to support the theory by conducting a simple test, the failure to conduct the test was not reasonable."[93] Moreover, "the evidence would have contradicted the testimony of the prosecution's only eyewitness, Kyrice Higgins, an admitted drug dealer and convicted criminal, who stated . . . that Manciel did not possess or fire a weapon on the night in question."[94] When the test was conducted, it revealed that gunshot residue was indeed on Manciel's clothing.[95] Holbrook's new attorney additionally noticed from photographs that the steps at the site of the shooting were wet and he elicited testimony that blood was on them. When questioned at Holbrook's retrial, the medical examiner conceded that this information was consistent with Manciel being shot while still on the porch, and then tumbling down the steps and falling into the driveway.[96] Holbrook's initial retrial ended in a hung jury but when he was again tried, in October 2009, a jury found him not guilty.[97]

91. People v. Holbrook, No. 271562, 2008 WL 2917641 (Mich. Ct. App. July 29, 2008); *Matthew Holbrook*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5161 [https://perma.unl.edu/8VBG-4Z82] (last visited Apr. 29, 2019) [hereinafter *Matthew Holbrook*].
92. *Matthew Holbrook*, *supra* note 91.
93. *Holbrook*, 2008 WL 2917641, at *2.
94. *Id.* at *3.
95. *Matthew Holbrook*, *supra* note 91.
96. *Id.*
97. *Id.*

Dennis Lewchuk. Prior to Dennis Lewchuk arriving at the Brass Rail bar in Norfolk, Nebraska, James Warner distinguished himself by shoving, gouging the eyes of, beating, and picking fights with various patrons. After Lewchuk entered the bar around midnight on December 21, 1979, Warner began disparaging the Joker's Wild motorcycle gang, which Lewchuk was affiliated with. The two men left together in Lewchuk's car. They would later agree that the toughness of Joker's Wild members was a topic of discussion, but not what led to their violent altercation which culminated with Lewchuk stabbing Warner twenty-five times and inflicting wounds which necessitated roughly 500 stitches. Lewchuk claimed that Warner karate chopped him in the throat, pulled him to the car floor, and choked him until he nearly blacked out, at which point Lewchuk drew his knife and stabbed Warner in self-defense. Warner contended that Lewchuk repeatedly stabbed him without warning and that he managed to escape and get help after the car ran off the road. Lewchuk was later arrested and charged with first-degree assault.[98]

Lewchuk's first trial, wherein the judge allowed several witnesses to testify about the specific acts of violence they observed Warner engage in prior to Lewchuk's arrival at the Brass Rail bar, ended in a hung jury. At Lewchuk's retrial in September 1980, which took place in a different county, the judge prohibited testimony about Warner's violent conduct that occurred prior to Lewchuk's arrival, concluding that since there was no evidence Lewchuk was aware of that conduct, it had no bearing on whether he reasonably feared Warner and hence it was irrelevant to his claim that he acted in self-defense. The jury found Lewchuk guilty. Lewchuk failed to appear at his sentencing hearing and several years passed before he was located in Alabama and returned to Nebraska. Two dozen residents of the Alabama town where Lewchuk had relocated drove to Nebraska to offer testimony about Lewchuk's exemplary character and good behavior at the 1994 sentencing hearing. The judge sentenced Lewchuk to serve five to ten years in prison on the assault conviction, and to a concurrent one-year term for escaping.[99]

On appeal, the Nebraska Court of Appeals reversed, ruling the exclusion of evidence about Warner's specific acts of violence was prejudicial error. The evidence was admissible to support Lewchuk's contention that Warner was the initial aggressor in the fight that resulted in Warner's being stabbed and thus was relevant to Lewchuk's self-defense claim even if Lewchuk had no knowledge of Warner's vio-

98. State v. Lewchuk, 4 Neb. App. 165, 167, 539 N.W.2d 847, 849–51 (1995).

99. *Dennis Lewchuk*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4566 [https://perma.unl.edu/QYB9-D2SG] (last visited Apr. 30, 2019) [hereinafter *Dennis Lewchuk*]; *Lewchuk*, 539 N.W.2d at 850–51.

lent conduct.[100] Following the reversal, the prosecution dismissed the assault charge against Lewchuk. Because he served the one-year sentence imposed for escape, Lewchuk was released from prison.[101]

Michael Linder. In 1979, a South Carolina jury convicted Michael Linder of murder and sentenced him to death for slaying a Highway Patrolman, Willie Peeples. Linder had been speeding on his motorcycle and then led the officer on an extended chase after refusing to pull over in response to the squad car's flashing lights. Peeples finally caught up with Linder on a stretch of road. Then, according to the prosecution, Linder used a concealed revolver to shoot Peeples as the officer attempted to place him under arrest. Linder seized the fallen officer's gun and ran away, the government contended, and thereafter inserted the spent rounds from his own gun into the officer's weapon to make it appear as if the officer fired at him six times. Linder's trial testimony was markedly different. He claimed that Peeples bumped his motorcycle with his squad car, knocking him to the ground, and that the officer then began firing his gun at him. Linder responded by shooting the officer and defending himself from the potentially lethal attack. He then panicked and ran. Not crediting Linder's version, the jury returned its guilty verdict and death sentence.[102]

The South Carolina Supreme Court granted Linder a new trial on appeal, ruling that the trial judge erroneously declined to instruct the jury on the lesser included offense of voluntary manslaughter.[103] At Linder's 1981 retrial, the defense submitted the results of a ballistics test carried out by the South Carolina State Law Enforcement Division, which had not been introduced at the first trial. The analysis concluded that the bullets from the six spent rounds in Officer Peeples's gun had in fact been fired from the officer's weapon. This conclusion contradicted the prosecution's theory that Linder fired the bullets from his own gun and then placed the cartridges in Peeples's gun. As in the original trial, Linder testified that the officer shot at him and

100. *Lewchuk*, 539 N.W.2d at 854–56.

101. *Dennis Lewchuk*, *supra* note 99.

102. State v. Linder, 278 S.E.2d 335, 336–37 (S.C. 1981) (noting Linder was also found guilty of grand larceny); *Michael Linder*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=197 [https://perma.unl.edu/QF46-EUDL] (last visited May 9, 2019) [hereinafter *Michael Linder*]; Associated Press, *Convicted Slayer in Carolina Wins Acquittal After Retrial*, N.Y. TIMES (Nov. 15, 1981), https://www.nytimes.com/1981/11/15/us/convicted-slayer-in-carolina-wins-acquittal-after-retrial.html [https://perma.unl.edu/SGM7-M4VG]; Associated Press, *Innocent After New Trial*, CANBERRA TIMES (Nov. 12, 1981), https://trove.nla.gov.au/newspaper/article/126857719 [https://perma.unl.edu/X54F-PT2Q].

103. *Linder*, 278 S.E.2d at 337. The court additionally ruled that the trial judge erred by not polling the jurors following their sentencing verdict. *Id.* at 337–38.

that he returned fire in self-defense. The jury found him not guilty.[104] He was released from custody after spending two years in prison, with a part of that time on South Carolina's death row.[105]

David McMahan. A long-simmering feud between two Maine lobstermen eventuated in their coming to blows and, ultimately, a relatively rare exoneration in a case involving a misdemeanor conviction.[106] David McMahan and Gerald Brown both harvested lobsters in the same waters off the Maine coast. They had a history of disagreements over several years concerning their respective fishing rights and practices. In March 1999, the two men exchanged "a number of salty, down-east expressions"[107] precipitated by Brown who suspected that McMahan adorned Brown's polyball[108] with an obscene drawing. Their verbal confrontation escalated to a physical one on McMahan's dock. Brown claimed that McMahan hit him from behind, breaking a wooden gaff handle over his head. McMahan contended that Brown screamed at him and shoved and threatened to punch him; they both then fell from the dock and landed on rocks where they wrestled over the gaff handle before separating; and that Brown menaced him with a pitchfork before stalking away. Following their fight, Brown drove himself to a hospital. He also reported the incident to the

104. *Michael Linder*, *supra* note 102; *Convicted Slayer*, *supra* note 102; *Innocent After New Trial*, *supra* note 102.

105. *Farewell Death Row*, GREENVILLE NEWS (Nov. 11, 1981), https://www.newspapers.com/clip/12250675/the_greenville_news/ [https://perma.unl.edu/8U5W-QVR9]; *Convicted Slayer*, *supra* note 102.

106. As of July 2, 2019, just 92 of the 2,471 exonerations (3.7%) identified on the National Registry of Exonerations involved individuals convicted of misdemeanors. *The Cases, Detailed View: Misdemeanor*, NAT'L REGISTRY EXONERATIONS, bit.ly/32hb8OV [https://perma.unl.edu/Z25Y-8AAN] (last visited July 2, 2019). The small proportion of exonerations from misdemeanor convictions almost certainly reflects a vast undercounting, attributable to many factors including the tendency of organizations devoted to innocence work to focus their efforts on cases involving greater punishment, and the investment of time and resources normally required to upset a conviction and exonerate a wrongfully convicted person. *See* James R. Acker, *Taking Stock of Innocence: Movements, Mountains, and Wrongful Convictions*, 33 J. CONTEMP. CRIM. JUST. 8, 16–17 (2017). This is not to say that misdemeanor convictions do not entail significant adverse consequences, which they often do, or that they otherwise are unimportant. *See, e.g.*, Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779 (2018); Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999 (2018); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

107. State v. McMahan, 761 A.2d 50, 51 (Me. 2000).

108. "A polyball is a large, round, vinyl ball with a variety of uses in the commercial trade. In this case, the ball was used to mark the location of lines to a boat mooring and kept those lines suspended in the water." *Id.* at 51 n.1.

county sheriff. McMahan later was charged with aggravated assault, a felony.[109]

McMahan pled not guilty, asserting he struck Brown in self-defense, and opted for a bench trial. In an attempt to demonstrate that McMahan had reason to fear Brown and acted reasonably to defend himself when confronted on his dock, McMahan's attorney sought to question Brown about disputes and threats dating back several years that involved Brown, McMahan, and other fishermen. The trial judge *sua sponte* ruled the matter irrelevant and later sustained an objection to related questions. The judge thereafter declined to consider the attorney's legal memorandum addressing the issue and directed that the offer of proof necessary to place the responses to the line of questioning in the record take place during the lunch recess. The offer of proof was accordingly made in the judge's absence. Following the recess, the prosecution rested and the judge granted defense counsel's motion to dismiss the aggravated assault count for lack of evidence. The trial thus proceeded only for the lesser offense of misdemeanor assault. At the conclusion of the defense's case, which included McMahan's testimony, the judge found McMahan guilty of the misdemeanor charge and imposed a ten day suspended jail sentence.[110]

The Maine Supreme Court reversed McMahan's conviction on appeal. It ruled that the trial judge's absenting himself during the offer of proof made over the lunch recess precluded a fully informed decision regarding the relevance of the contested evidence, and thus negated the deference normally owed a trial court ruling on an issue of this nature. McMahan was prejudiced because a portion of the tendered evidence directly pertained to "the reasonableness of McMahan's belief that Brown would assault him, and his knowledge of Brown's asserted reputation for violence,"[111] and hence was important to his claim of self-defense. The prosecution dismissed the assault charge against McMahan following the remand.[112]

Sandra Ortiz. In July 1997 in Paterson, New Jersey, Sandra Ortiz dialed 911 to ask for assistance because she stabbed her boyfriend, Camel "Diego" Hammad. When the police arrived at her residence they found Hammad's body in the bathtub. He died from a single stab wound to his heart. Ortiz claimed that she and Hammad quarreled while she was preparing food, and that he grabbed her and then lunged at her while she was holding the knife she picked up to defend herself. She did not realize until after she heard him fall in the shower

109. *Id.*; *David McMahan*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4436 [https://perma.unl.edu/MRA9-7P22] (last visited May 1, 2019) [hereinafter *David McMahan*].

110. *McMahan*, 761 A.2d at 52–53; *David McMahan*, *supra* note 109.

111. *McMahan*, 761 A.2d at 55.

112. *David McMahan*, *supra* note 109.

that he had been stabbed. She was charged with murder. At her 2001 trial the prosecution presented evidence that undermined Ortiz's account, including that Hammad's blood-stained clothing was found outside of the bathroom and that Ortiz may have tried to clean the room before police arrived. She was found guilty as charged and a juror later explained that the jury did not believe that she acted in self-defense.[113]

Prior to Ortiz being sentenced, a judge set aside her conviction based on the prosecutor making numerous improper statements during closing argument, including a reference to Ortiz not testifying at the trial. At her 2003 retrial, Ortiz was represented by a new attorney. The attorney enlisted the services of a forensic psychologist, who evaluated Ortiz and testified that Hammad's recurring abuse resulted in Ortiz exhibiting symptoms of post-traumatic stress syndrome and the battered woman's syndrome. After considering additional testimony concerning Hammad's abusive behavior and problems with alcohol, the jury found Ortiz not guilty.[114]

Charles Podaras. Two burly six-footers, 250-pound Charles Podaras and 300-pound Dennis Hatfield, became involved in a heated exchange in a Menlo Park, California dog park in 2004 after Hatfield believed that Podaras's dog, Emerson, was acting aggressively and hoisted the dog up by the collar. The men and various witnesses disagreed about what happened next. According to some accounts, Podaras choked, grabbed, shook, and pushed Hatfield while yelling obscenities. According to others, despite Podaras's demand, Hatfield refused to relinquish his grip on Emerson, resulting in permanent injuries to the dog's neck, and instead responded by threatening "to smack" Podaras. Both Podaras and Hatfield called 911. After gathering information from several bystanders, the responding police officer arrested Podaras, who was charged with misdemeanor assault.[115]

At the conclusion of his 2005 jury trial, Podaras was convicted of two counts of misdemeanor assault and sentenced to ten days in jail. Podaras filed a motion for a new trial, citing evidence that the arresting officer misrepresented in his report what witnesses at the scene of the confrontation described, alleging prosecutorial misconduct in allowing and not correcting false trial testimony, the trial judge's failure

113. *Sandra Ortiz*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4199 [https://perma.unl.edu/QA55-CYNW] (last visited May 3, 2019) [hereinafter *Sandra Ortiz*].

114. *Id.*

115. *Charles Podaras*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5127 [https://perma.unl.edu/UV23-CV4V] (last visited May 3, 2019) [hereinafter *Charles Podaras*]. *See also* Petition for Writ of Certiorari, Podaras v. City of Menlo Park, 2011 WL 3809374, at *4–5 (U.S. 2011) (No. 11-261) (alleging that the responding officer's police report was inaccurate).

to give the jury an instruction on self-defense, and the judge's refusal to admit evidence concerning the 911 calls that had been made. The motion was denied, but that decision was reversed on appeal because of the judge's failure to instruct the jury on self-defense. Podaras was granted a new trial. On remand, the prosecution dismissed the charges.[116]

Harvill Richardson. Rudy Quilon had recently been released from prison and was homeless in Biloxi, Mississippi in 2009 when sixty-six-year-old Harvill Richardson learned about his circumstances through his church and invited Quilon to move into his home on a temporary basis. Five months later, Richardson had enough of Quilon and ordered him to leave. Quilon, who had prior convictions for murder and armed robbery, boasted about having killed a snitch while in prison and about his gang membership, and began watching pornography on Richardson's computer. The final straw came when Quilon stated that he wanted to have sex with Richardson's wife. Instead of leaving, Quilon walked to a shed in Richardson's backyard which contained axes and other tools, and reentered the house with one arm behind his back. Then, according to Richardson, Quilon approached him in a threatening manner and Richardson, who armed himself with a pistol, fired a warning shot into the ground. When Quilon kept advancing, Richardson shot him in the stomach at close range. Richardson then called 911. Quilon died from the gunshot wound and Richardson was charged with murder.[117]

At Richardson's 2011 trial, the judge excluded evidence of Quilon's prior convictions and his prior acts of violence,[118] including Richardson's knowledge of them, ruling that this evidence would represent impermissible impeachment evidence and would be unfairly prejudicial.[119] The jury rejected Richardson's claim that he shot Quilon in self-defense and convicted him of murder. Richardson was sentenced to life imprisonment. In 2014, the Mississippi Supreme Court reversed in a 6–3 decision. The court held the excluded evidence had not been offered for impeachment purposes but instead bore directly on Richardson's self-defense claim, in particular whether he actually and rea-

116. *Charles Podaras*, *supra* note 115; Petition for Writ of Certiorari, *Podaras*, *supra* note 115, at *4–9.

117. Richardson v. State, 147 So. 3d 838, 839–40 (Miss. 2014); *Harvill Richardson, Sr.*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5113 [https://perma.unl.edu/TH2Y-ZHBE] (last visited May 6, 2019) [hereinafter *Harvill Richardson*].

118. Addressing Richardson's defense counsel, the judge said:

> What I'm not going to allow you to bring forth to this jury is the fact that this victim [was] alleged to be a gang member in San Diego . . . . That he had killed a cell mate by throwing him to the ground and strangling him. And that he had executed a young lady because she was a snitch.

Richardson, 147 So. 3d at 845.

119. *Id.* at 840–41.

sonably believed that Quilon was threatening him with lethal violence when he shot him.[120] The excluded evidence was admitted at Richardson's 2017 retrial, where Richardson again insisted that he shot Quilon in self-defense. After deliberating for three hours, the jury acquitted Richardson, who had served forty-one months in prison pursuant to his 2011 conviction.[121]

Christopher Roesser. Shortly before Christmas 2006, Christopher Roesser entered the rear seat of a parked car in Lawrenceville, Georgia with $2,000 in cash. In the driver's seat was Allen Epstein and in the front passenger seat, Keith Price. Within minutes, Roesser shot and killed Price. Police found a plastic pellet gun, $2,000, and Roesser's glasses in the vicinity of the shooting. Dramatically different testimony was offered in explanation of these events at Roesser's 2008 trial for murder and related charges. Epstein testified that Roesser and Price argued over the cost of marijuana that Roesser planned to sell, resulting in Roesser shooting Price. Epstein denied that he told the police that Price trained a gun on Roesser and a detective confirmed that testimony. In contrast, Roesser claimed that he brought the cash to purchase a Sony PlayStation as a Christmas gift and that when he entered the car Price grabbed him by the collar, pointed a gun at him, and demanded the money. Fearing for his life, Roesser testified, he fled the vehicle, firing his gun at Price as he did so. The jury convicted Roesser and he was sentenced to life in prison plus five years.[122]

Roesser's motion for a new trial was granted in 2009 because the trial judge gave erroneous jury instructions.[123] At his 2011 retrial, Roesser introduced previously undisclosed notes of the medical exam-

120. *Id*. at 841–44. *See also* Eugene Volokh, *Putting the Victim on Trial*, WASH. POST (July 1, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/01/putting-the-victim-on-trial/?utm_term=.51b6f5990397 [https://perma.unl.edu/3VCG-MDY3] (noting the importance of Quilon's past offenses regarding Richardson's self-defense claim).

121. *Harvill Richardson*, *supra* note 117; WLOX Staff, *Harvill Richardson Found Not Guilty of Murder*, WLOX.COM (Mar. 15, 2017), https://www.wlox.com/story/34868363/jurors-hear-testimony-in-harvill-richardson-retrial/ [https://perma.unl.edu/77PT-GSTY].

122. *Christopher Roesser*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4308 [https://perma.unl.edu/7MG9-78GE] (last visited May 7, 2019) [hereinafter *Christopher Roesser*]. *See also* Roesser v. State, 730 S.E.2d 641 (Ga. Ct. App. 2012), *rev'd*, 751 S.E.2d 297 (Ga. 2013) (describing similar testimony offered at Roesser's 2011 retrial).

123. Roesser v. State, 751 S.E.2d 297, 298 (Ga. 2013); *Christopher Roesser*, *supra* note 122. The specific nature of the erroneous jury instruction is unclear. *See also* Keith Farmer, *Supreme Court Orders Lawrenceville Man Free of Manslaughter Charges*, GWINNETT DAILY POST (Nov. 17, 2013), https://www.gwinnettdailypost.com/archive/supreme-court-orders-lawrenceville-man-free-of-manslaughter-charges/article_04c10e3f-ac14-530d-b8ae-03901a555e7f.html [https://perma.unl.edu/8EL5-BRSM] (noting a retrial was granted after an erroneous jury instruction).

iner's investigator, which indicated that the detective assigned to the case reported that Epstein told him that Price pointed a gun at Roesser and threatened to kill him. The investigator testified and confirmed what was recorded in the notes. In addition, a defense investigator testified that he interviewed Epstein's uncle, who told him that Epstein confided in him that Price pointed a gun at Roesser while demanding his money. A ballistics expert testified and opined that Epstein's wounds likely were inflicted as Roesser was leaving the parked car.[124] The jury found Roesser not guilty of the homicide-related charges except for voluntary manslaughter, which resulted in a deadlocked verdict of 11–1 in favor of acquittal.[125] The prosecution announced its intention to retry Roesser on the voluntary manslaughter charge, but the Georgia Supreme Court prohibited the retrial on double jeopardy grounds. The court reasoned that the acquittal on the murder charge meant the jury accepted that Roesser shot Price in self-defense, thus also barring his prosecution for voluntary manslaughter.[126] Roesser, who had been incarcerated since his original conviction in 2008, was released from custody in November 2013.[127]

Gerald Sailors. While off duty from his service as a captain on the Huntington, Indiana Police Department, Gerald Sailors shot and killed Michael Fisher, whom he knew and socialized with for roughly three years. The shooting occurred in Sailors's car shortly after midnight on June 21, 1990. According to Sailors, Fisher volunteered to show him "crack houses" in the area but when he had trouble locating them, Sailors announced that he was ending their excursion. Fisher discussed his own problems with drugs as they began driving to where Fisher left his car and then showed Sailors a substantial quantity of marijuana seeds. When Sailors informed Fisher that he was going to have him jailed for possession of marijuana, Sailors claimed that Fisher struck him repeatedly, choked him, and threatened to kill him and his family. As he began to lose consciousness, and fearing that Fisher would carry through with his threats, Sailors drew his revolver and shot Fisher, striking him in the head and chest. Sailors then drove to the police station in nearby Roanoke. Fisher was pronounced dead and Sailors later was indicted for voluntary manslaughter.[128]

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124. *Christopher Roesser*, *supra* note 122.

125. *Roesser*, 730 S.E.2d at 643 n.9. The jurors also were unable to reach a verdict on two counts of possession of a firearm during the commission of a felony, but the trial court ruled that Roesser could not be retried on those charges because of his acquittal of the predicate felonies. *Id*. at 643 n.10.

126. *Roesser*, 751 S.E.2d at 297.

127. Bill Rankin, *Man in '06 Gwinnett Shooting to Be Freed*, ATLANTA J. CONST. (Nov. 18, 2013), https://www.ajc.com/news/crime—law/man-gwinnett-shooting-freed/V8VyPmx3BfI1qTVRiB90uJ/ [https://perma.unl.edu/X9A8-HFTA].

128. *Gerald Sailors*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5175 [https://perma.unl.edu/

The trial judge denied Sailors's motion for a change of venue based on prejudicial pretrial publicity, but granted his motion to exclude evidence the prosecution sought to introduce that Sailors and Fisher were involved in a homosexual relationship and that the shooting was motivated to conceal that relationship.[129] Trial testimony included the Huntington Police Chief noting that he had no knowledge of Sailors's purported investigation of "crack houses," reports by medical personnel that Sailors had no apparent choke marks about his neck when he was treated for cuts and bruises about the face following the shooting, and that of a crime lab analyst who opined that blood splatter patterns in Sailors's car were inconsistent with Fisher being shot while the vehicle's door was closed, as Sailors contended. Sailors presented evidence suggesting that he indeed had been choked, that he attempted to neutralize the testimony of the crime lab analyst, and he testified that he shot Fisher in self-defense after Fisher "went berserk" and attacked him.[130] During his closing argument, the special prosecutor pressed for a conviction while reminding the trial jury that Sailors had been indicted by the grand jury—"six of your fellow citizens"[131]—which already had "investigated"[132] the case. The jury found Sailors guilty of voluntary manslaughter and he was sentenced to a twenty-two-year term of imprisonment.[133]

The Indiana Court of Appeals reversed Sailors's conviction in 1992. The court determined that the prosecutor's references to the grand jury indictment during his closing argument constituted "fundamental error" which, in light of "the close nature of the evidence against" Sailors, undermined the fairness of the trial. Those references, the court concluded, "were clearly exhortations to the jury to convict Sailors because other people thought he was guilty."[134] Sailors was retried in 1993 following a change of venue to Indianapolis. Supported by the testimony of two defense experts regarding the blood splatter patterns in the car and other evidence related to the shooting and Sailors's own testimony that he shot Fisher in self-defense, the jury found Sailors not guilty.[135]

Lydia Salce. When Michael McKee returned to his home in Halfmoon, New York in the early morning of August 11, 2011, he and his

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H8HM-V5Z5] (last visited May 7, 2019) [hereinafter *Gerald Sailors*]; Sailors v. State, 593 N.E.2d 202, 203–04 (Ind. Ct. App. 1992).

129. *Gerald Sailors*, *supra* note 128.

130. *Id.*; *Sailors*, 593 N.E.2d at 204–05.

131. *Sailors*, 593 N.E.2d at 206.

132. *Id.*

133. *Id.* at 204.

134. *Id.* at 207.

135. *Gerald Sailors*, *supra* note 128; *Jury Acquits Ex-Policeman of Manslaughter*, INDIANAPOLIS STAR (July 28, 1993), https://www.newspapers.com/newspage/107341832/ (access through subscription).

wife, Lydia Salce, engaged in a violent confrontation that left McKee with fourteen cut and stab wounds and Salce bruised from McKee's fist blows to her face. The couple offered "[m]arkedly different versions"[136] of what transpired. McKee, who recovered from Salce's attack following hospitalization, claimed that Salce was infuriated about him spending so much time with members of the "Prisoners of Faith" motorcycle club and that at the conclusion of their verbal argument he turned to leave, at which time Salce stabbed him in the back. As she continued to stab him, he struck her to defend himself. Salce contended that McKee came home intoxicated, threw a glass at her, grabbed her by the hair, held a knife to her throat, and then began hitting her. She maintained that he dropped the knife and she picked it up and began swinging it to defend herself from his attack. She called 911 after stabbing McKee. Salce subsequently was charged with attempted murder and assault.[137]

At her 2012 trial, Salce continued to insist that she stabbed McKee in self-defense. Her attorney sought to elicit testimony from an expert witness, "a police officer with expertise in assaults and knives . . . that the nature of [Salce's] injuries and McKee's wounds were not inconsistent with defensive action by [Salce]."[138] The prosecution previously presented testimony from the police "indicating that they relied on the extensive nature of McKee's wounds in believing his version and decided to charge [Salce]."[139] The jury convicted Salce of attempted murder and assault and she was sentenced to sixteen years in prison.

Salce's convictions were reversed on appeal in 2015. The Appellate Division of the New York Supreme Court ruled that excluding the defense expert's opinion that McKee's injuries were consistent with defensive wounds was prejudicial error, particularly because the prosecution presented testimony about the "extensive nature" of those wounds.[140] Salce was retried later that year. The jury heard the previously excluded expert testimony and also heard Salce testify that she

136. People v. Salce, 1 N.Y.S.3d 417, 419 (N.Y. App. Div. 2015).

137. *Id.* at 419–20. *See also Lydia Salce*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4691 [https://perma.unl.edu/FS99-TMPU] (last visited May 7, 2019) (detailing Lydia Salce's conviction) [hereinafter *Lydia Salce*]; Lucian McCarty, *Lydia Ann Salce Sentenced for Stabbing Ex- Husband*, TROY REC. (Sept. 1, 2012), https://www.troyrecord.com/news/lydia-ann-salce-sentenced-for-stabbing-ex-husband/article_9baf0840-713c-58f1-96d0-66c93f705527.html [https://perma.unl.edu/SSU6-58N9].

138. *Salce*, 1 N.Y.S.3d at 421.

139. *Id*

140. *Id*. The court further found that the trial court erred by not including in the jury instructions that Salce had no duty to retreat before using deadly defensive force while in her home. *Id.*

acted in self-defense. Salce was acquitted following the three-week long retrial.[141]

Teresa Thomas. "On September 15, 1993, twenty-nine-year-old Teresa Thomas fatally shot her live-in boyfriend, Jerry 'Jake' Flowers, in their trailer on Tick Ridge, an unpaved road in northeastern Athens County, Ohio."[142] The following week a grand jury indicted her for aggravated murder. Just three months later, on December 20, 1993, a jury rejected Thomas's claim that she shot Flowers in self-defense. She was convicted of murder with a firearm specification and sentenced to eighteen years to life in prison.[143]

A clinical psychologist testifying at Thomas's trial opined that Thomas manifested classic symptoms of the battered woman's syndrome. Thomas testified that Flowers repeatedly beat her, sometimes refused to allow her to eat for three to four day stretches, intentionally soiled his clothes and made her clean them, forced her into having sexual relations, and often reminded her how easily he could kill her. The night before the shooting Flowers threw food and drink on the floor of the couple's trailer and told Thomas he would kill her if she did not clean up the mess before he returned from work the next day. Thomas had not finished cleaning when Flowers appeared somewhat earlier than expected. He began yelling and threatened to kill her. Thomas retrieved Flowers's gun from his closet and then, she testified, "she fired two warning shots and when Flowers continued to threaten her, she shot him in the arm twice . . . . Flowers fell and then started to get up again, continuing to threaten Thomas. Thomas shot Flowers two more times while he was bent over; the shots entered Flowers in the back."[144]

At the time of Thomas's trial, Ohio law was unclear about whether the resident of a dwelling had a duty to retreat before using deadly defensive force in the dwelling against a co-inhabitant in order to succeed on a justification defense. The trial judge failed to instruct the jury that a cohabitant had no duty to retreat under those circumstances. The Ohio Supreme Court reversed Thomas's conviction and

141. *Lydia Salce*, *supra* note 137; *Jury Acquits in Saratoga County Attempted Murder Trial*, ALB. TIMES UNION (May 15, 2015), https://www.timesunion.com/news/article/Jury-acquits-in-Saratoga-County-attempted-murder-6258958.php [https://perma.unl.edu/G9P7-WH4J]; Lauren Mineau, *Jury Clears Wife in Biker's Stabbing*, ONEIDA DAILY DISPATCH (May 14, 2015), https://www.oneidadispatch.com/news/jury-clears-wife-in-biker-s-stabbing/article_5390df85-6630-5f29-bbd1-288ec9f83f13.html [https://perma.unl.edu/2PLQ-KNTL].

142. *Teresa Thomas*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4124 [https://perma.unl.edu/BQ9P-9HP7] (last visited May 9, 2019) [hereinafter *Teresa Thomas*].

143. State v. Thomas, 673 N.E.2d 1339, 1342 (Ohio 1997); *Teresa Thomas*, *supra* note 142.

144. *Thomas*, 673 N.E.2d at 1341.

ordered a new trial, ruling that "[t]here is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home,"[145] and that Thomas was entitled to have her jury so instructed. A jury found Thomas not guilty at her 1997 retrial.[146]

James Williams. In a case that would be memorialized in a bestselling book[147] and a movie directed by Clint Eastwood,[148] James Williams, a fifty-year-old patrician of Savannah, Georgia, shot and killed twenty-one-year-old Danny Hansford in Williams's home, the spacious Mercer House, on May 2, 1981. According to Williams, Hansford, a volatile young man who assisted Williams in his acquisition and restoration of upscale antiques, flew into a rage, threw over a large grandfather clock, and shot at him during a late night argument, prompting Williams to return fire in self-defense. The prosecution contended that an angry Williams shot Hansford—his young homosexual lover—without provocation and then, to back up his fabricated self-defense claim, damaged property in the room, fired bullets into the floor, and planted a gun under Hansford's hand after he lay dead. Williams was charged with murder. He was convicted and sentenced to life imprisonment following his talk-of-the-town 1982 Savannah trial.[149]

On appeal, the Georgia Supreme Court reversed. It ruled that, despite defense counsel's request, the prosecution failed to disclose the contents of a police report that conflicted with the testimony of an investigating officer concerning the officer's opinion about whether a bullet hole found in the floor of Williams's home was "fresh."[150] Williams would be tried twice more in Savannah on the murder charge. He was again found guilty and sentenced to life in prison in October 1983. The Georgia Supreme Court once again reversed the conviction on appeal.[151] In his third trial in 1987 the jury deadlocked 11–1 in

145. *Id.* at 1340.

146. *Teresa Thomas*, *supra* note 142.

147. JOHN BERENDT, MIDNIGHT IN THE GARDEN OF GOOD AND EVIL: A SAVANNAH STORY (1994).

148. MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (Warner Bros., Nov. 21, 1997).

149. *James Williams*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4195 [https://perma.unl.edu/DH6C-862G] (last visited May 9, 2019) [hereinafter *James Williams*]; Williams v. State, 298 S.E.2d 492 (Ga. 1983); BERENDT, *supra* note 147, at 210–31.

150. *Williams*, 298 S.E.2d at 464–65 (citing United States v. Agurs, 427 U.S. 97 (1976) and Brady v. Maryland, 373 U.S. 83 (1963)).

151. Williams v. State, 330 S.E.2d 353 (Ga. 1985). In this 4–3 decision, the majority ruled that a testifying detective had erroneously been allowed to offer an expert opinion about matters relating to the crime scene, reasoning that the subjects of the testimony were not "beyond the ken of average [lay jurors]." The majority further determined that the prosecutor had improperly introduced new evidence during his closing argument to the jury. *Id.* at 355.

favor of conviction.[152] The prosecution commenced a fourth trial,[153] which took place in Augusta rather than publicity-saturated Savannah, pursuant to Williams's change of venue motion. The Augusta jury found him not guilty in May 1989.[154] Williams spent hundreds of thousands of dollars in his defense[155] and endured lengthy incarceration over the protracted sequence of trial and retrials.[156] Eight months following his acquittal, at age fifty-nine, he collapsed and died in his Savannah home.[157]

B. Exonerations in the Wake of Rejected Excuse Defenses

Yun Hseng Liao. Somnambulism, or sleepwalking, is a complete defense to a charged crime in several jurisdictions. Jurisdictions recognize this defense because individuals who engage in harmful conduct while sleeping are unconscious, and thus either lack *mens rea* or their actions are involuntary. Consistent with its obligation to prove all elements of a crime, the prosecution consequently must negate somnambulism beyond a reasonable doubt when it is fairly at issue.[158] In other jurisdictions, somnambulism is considered an affirmative defense, a form of excuse, thus allowing the burden of persuasion to be assigned to the defendant.[159] Yun Hseng Liao was convicted in California[160] in 2003 of attempted murder, assault with a deadly

152. Williams v. State, 369 S.E.2d 305, 309 (Ga. 1988); *James Williams*, *supra* note 149; BERENDT, *supra* note 147, at 357–58, 363.

153. The Georgia Supreme Court rejected Williams's motion to bar another trial on double jeopardy grounds, and to disqualify the Chatham County district attorney and his staff from participating in the case. *Williams*, 369 S.E.2d at 232.

154. In addition to the new venue for the trial being a factor that may have helped explain the acquittal, testimony from a new witness corroborated another witness's testimony (which had been received at the third trial) that was offered to explain the absence of gunpowder residue on Danny Hansford's hands—a finding the prosecution argued undermined Williams's contention that Hansford fired a gun at him and supported the prosecution's theory that Williams manipulated the scene of the shooting to substantiate his claim that he shot Hansford in self-defense. *James Williams*, *supra* note 149, BERENDT, *supra* note 147, at 368–69.

155. BERENDT, *supra* note 147, at 339.

156. *Id.* at 329.

157. *Id.* at 382–83.

158. *See, e.g.*, State v. Cabrera, 891 A.2d 1066, 1071–73 (Del. Super. Ct. 2005); McClain v. State, 678 N.E.2d 104, 106–07 (Ind. 1997); Deborah W. Denno, *Crime and Consciousness, Science and Involuntary Acts*, 87 MINN. L. REV. 269, 338, 338 n.314, 346–48, 366–74 (2002); Eunice A. Eichelberger, Annotation, *Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R. 4th 1067, § 4[a] (1984 & Supp.).

159. *See, e.g.*, Fulcher v. State, 633 P.2d 142, 143–47 (Wyo. 1981); State v. Caldell, 215 S.E.2d 348, 363 (N.C. 1975); Denno, *supra* note 158; Eichelberger, *supra* note 158.

160. In California, somnambulism appears to operate as a "failure of proof" defense, a class consisting "of instances in which, because of the conditions that are the basis for the 'defense,' all elements of the offense charged cannot be proven. They

weapon, and injuring a child after he struck the sixteen-year-old son of his live-in partner three times in the head with a hammer. Liao maintained that he was sleepwalking when he entered the boy's room at 4:00 a.m. and hit him with the hammer.[161]

Among the defense witnesses at Liao's trial was Dr. Clete Kushida, director of the Stanford University Center for Human Sleep Research. Dr. Kushida reviewed various transcripts and reports regarding Liao but he had not personally examined Liao. He opined that Liao "may be a sleepwalker," but disclaimed that this was a diagnosis, which would require "a clinical evaluation, and perhaps 'a sleep study, but the sleep study is optional.'"[162] On cross-examination, Dr. Kushida "was 'clobbered' . . . [and] 'his credibility was pretty much destroyed'"[163] because no formal sleep study, involving a battery of tests monitoring brain activity during sleep, had been conducted. Liao's trial attorney requested the trial court's authorization to have a sleep study performed on Liao, who was in pretrial custody. The court granted the request but a clerk erroneously informed trial counsel that the request had been denied, so no sleep study was conducted. When the order granting the request was discovered following Liao's conviction, the state

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are in essence no more than the negation of an element required by the definition of the offense." Robinson, *supra* note 28, at 204 (footnote omitted). Consequently, in California the prosecution is required to disprove somnambulism beyond a reasonable doubt if the matter is fairly put at issue in a criminal case. People v. Sedeno, 518 P.2d 913, 922 (Cal. 1974), *overruled on other grounds by* People v. Breverman, 960 P.2d 1094 (Cal. 1998); People v. Cruz, 147 Cal. Rptr. 740, 754–55 (Cal. Ct. App. 1978) *superseded by statute*, CALJIC 4.31, *as recognized in* People v. Levell, 247 Cal. Rptr. 489, 490 (Cal. Ct. App. 1988); Mike Horn, *A Rude Awakening: What to Do with the Sleepwalking Defense?*, 46 B.C. L. REV. 149, 163–64 (2004). We nevertheless discuss Liao's California conviction and exoneration because somnambulism is treated as an affirmative defense in some other jurisdictions. *See supra* text accompanying note 159.

161. People v. Liao, Nos. B170596, B185117, 2006 WL 2022826, at *1–4. (Cal. Ct. App. 2006), *vacated* Liao v. Junious, 817 F.3d 678 (9th Cir. 2016). Liao had a history of sleep disorders. His former wife testified at trial that he often awakened during the night, then sat up as if terrified, and walked about in a daze. A psychiatrist, Dr. Vicary, opined that Liao suffered from a sleep disorder that was aggravated by depression. Liao and his live-in partner argued on the night of the incident and she had recently told him she was ending their five-year-long relationship. After he struck sixteen-year-old Henry Chen with a hammer, resulting in the charges against him, Liao appeared to be shocked. When asked why he hit the boy, he replied that he was dreaming that someone was hitting him, so he fought back. Liao's conviction ultimately was vacated by the Ninth Circuit Court of Appeals. *See Yun Hseng Liao*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5301 [https://perma.unl.edu/M83T-DS4M] (last visited May 14, 2019) [hereinafter *Yun Hseng Liao*].

162. *Liao*, 2006 WL 2022826, at *5.

163. *Liao*, 817 F.3d at 690 (quoting the attorney representing California at oral argument).

courts[164] and a federal district court[165] concluded that Liao's attorney performed unreasonably in not uncovering the error, but that Liao was not entitled to a new trial based on ineffective assistance of counsel because he was not prejudiced by the oversight.[166]

The Ninth Circuit Court of Appeals vacated Liao's conviction in 2016. In granting Liao a new trial, the court concluded that the lack of a sleep study seriously compromised the fairness of the original trial. "His attorney's serious mistake, triggered by an equally grievous error by a court clerk, eviscerated a viable defense of unconsciousness. His conviction represents an extreme malfunction of justice caused by a violation his Sixth Amendment right to competent and effective counsel."[167] Liao had been sentenced to life imprisonment and four years upon his conviction, but he had been released on parole by the time of the court's ruling, after spending more than twelve years in prison.[168] The Court of Appeal pointedly observed that "[i]t is difficult to conceive of circumstances under which the State would again take him before a jury."[169] The Los Angeles County District Attorney's Office dismissed the charges against Liao following the remand.[170]

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164. The California Court of Appeal ordered the trial court to conduct a hearing to determine what caused the mix-up concerning the sleep test. *Liao*, 2006 WL 2022826, at *11. The hearing was conducted, but in unreported decisions, the trial court and the California Court of Appeal rejected Liao's request for a new trial. Liao v. Junious, No. CV 10-5691 SJO (JCG), 2013 WL 8446035, at *1 (C.D. Cal. 2013), *recommendation accepted with modification*, Liao v. Junious, No. CV 10-5691 JGB (JCBG), 2014 WL 1920970 (C.D. Cal. 2014), *reversed*, *Liao*, 817 F.3d 678.

165. *Liao*, 2014 WL 1920970 (C.D. Cal. 2014), *reversed*, *Liao*, 817 F.3d 678.

166. The courts applied the two-part performance and prejudice test governing claims of ineffective assistance of counsel articulated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

167. *Liao*, 817 F.3d at 695.

168. *Id.* at 681.

169. *Id.* at 695.

170. *Yun Hseng Liao*, *supra* note 161.

Erwin Charles Simants. In a burst of violence that rocked the small town of Sutherland, Nebraska in October 1975, and later occasioned a landmark Supreme Court case weighing the right to freedom of the press against the right to a fair trial,[171] Erwin Charles Simants entered the home of Henry and Audrey Kellie, sexually assaulted their ten-year-old granddaughter, and then shot and killed all six family members, including two other children aged five and seven. Evidence suggested that he also had sexual contact with Mrs. Kellie and her five-year-old granddaughter after killing them. Simants, who lived in the house next door, then returned home and told relatives that he killed the Kellies. After his father confirmed his twenty-nine-year-old son's story, he instructed his wife to call the police. In the meantime, Simants drank beer at two local bars and then spent the night in a field. He was taken into custody the next morning after he was denied entry to his sister's home and she contacted law enforcement. Simants confessed the killings to the police.[172]

Simants was charged with six counts of first-degree murder. He pled not guilty by reason of insanity at his 1976 trial. The trial thus focused on Simants's "capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act."[173] The jury heard from twenty-four prosecution witnesses and eleven defense witnesses[174] about the killing and about Simants, who was described as "an unemployed handy-

171. Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976). *See* David B. Sentelle, *The Courts and the Media*, 48 FED. LAW. 24 (2001); James C. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 497 (1977); Proceedings of the Thirty-Seventh Annual Judicial Conference of the District of Columbia Circuit, *Panel and Discussion—Recent Developments in Fair Trial-Free Press: The Relationship of Historical First Amendment Guarantees of a Free Press and the Requirements of a Fair Trial, the Legal Issues Raised by the Judicial Gag Orders, and the Impact of Such Orders on the Press*, 73 F.R.D. 147, 159–99 (1976); Fred W. Friendly, *A Crime and Its Aftershock*, N.Y. TIMES (Mar. 21, 1976), https://www.nytimes.com/1976/03/21/archives/a-crime-and-its-aftershock-aftershock.html? [https://perma.unl.edu/FLL9-YGJ2].

172. State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 884–85 (1977), *overruled by* State v. Reeves, 243 Neb. 711, 453 N.W.2d 359, 375 (1990); Friendly, *supra* note 171; Associated Press, *Man Guilty of Oklahoma Murders; Defendant in Nebraska Acquitted*, N.Y. TIMES (Oct. 18, 1979), https://www.nytimes.com/1979/10/18/archives/man-guilty-of-oklahoma-murders-defendant-in-nebraska-acquitted-six.html [https://perma.unl.edu/DRX3-S33X] [hereinafter *Man Guilty of Oklahoma Murders*]; Sharron Hollen, *30 Years Later, A Sad Anniversary*, N. PLATTE TELEGRAPH (Oct. 18, 2005), https://www.nptelegraph.com/years-later-a-sad-anniversary/article_d7548606-96aa-50c3-bdb6-6864b91f9cde.html [https://perma.unl.edu/K5QE-J74K].

173. *Simants*, 197 Neb. at 570, 250 N.W.2d at 893 (quoting State v. Jacobs, 190 Neb. 4, 6, 205 N.W.2d 662, 663 (1973)).

174. Hollen, *supra* note 172.

man and fence-builder with an IQ of 75."[175] "[S]ubstantial evidence" undermined Simants's insanity defense, including testimony from two defense expert witnesses, one of whom opined that Simants "was aware of what he was doing" on the night of the killings.[176] The jury found Simants guilty on all counts and the trial judge sentenced him to death.[177]

The Nebraska Supreme Court upheld Simants's convictions and death sentence on appeal in 1977.[178] Simants's attorney filed a writ of error *coram nobis* the following year, challenging the conviction based on information that was unknown at the time of the trial. The writ alleged that the county sheriff, who appeared as a prosecution witness, visited members of the sequestered jury while the trial was in progress and conversed and played cards with them, thus tainting the fairness of the trial.[179] As a part of his trial testimony, the sheriff reported that Simants never engaged in acts in his presence "which would indicate . . . that he might have a mental problem."[180] The district court held a hearing on the writ and found that the sheriff had improper contact with the jurors on three occasions while the trial was in progress, but it concluded that Simants suffered no prejudice. The Nebraska Supreme Court reversed. It held that the unwarranted contact was presumptively prejudicial and that the State had not overcome that presumption. The court vacated Simants's convictions and death sentence, explaining:

> The sheriff was an important lay witness on the issue of the sanity of the defendant, which was the only real issue in the murder trial. The jury had to decide the question of Simants's sanity. The expert testimony was conflicting on that point. The jury had to weigh that testimony. In deciding the issue, the opinion testimony of a lay witness in whom the jury may have had special confidence because of unwarranted contacts such as are shown by the evidence may have been the critical factor in determining the one key issue which was determinative of the defendant's guilt or innocence.[181]

Simants was retried in October 1979. The trial venue was changed from North Platte, the county where the killings and the original trial occurred, to Lincoln, the state capital. Simants was represented by

175. Friendly, *supra* note 171.
176. *Simants*, 197 Neb. at 570, 250 N.W.2d at 893 (quoting testimony of Dr. Campanella).
177. *Id.*
178. *Id.*
179. Simants v. State, 202 Neb. 828, 829, 277 N.W.2d 217, 218 (1979). The writ also alleged that the trial judge had visited the sequestered jurors. The judge made two visits to the hotel where the jurors were sequestered to check on the accommodations and to ensure that his sequestration orders were being followed, but his conversations were limited to "a cursory acknowledgment or response to a greeting or comment." *Id.*
180. *Id.* (quoting the question to Sheriff Gordon D. Gilster during Simants's trial, and stating that the sheriff's answer was "[n]o.").
181. *Id.* at 221.

new counsel, who conceded that Simants killed the Kellies and focused exclusively on the insanity defense. After hearing the evidence and deliberating for eighteen hours, the jury found Simants not guilty by reason of insanity.[182] Simants was civilly committed at the conclusion of the trial.[183] He remained under civil confinement as of the end of 2018.[184] Simants's acquittal prompted calls for revising Nebraska's insanity defense. In 1981, legislation was enacted in the state requiring defendants to establish their insanity by a preponderance of the evidence. Previously, the prosecution had been required to prove beyond a reasonable doubt that the defendant was not insane.[185]

Andrea Yates. In June 2001, Andrea Yates systematically drowned her five children—seven-year-old Noah, five-year-old John, three-year-old Paul, two-year-old Luke, and six-month-old Mary—in the bathtub at her home in the Houston suburb of Clear Lake, Texas. She telephoned her husband, Rusty, who worked at the NASA Space Center, and told him to come home. She then dialed 911 and told the dispatcher that she needed a police officer. When an officer arrived she told him, "I just killed my kids." The bodies of the four youngest children lay on the bed in the master bedroom and Noah's floated in the bathtub.[186] Yates was charged with two counts of capital murder.[187] The Harris County District Attorney sought the death penalty.

Andrea Yates was the captain of her high school swim team, valedictorian of her graduating class, earned a degree from the University of Texas School of Nursing, and was employed as a registered nurse

182. Margaret Reist, *38 Years Later, Simants Murder Case Still Raises Tough Questions*, LINCOLN J. STAR (Oct. 21, 2013), https://journalstar.com/news/state-and-regional/nebraska/years-later-simants-murder-case-still-raises-tough-questions/article_4ad142f1-ef56-52ea-9d3a-63de73a830ca.html [https://perma.unl.edu/5HQS-4W54]; *Man Guilty of Oklahoma Murders*, *supra* note 172.

183. State v. Simants, 248 Neb. 581, 582, 537 N.W.2d 346, 348 (1995).

184. Tammy Bain, *Simants Is "Still Mentally Ill and Dangerous," Judge Rules*, OMAHA WORLD- HERALD (Dec. 23, 2018), https://www.omaha.com/eedition/sunrise/articles/simants-is-still-mentally-ill-and-dangerous-judge-rules/article_3f41f6fc-cfd7-53ef-9cbf-7736e6bc3000.html [https://perma.unl.edu/TR2C-FJAQ]. Simants was "in a residential transition unit at [the Lincoln Regional Center]. He never leaves unless accompanied by a relative or staff members." *Id.*

185. Reist, *supra* note 182; NEB. REV. STAT. ANN. § 29-2203 (Reissue 2016); *see generally* State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989); State v. Hankins, 232 Neb. 608, 637, 441 N.W.2d 854, 875–76 (1989); State v. Newson, 183 Neb. 750, 164 N.W.2d 211 (1969).

186. SUZANNE O'MALLEY, "ARE YOU THERE ALONE?" THE UNSPEAKABLE CRIME OF ANDREA YATES 1–5 (2004); *see also* Yates v. State, 171 S.W.3d 215, 216–18 (Tex. App. 2005) (discussing the facts of the murders of Andrea Yates's children, and Andrea Yates's mental state at the time of and immediately following the murders).

187. One of the charges related to the deaths of Noah and John Yates and qualified as capital murder under the section of Texas law making the killing of multiple victims a capital offense. The other charge related to the death of Mary; another provision of Texas law made the murder of a child younger than six a capital offense. *Yates*, 171 S.W.3d at 216 n.1.

prior to her 1993 marriage.[188] She also had an extensive history of mental illness, dating back to shortly after Noah's birth in 1994. In the ensuing years, while giving birth to four more children, she experienced hallucinations, twice attempted suicide, was variously diagnosed with postnatal psychosis, major depression, schizophrenia and bipolar disorder, was intermittently administered antipsychotic medication, and was hospitalized multiple times because of her mental health difficulties. After Luke, her fourth child, was born in 1999, she was strongly warned by an attending psychiatrist that additional pregnancies would likely further jeopardize her mental health.[189] In March 2001, Yates's father died, causing her condition to worsen. Two months later, in May, she filled the bathtub in her home with water for no apparent reason. When her mother-in-law asked her about drawing the water, she replied that she "might need it."[190] She drowned her children on June 20, two days after she last visited with a psychiatrist.[191]

Yates's trial began in February 2002. She entered pleas of not guilty by reason of insanity to the capital murder charges. Under Texas law, to be acquitted by reason of insanity, she would have to prove by a preponderance of the evidence "that, at the time of the conduct charged, [she], as a result of severe mental disease or defect, did not know that [her] conduct was wrong."[192] Yates claimed to believe that she had been marked by Satan and that the only way to save her children from hell was to kill them, causing them to go to heaven and be with God, and her to be punished, thus destroying Satan in the process.[193] Ten psychiatrists and two psychologists testified at her trial. Four of the psychiatrists and one psychologist examined Yates prior to the killings and described the severity of her symptoms and their attempts to treat her. The other mental health professionals saw her after the killings, either to treat her or to assess her mental state, and were asked their opinions about whether she knew at the time she drowned her children that her conduct was wrong.[194] One psychiatrist was unable to arrive at a conclusion.[195] Among the others, four

188. Deborah W. Denno, *Who Is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1, 7–8 (2003).
189. *Id.* at 27–33; Faith McLellan, *Mental Health and Justice: The Case of Andrea Yates*, 368 THE LANCET (Issue 9551) 1951–54 (Dec. 2, 2006), https://www.thelancet.com/journals/lancet/article/PIIS0140673606697894/fulltext [https://perma.unl.edu/HP4X-BA44].
190. *Yates*, 171 S.W.3d at 217; Denno, *supra* note 188, at 32–33.
191. *Yates*, 171 S.W.3d at 217–18; Denno, *supra* note 188, at 34.
192. TEX. PENAL CODE § 8.01 (1992). *See* Ruffin v. State, 270 S.W.3d 586, 591–92 (Tex. Crim. App. 2008); Riley v. State, 830 S.W.2d 584, 585 (Tex. Crim. App. 1992); Denno, *supra* note 188, at 16–17.
193. McLellan, *supra* note 189; Denno, *supra* note 188, at 37–38.
194. *Yates*, 171 S.W.3d at 218.
195. *Id.* at 218 n.2.

psychiatrists and the psychologist testified that Yates "did not know right from wrong, was incapable of knowing what she did was wrong, or believed that her acts were right."[196] The remaining psychiatrist, "Dr. Park Dietz . . . was the State's sole mental-health expert in the case, [and] testified that [Yates], although psychotic on June 20, knew that what she did was wrong."[197]

In response to defense counsel's questioning about his role as a consultant for the television show *Law & Order*, Dr. Dietz volunteered that an episode of that show which aired shortly before Yates drowned her children featured "a woman with postpartum depression who drowned her children in the bathtub and was found insane."[198] The prosecutor subsequently sought to undermine the testimony of a defense expert witness by inquiring about her failure to explore what significance Yates might have attributed to the *Law & Order* show referenced by Dr. Dietz.[199] And during her closing argument to the jury, the prosecutor suggested that viewing the *Law & Order* episode offered Yates "a way out" from her depression and troubled thoughts: "[S]he watches 'Law & Order' regularly, she sees this program. There is a way out. She tells that to Dr. Dietz. A way out."[200] The jury rejected Yates's insanity defense and convicted her of both capital murder charges.

Following the guilty verdicts, but before the jurors began their penalty-phase deliberations to determine whether Yates should be sentenced to death or life imprisonment, it was discovered that Dr. Dietz's testimony was erroneous: no *Law & Order* episode depicting what he described had ever been presented. Defense counsel's motion for a mistrial was denied. The jury was informed about the erroneous testimony via a stipulation and it ultimately rejected the prosecution's request for the death penalty. Yates accordingly was sentenced to life imprisonment.[201] In 2005, the Texas Court of Appeals reversed Yates's convictions, concluding that "there is a reasonable likelihood that Dr. Dietz's false testimony could have affected the judgment of the jury."[202]

Yates's retrial began in June 2006. She again entered pleas of not guilty by reason of insanity. The prosecution elected not to seek the

196. *Id.* at 218 (footnote omitted).

197. *Id.* at 218.

198. *Id.*

199. *Id.* at 219.

200. *Id.*

201. *Id.* at 219–20. *See generally* Edward Wyatt, *Even for an Expert, Blurred TV Images Become a False Reality*, N.Y. TIMES (Jan. 8, 2005), https://www.nytimes.com/2005/01/08/arts/television/even-for-an-expert-blurred-tv-images-became-a-false-reality.html [https://perma.unl.edu/Z4AH-Q64W].

202. *Yates*, 171 S.W.3d at 222.

death penalty.[203] As a consequence, the jurors did not have to be death-qualified, i.e., attest to their willingness to consider imposing a capital sentence in the event of a conviction.[204] Research suggests that, in addition to exhibiting other "conviction-proneness" tendencies, death-qualified juries generally are less receptive to the insanity defense than juries that are not death-qualified.[205] At the conclusion of the month-long retrial, the jurors deliberated for nearly thirteen hours and then found Yates not guilty by reason of insanity.[206] Yates was civilly committed and, as of 2018, remained hospitalized.[207]

IV. WHAT WENT WRONG? SOURCES OF ERROR IN FAILED AFFIRMATIVE DEFENSE EXONERATION CASES

A. Failed Self-Defense

We can compare the frequency with which different types of problems were evident in the failed justification (self-defense) cases we discussed and in the larger body of analogous exoneration cases identified in the National Registry of Exonerations (NRE). Our sample of nineteen cases[208] is not representative of NRE cases generally. Our cases are exclusively "no crime" wrongful convictions, and all concern convictions for murder (eleven of nineteen, or 57.9%), attempted mur-

203. *Andrea Yates Found Not Guilty by Reason of Insanity—Prosecutors Had Originally Sought Death*, DEATH PENALTY INFO. CTR. (July 27, 2006), https://deathpenaltyinfo.org/node/444 [https://perma.unl.edu/RJR9-NKUR].

204. "[A] prospective juror may be excluded for cause because of his or her views on capital punishment . . . [if those] views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

205. *See* Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 L. & HUM. BEHAV. 81 (1984); *see generally* William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts*, 8 L. & HUM. BEHAV. 95 (1984); *see also* Lockhart v. McCree, 476 U.S. 162 (1986) (stating that death-qualified juries are more "conviction-prone").

206. DEATH PENALTY INFO. CTR., *supra* note 203; McLellan, *supra* note 189; Maria Newman, *Yates Found Not Guilty by Reason of Insanity*, N.Y. TIMES (July 26, 2006), https://www.nytimes.com/2006/07/26/us/26cnd-yates.html [https://perma.unl.edu/FT47-V6Q5]; *Yates Not Guilty by Reason of Insanity*, CNN (July 26, 2006), http://www.cnn.com/2006/LAW/07/26/yates.verdict/ [https://perma.unl.edu/E3K4-EEB2].

207. *Where is Andrea Yates Now? A Peek Inside Her Life in a State Mental Hospital*, ABC 13 EYEWITNESS NEWS (June 20, 2018), https://abc13.com/where-is-andrea-yates-now-peek-inside-her-secluded-life/1980992/ [https://perma.unl.edu/T9W6-CUNM]; *see also* George Parham, *Beyond the Andrea Yates Verdict: Mental Health and the Law*, 49 TEX. TECH L. REV. 847, 858 (2017) (stating "[Andrea Yates] is currently in a mental health hospital and will come up for yearly review to determine whether she constitutes a danger to others.").

208. We include Jacob Gentry's case, see *supra* Part II, and the eighteen cases discussed, see *supra* section III.A.

der (two, or 10.5%), manslaughter (three, or 15.8%), or assault (three, or 15.8%). In contrast, just 36.8% of the post-1988 exonerations included in the NRE involve "no crime" wrongful convictions, and among those, considerably smaller proportions represent convictions for murder (8.0%), attempted murder (0.5%), manslaughter (2.2%), or assault (5.3%).[209] The race and ethnicity of the nineteen exonerees in our sample (73.7% White; 21.1% Black; 5.3% Hispanic; 0% Other) and in the 146 NRE "no crime" cases involving murder, attempted murder, manslaughter, and assault (66.0% White; 20.8% Black; 10.4% Hispanic; 2.8% Other) are roughly comparable.[210]

The NRE identifies the "contributing factors" associated with the wrongful convictions in its database. Those factors include mistaken witness identification (MWI), false confession (FC), perjury or false accusation (P/FA), false or misleading forensic evidence (F/MFE), official misconduct (OM), and inadequate legal defense (ILD).[211] Many cases involve multiple contributing factors, while in some of the wrongful conviction cases no contributing factors are identified. Table 1 describes the frequency with which the various contributing factors are present in all 2,471 of the exoneration cases; in the 910 "no crime" cases; in the 146 "no crime" cases involving convictions for murder, attempted murder, manslaughter, or assault; and in the nineteen cases in our sample of failed self-defense cases (all of which are "no crime" wrongful convictions for murder, attempted murder, manslaughter, or assault).[212]

209. These calculations were based on NRE data current as of July 2, 2019, at which time 910 of the 2,471 NRE exonerations were identified as "no crime" cases, and 73 of the 910 "no crime" cases involved convictions for murder, 5 for attempted murder, 20 for manslaughter, and 48 for assault. *See* NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.unl.edu/KA8K-8DAG] (last visited July 2, 2019).

210. *Id.*

211. *Id.* The contributing factors are defined at *Glossary*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#MWID [https://perma.unl.edu/KY6J-N5JE] (last visited May 29, 2019) (defining contributing factors).

212. The reported statistics are current as of July 2, 2019. *See* NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterClear=1 [https://perma.unl.edu/R3QJ-6F7J] (last visited July 2, 2019).

Table 1
Frequency with Which Factors Contribute to Wrongful Convictions in NRE Cases

Factor	MWI	FC	P/FA	F/MFE	OM	ILD	None
All Cases (N=2,471)	28.5%	12.1%	58.2%	23.0%	53.5%	25.7%	5.4%
No Crime (N=910)	0.2%	4.6%	61.2%	28.8%	42.1%	24.5%	11.1%
No Crime + Murder, Att., M.S., Assault (N=146)	0.7%	8.2%	56.2%	45.2%	52.1%	41.1%	6.2%
Failed Self-Defense (N=19)	0%	0%	47.4%	21.1%	52.6%	36.7%	21.4%

Significant differences exist in the prevalence of the individual factors contributing to wrongful convictions among all of the NRE cases and the nineteen failed self-defense cases in our sample. Not surprisingly, none of the failed self-defense cases involved mistaken witness identifications, a factor present in more than one-fourth (28.5%) of all exoneration cases. Nor did any defendants in the failed self-defense cases falsely confess, in contrast to 12.1% of the defendants in the larger body of exoneration cases. Inadequate legal defense contributed more often to the wrongful convictions in the failed self-defense cases than others (36.7% versus 25.7%), while perjury and false accusations were somewhat less prevalent (47.4% versus 58.2%). Interestingly, a noticeably higher proportion of the failed self-defense cases (21.4%) than exoneration cases generally (5.4%) were marked by the absence of factors commonly associated with wrongful convictions.[213] Al-

213. *See* Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008) ("There is a canonical list of factors that lead to false convictions: eyewitness misidentification; false confession; misleading, false, or fraudulent forensic evidence; testimony by highly motivated police informants such as 'jailhouse snitches'; perjury in general; prosecutorial misconduct; ineffective legal defense."); Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 841 (2010) ("[R]esearch has identified seven central categories of sources [of wrongful convictions], including problems involving (1) mistaken eyewitness identification; (2) false confessions; (3) tunnel vision; (4) informant testimony; (5) imperfect forensic science; (6) prosecutorial misconduct; and (7) inadequate defense representation.").

though our sample is small, this disparity suggests the importance of probing for other sources of error to explain wrongful convictions in failed self-defense cases.

In our sample of failed self-defense cases, the erroneous exclusion of evidence of the alleged victim's prior acts of violence or reputation for violence—which may be relevant to whether the alleged victim was the initial aggressor and whether the defendant actually and reasonably believed it was necessary to resort to defensive force—or a related flawed jury instruction, contributed to reversals with some regularity and, by hypothesis, to the wrongful convictions. These problems arose in five of the nineteen cases.[214] Several other cases also involved errors primarily or exclusively related to self-defense issues. In one, the trial judge erred by failing to instruct the jury that under state law the resident of a dwelling has no duty to retreat prior to using deadly defensive force within the dwelling against a cohabitant.[215] In one of the two wrongful convictions for misdemeanor assault in our sample, the trial judge failed to instruct the jury on self-defense when such an instruction was merited.[216] In the other, the trial judge left the bench during the defendant's offer of proof regarding the alleged victim's demonstrated history of ill will against him, which was relevant to the self-defense claim.[217] In another case, the judge presiding at a murder trial failed to instruct the jury that self-defense was available not only for the murder charge, but also for the lesser included offense of manslaughter.[218] And in another case, the prosecutor erroneously represented to the jury that state law prohibited the use of deadly defensive force when the alleged victim was unarmed.[219]

Cases that hinge on the acceptance or rejection of self-defense claims are not immune to the more common sources of error that contribute to wrongful convictions generally. In several cases within our sample, reversals stemmed from problems other than evidentiary or doctrinal issues exclusive to self-defense. They instead involved factors commonly found to contribute to the general lot of wrongful convictions, including false testimony,[220] prosecutorial misconduct,[221]

214. Antoine v. State, 138 So. 3d 1064, 1074–76 (Fla. Dist. Ct. App. 2014); Commonwealth v. Chambers, 989 N.E.2d 483, 489–95 (Mass. 2013); State v. Fish, 213 P.3d 258, 263–75 (Ariz. Ct. App. 2009); State v. Lewchuk, 4 Neb. App. 165, 170–78, 539 N.W.2d 847, 852–56 (1995); Richardson v. State, 147 So. 3d 838, 839–44 (Miss. 2014).

215. State v. Thomas, 673 N.E.2d 1339, 1342–43 (Ohio 1997).

216. *See* Petition for Writ of Certiorari, Podaras v. City of Menlo Park, *supra* note 115, at *9.

217. State v. McMahan, 761 A.2d 50, 53–55 (Me. 2000).

218. State v. Gentry, 106 A.3d 552, 558–61 (N.J. Super. Ct. App. Div. 2015).

219. Drennen v. State, 311 P.3d 116, 121–23 (Wyo. 2013).

220. Cash v. State, 875 So. 2d 829, 830–31 (Fla. Dist. Ct. App. 2004).

221. *Gentry*, 106 A.3d at 562–65 (improper questioning about inadmissible evidence); *Sandra Ortiz*, *supra* note 113 (improper closing argument); Sailors v. State, 593

problems relating to expert testimony,[222] and ineffective assistance of defense counsel,[223] among others.[224]

Although deficient jury instructions, evidentiary rulings, and other case-specific errors often contribute to wrongful convictions when self-defense is at issue, the doctrinal and principled choices that demarcate the bounds of lawful self-defense can be the fundamental determinants of innocence and guilt in this context. These choices reflect normative judgments concerning the circumstances under which citizens are justified in using defensive force, how much defensive force can be employed, and how the risk of error is best allocated when self-defense is at issue. They do so through provisions of law that are more or less permissive in defining when citizens are authorized to use defensive force, and that are more or less demanding in their proof requirements.

Jurisdictions vary, for example, in whether a law-abiding person has a duty to retreat before using deadly defensive force against an unlawful aggressor.[225] The use of deadly force in self-defense is less readily available in states that abide by the common law duty to retreat, a rule designed to preserve life, even that of an unlawful aggressor, absent necessity.[226] In contrast, in "stand your ground"

N.E.2d 202, 205–07 (Ind. Ct. App. 1992) (improper closing argument); Williams v. State, 298 S.E.2d 492, 493–94 (Ga. 1983) (failure to disclose material exculpatory evidence); Williams v. State, 330 S.E.2d 353, 355–56 (Ga. 1985) (improper closing argument).

222. People v. Salce, 1 N.Y.S.3d 417, 420–21 (N.Y. App. Div. 2015) (exclusion of defense witness expert testimony regarding defensive nature of wounds); *Williams*, 330 S.E.2d at 354–55 (improper admission of prosecution expert witness testimony because subject matter was not beyond the ken of average lay jurors).

223. *Cash*, 875 So. 2d at 832; People v. Holbrook, No. 271562, 2008 WL 2917641, at *2–3 (Mich. Ct. App. July 29, 2008).

224. People v. Gurley, 602 N.Y.S.2d 184 (N.Y. App. Div. 1993) (newly discovered evidence); State v. Linder, 278 S.E.2d 335 (S.C. 1981) (failure to instruct jury on lesser included offense of manslaughter in murder trial); Roesser v. State, 751 S.E.2d 297 (Ga. 2013) (reversal for unspecified erroneous jury instruction).

225. A slim majority of states (twenty-seven) generally impose no duty to retreat before deadly defensive force is used by a person who was not the original aggressor, although the rule has varied application when the circumstances involve the co-inhabitants of a dwelling. Twenty-two states impose a duty to retreat before deadly defensive force is utilized when retreat can be made in complete safety. Two jurisdictions consider whether safe retreat was available using a totality of the circumstances analysis. *See* Alon Lagstein, *Beyond the George Zimmerman Trial: The Duty to Retreat and Those Who Contribute to Their Own Need to Use Deadly Self-Defense*, 30 HARV. J. RACIAL & ETHNIC JUST. 367, 373–79 (2014); *see also* Annotation, *Homicide: Duty to Retreat When Not on One's Own Premises*, 18 A.L.R. 1279 (1922 & Supp.) (discussing the duty to retreat based on jurisdiction); *Self-Defense and "Stand Your Ground,"* NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx [https://perma.unl.edu/8S75-UU2Y] (last visited June 3, 2019).

226. *See* Richard Stephens, *Life and Liberty: Seven Factors That Will Better Evaluate Self-Defense in Nevada's Common Law on Retreat*, 8 NEV. L.J. 649, 651–52

jurisdictions, the law promotes the policy that innocent citizens need not yield to lawbreakers, and thus may use deadly force to defend against threatened death or serious injury even if an avenue of safe retreat is available.[227] As a consequence, whether retreat is a prerequisite to the use of deadly defensive force may be determinative of guilt or innocence in courts of law.

Other measures also may tip the scales of guilt or innocence when self-defense is at issue. Several states have enacted legislation that creates a presumption that persons claiming to have acted in self-defense under qualifying circumstances had a reasonable fear of imminent death or great bodily harm, and bar arrest, prosecution, or conviction (as well as civil liability) unless that presumption is rebutted. Florida's legislation,[228] enacted in 2005 and supported by the National Rifle Association and the American Legislative Exchange Council (ALEC),[229] serves as a model followed in whole or in part elsewhere.[230]

The states now overwhelmingly mandate that the prosecution must prove beyond a reasonable doubt that the defendant failed to act in justifiable self-defense when self-defense is at issue.[231] Defendants

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(2008); Michael Jaffe, *Up in Arms Over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 155, 160 (2005); DRESSLER, *supra* note 31, at 243–45; WAYNE R. LAFAVE, CRIMINAL LAW § 5.7(f), 497–99 (3d ed. 2000); FLETCHER, RETHINKING CRIMINAL LAW, *supra* note 28, at 857–64.

227. *See* RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991); Stephens, *supra* note 226, at 652–53; DRESSLER, *supra* note 31, at 243–45; LAFAVE, *supra* note 226, at 497–99; FLETCHER, RETHINKING CRIMINAL LAW, *supra* note 28, at 860–64.

228. *See* FLA. STAT. ANN. §§ 776.013, 776.032 (West 2017). *See generally* Lydia Zbrzeznj, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 253–57 (2012).

229. *See* Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 836–39 (2013); Zachary L. Weaver, *Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 396 (2008); John Nichols, *How ALEC Took Florida's "License to Kill" Law National*, THE NATION (Mar. 22, 2012), https://www.thenation.com/article/how-alec-took-floridas-license-kill-law-national/ [https://perma.unl.edu/XEM8-BTZP].

230. *See* Jennifer Randolph, *How to Get Away With Murder: Criminal Law and Civil Immunity Provisions in "Stand Your Ground" Legislation*, 44 SETON HALL L. REV. 599, 611–16 (2014); Wyatt Holliday, *"The Answer to Criminal Aggression is Retaliation": Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407, 413–21 (2012); *"Stand Your Ground" Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/ [https://perma.unl.edu/2GWG-CWDW] (last visited June 3, 2019).

231. In 2019, Ohio became perhaps the last state to require the prosecution to prove that a defendant did not act in lawful self-defense after the legislature overrode Governor John Kasich's veto of legislation, which shifted the burden of persuasion to the government. *See* OHIO REV. CODE ANN. § 2901.05 (West 2019); Mike

are often required to satisfy the burden of persuasion to prevail on other affirmative defenses,[232] and there is no constitutional bar to having them do so with respect to self-defense.[233] The near universal agreement that the prosecution must negate self-defense claims reflects a value judgment reminiscent of the Blackstonian principle that "it is better that ten guilty persons escape, than that one innocent suffer,"[234] and is akin to the corresponding rationale underlying the constitutional imperative that the government must prove all elements of a crime beyond a reasonable doubt to establish guilt.[235] It demonstrates consensus that special caution is needed to guard against the

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Brookbank, *New Ohio Self-Defense Law Shifts Burden of Proof to Prosecutors*, NEWS 5 CLEV. (Mar. 27, 2019), https://www.news5cleveland.com/news/local-news/cleveland-metro/new-ohio-self-defense-law-shifts-burden-of-proof-to-prosecutors [https://perma.unl.edu/J2HM-NADT]; Andy Chow, *Ohio House, Senate Override Kasich Veto on Self-Defense Gun Bill*, CIN. PUB. RADIO NEWS (Dec. 27, 2018), https://www.wvxu.org/post/ohio-house-senate-override-kasich-veto-self-defense-gun-bill#stream/0 [https://perma.unl.edu/ZX2U-U3U3]; James Dearie, *Major Change in Ohio Self-Defense Cases for Criminal Defendants*, DEARIE, FISCHER & MATTHEWS, https://www.dfm-law.com/blog/2019/04/major-change-in-ohio-self-defense-cases-for-criminal-defendants.shtml [https://perma.unl.edu/EK9F-PCZZ] (last visited June 4, 2019) ("Up until the passage of this law [shifting the burden of proof from the defendant to the prosecution in self-defense cases], Ohio was the only state in the Union that laid the burden of proof on the defendant to prove that an act was committed in self-defense."); *see also* Amber L. Kipfmiller, *Examining Retaliation as a Use of Force: Why State Courts Should Return to the Pre-Nassar, Pro-Plaintiff Framework*, 87 MISS. L.J. SUPRA 1, 22–24 (2018); Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R.3d 221 § 5[b] (1972 & Supp.) (examining a selection of cases where courts stated the rules regarding who has the burden of showing self-defense in a homicide prosecution); *Homicide*, 40A AM. JUR.2d § 236 (2019) (discussing the presumptions and inferences that occur in homicide cases).

232. *See, e.g.*, Smith v. United States, 133 S. Ct. 714 (2013); Dixon v. United States, 548 U.S. 1 (2006); Patterson v. New York, 432 U.S. 197 (1977); Leland v. Oregon, 343 U.S. 790 (1952). *See generally* George Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 899–910 (1968); Robinson, *supra* note 29, at 256–62; LAFAVE, *supra* note 226, at 53–59; DRESSLER, *supra* note 31, at 236.

233. Martin v. Ohio, 480 U.S. 228 (1987).

234. 4 WILLIAM BLACKSTONE, COMMENTARIES *358. *See generally* Robert J. Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301 (2011); Alexander Volokh, *N Guilty Men*, 146 U. PENN. L. REV. 173 (1997). Blackstone, however, was of the view that criminal defendants were properly assigned the burden of persuasion on "defensive" issues, including self-defense. FLETCHER, *supra* note 232, at 902–03; Brown, *supra* note 227, at 3.

235. *In re* Winship, 397 U.S. 358, 363–64, 372 (1970) (Harlan, J., concurring) ("In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty . . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

erroneous rejection of legitimate self-defense claims and the attendant risk of wrongful conviction.

Nevertheless, dangers lurk when claims of self-defense are indulged too permissively. If not cabined by requirements that defensive force is justified only when reasonably believed to be a necessary and proportionate response to imminent unlawful injury,[236] the law risks condoning sanctioning the private use of violence too liberally,[237] potentially encompassing acts of vigilantism[238] and accommodating seriously misguided and idiosyncratic perceptions and beliefs.[239] The

236. *See generally* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 18–38 (1988).

237. *See, e.g.*, State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) ("The killing of another human being is the most extreme recourse to our inherent right of self-preservation and can be justified in law only by the utmost real or apparent necessity brought about by the decedent . . . . Only if defendants are required to show that they killed due to a reasonable belief that death or great bodily harm was imminent can the justification for homicide remain clearly and firmly rooted in necessity. The imminence requirement ensures that deadly force will be used only where it is necessary as a last resort in the exercise of the inherent right of self-preservation."); FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 236, at 18 ("A legal system is possible only if the state enjoys a monopoly of force. When private individuals appeal to force and decide who shall enjoy the right to 'life, liberty and the pursuit of happiness,' there can be no pretense of the rule of law. Yet the state's monopoly also entails an obligation to secure its citizens against violence. When individuals are threatened with immediate aggression, when the police cannot protect them, the monopoly of the state gives way. The individual right of survival reasserts itself. No inquiry could be more important than probing this boundary between the state's obligation to protect us and the individual's right to use force, even deadly force, to repel and disarm an aggressor.").

238. *See* Lagstein, *supra* note 225, at 390–91, n.203–06; Ebonie R. Rocio, *Flip a Coin: Heads, Stand Your Ground Is Good Law . . . Tails, Stand Your Ground Is Bad Law*, 40 T. MARSHALL L. REV. ONLINE 3, 14, n.107 (2014); Devin C. Daines, State v. Harden*: Muddying the Waters of Self-Defense Laws in West Virginia*, 113 W. VA. L. REV. 971, 975, n.21 (2011); Adam Winkler, *What the Florida "Stand Your Ground" Law Says*, N.Y. TIMES (Jan. 4, 2013), https://www.nytimes.com/roomfordebate/2012/03/21/do-stand-your-ground-laws-encourage-vigilantes/what-the-florida-stand-your-ground-law-says [https://perma.unl.edu/5HQV-4JMQ].

239. For example, in affirming the requirement that a person's belief that it is necessary to defend against imminent unlawful conduct must be objectively reasonable, the New York Court of Appeals explained:

> We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law. We can only conclude that the Legislature retained a reasonable requirement to avoid giving a license for such actions.

People v. Goetz, 497 N.E.2d 41, 50 (N.Y. 1986).

standards governing the justified use of defensive force must be sensitive to these concerns while also ensuring that the boundaries of lawful self-defense are not unduly restrictive, so that law-abiding individuals remain at liberty to defend themselves against unlawful aggression without risking either harm or unjust conviction. Plumbing this balance, to adequately protect innocents both outside and within courts of law, is perhaps the fundamental principled challenge in determining the proper scope and essentials of self-defense laws.

B. Failed Excuse Defenses

Although excuse and justification defenses both negate legal guilt, they do so for different reasons. Actors whose conduct would otherwise be criminal may be excused from responsibility because they suffer a disabling condition—such as mental illness, youth, or threatened harm—that negates blameworthiness and hence makes condemnation and punishment inappropriate. The harm caused nevertheless remains socially disapproved and is often tragically lamentable. In contrast, justification defenses reflect the social judgment that an actor's conduct was appropriate under the circumstances, representing approval of the ensuing decision to inflict harm as well.[240] These fundamental differences may result in distinctive legal policies governing excuse and justification defenses, including rules of evidence and procedure that are more or less tolerant of the erroneous rejection or acceptance of the respective defenses.

Our sample of three cases in which excuse defenses initially were rejected, resulting in convictions for murder[241] or attempted murder,[242] but which ultimately culminated in exonerations, is far too small to illuminate factors that are apt to contribute to wrongful convictions generally in cases of failed excuse defenses. The errors resulting in the reversal of the convictions in our sample have no common theme. One involved defense counsel's failure to discover that a clerk of court erred in reporting that the lawyer's request to have a "sleep study" conducted on his client in support of the asserted defense of somnambulism had been denied.[243] Another concerned a sheriff's inappropriate contact with jury members during a trial at which the sheriff testified that he perceived no evidence of the defendant's

240. *See supra* text accompanying notes 29–30.

241. *See supra* text accompanying notes 171–202 (discussing the cases of Erwin Charles Simants and Andrea Yates).

242. *See supra* text accompanying notes 160–70 (discussing the case of Yun Hseng Liao).

243. *See supra* text accompanying notes 162–67 (discussing the case of Yun Hseng Liao).

mental illness, which was integral to the asserted insanity defense.[244] In the remaining case, a prosecution expert witness who disputed the defendant's claim of insanity presented false testimony that was deemed prejudicial to the defense.[245]

Beyond case-specific issues, various rules and legal doctrines reflect a greater reluctance to recognize excuse defenses, and a higher tolerance for the erroneous rejection of them, than is true for justification defenses. There is a noticeable contrast, for example, between jurisdictions' receptivity to the insanity defense, an excuse, and self-defense, a form of justification. In most states and under federal law, defendants now must satisfy the burden of persuasion to prevail on the insanity defense,[246] whereas the prosecution is required to negate claims of self-defense beyond a reasonable doubt.[247] In our samples of cases, following Erwin Charles Simants's acquittal by reason of insanity in 1979, the Nebraska legislature changed the prior rule that the prosecution must disprove insanity beyond a reasonable doubt and required defendants to establish their insanity by a preponderance of the evidence.[248] Conversely, after Harold Fish was charged with murder in a highly publicized and controversial case in which he claimed to have killed in self-defense, the Arizona legislature changed the prevailing law, which placed the burden on defendants to establish that they acted in self-defense by a preponderance of the evidence, and shifted the burden to the prosecution to disprove self-defense beyond a reasonable doubt.[249]

Four states now have effectively abandoned the insanity defense, making evidence of mental illness relevant only insofar as it bears on the *mens rea* element of a charged crime.[250] Other jurisdictions,

244. *See supra* text accompanying notes 179–81 (discussing the case of Erwin Charles Simants).

245. *See supra* text accompanying notes 197–202 (discussing the case of Andrea Yates).

246. *See* Annotation, *Modern Status of Rules as to Burden and Sufficiency of Proof of Mental Irresponsibility in Criminal Case*, 17 A.L.R.3d 146 (1968 & Supp.); *The Insanity Defense Among the States*, FINDLAW, https://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html [https://perma.unl.edu/FSL8-C2R9] (last visited June 6, 2019); 18 U.S.C.A. § 17(b) (West 2018) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence.").

247. *See supra* text accompanying note 231.

248. *See supra* text accompanying note 185.

249. *See supra* text accompanying notes 69–70.

250. IDAHO CODE ANN. § 18-207 (West 2018); KAN. STAT. ANN. § 22-3219 (West 2018); MONT. CODE ANN. § 46-14-102 (West 2018); UTAH CODE ANN. § 76-2-305 (West 2018). The Supreme Court granted certiorari to consider whether Kansas's abolition of the insanity defense is constitutionally permissible. Kahler v. Kansas, 139 S. Ct. 1318 (2019). *See generally* Fatma Marouf, *Assumed Sane*, 101 CORNELL L. REV. ONLINE 25, 32–33 (2016); R. Michael Shoptaw, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84

spurred by John Hinckley, Jr.'s acquittal by reason of insanity following his attempt to assassinate President Ronald Reagan,[251] restricted the availability of the insanity defense, such as by recognizing only "severe"[252] mental illness as a predicate, or narrowing the circumstances under which the defense applies.[253] The trend is otherwise with respect to self-defense, as several jurisdictions in recent years significantly expanded the availability of the justifiable use of defensive force and adopted correspondingly permissive evidentiary rules.[254]

The direction and magnitude of the risk of error in criminal prosecutions that hinge on the rejection or acceptance of affirmative defenses will vary depending on the procedural rules governing their recognition, as well as their substantive scope. For example, when "the defendant bears the burden of proof on an affirmative insanity defense, there is less risk that he will erroneously be excused from liability."[255] By the same token, however, the risk is thereby enhanced that a meritorious defense will be rejected.[256] And while limiting the

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MISS. L.J. 1101, 1111–12 (2015) (including Alaska as one of the states that abolished the insanity defense); Jessica Harrison, *Idaho's Abolition of the Insanity Defense—An Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 584–86 (2015).

251. *See* PETER W. LOW, JOHN CALVIN JEFFRIES, JR. & RICHARD L. BONNIE, THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE (1986); LINCOLN CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984); Elizabeth Bennion, *Death is Different No Longer: Abolishing the Insanity Defense is Cruel and Unusual Under* Graham v. Florida, 61 DEPAUL L. REV. 1, 1–2 (2011); Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1376–77, 1380–82 (1997); Robinson & Cahill, *supra* note 30, at 207.

252. TEX. PENAL CODE ANN. § 8.01 (1992); *see supra* text accompanying note 192; 18 U.S.C.A. § 17(a) (West 2018).

253. *See* Clark v. Arizona, 548 U.S. 735 (2006) (rejecting a constitutional challenge to Arizona's restrictive insanity defense). *See generally* J. Robert Russell, *Criminal Discovery and Psychological Defenses in West Virginia: "Squeezing a Lemon" or "Kicking a Dog,"* 99 W. VA. L. REV. 207, 214–15 (1996); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 639–40 (1990).

254. *See supra* text accompanying notes 227–30.

255. Brief for the United States as Amicus Curiae Supporting Respondent at 25, Clark v. Arizona 548 U.S. 735 (2006) (No. 05-5966), 2006 WL 542415, at *25.

256. *See* DRESSLER, *supra* note 31, at 236 ("[A] strong case can be made for the proposition that the government should carry the burden of persuasion regarding justification defenses, but that the defendant should be required to persuade the factfinder regarding excuses." This argument is based on the premise that "[s]ociety has determined [that justified conduct] is desirable or, at least permissible. In short, it is lawful conduct. If the defendant is allocated the burden of persuasion regarding a justification, she may be punished although the jury is not satisfied beyond a reasonable doubt that she has done anything wrong. In contrast, with excused conduct, all of the elements of the crime have been proven

reach of the insanity defense or the lawful use of defensive force will presumably result in fewer persons escaping responsibility who deserve conviction and punishment, such restrictions can be expected to place more individuals at risk who are not truly blameworthy.[257]

In short, case-specific errors can and will produce wrongful convictions that result when legitimate affirmative defenses fail. At the same time, the particular terms and the proof requirements of justification and excuse defenses warrant careful attention. The governing doctrinal and evidentiary policies are critical in allocating the competing risks of error inherent in adjudicating affirmative defenses, and in attempting to further "the twofold aim of [law] which is that guilt shall not escape or innocence suffer."[258]

V. COMPENSATION FOR WRONGFUL CONVICTION AND INCARCERATION

As with a majority of the states, Nebraska provided a statutory basis to allow wrongfully convicted individuals who have been incarcerated to recover damages for harms suffered.[259] Such legislation

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and it has been determined that the conduct was unjustifiable. Under those circumstances, it is fair to expect the defendant to persuade the jury that she is not to blame for her wrongful conduct." (emphasis in original)).

257. In his seminal article published in 1982, before many of the developments discussed above which concern affirmative defenses were enacted, Professor Robinson noted:

> many jurisdictions . . . place[ ] the burden on the state for all conditions that establish the harmfulness of the conduct and the blameworthiness of the defendant. Since justifications and excuses go to establish this "rightness of punishing the accused," the burden of persuasion for such defenses is likely to fall to the state under this view.

Robinson, *supra* note 29, at 260 (footnotes omitted) (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 802 (E. Cleary 2d ed. 1972)).

See generally Susan D. Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable* Clark v. Arizona, 58 CASE W. RES. L. REV. 19, 24–26 (2007) (arguing that abolishing the insanity defense would undermine the fundamental principle that moral culpability is a prerequisite for punishment); Joshua G. Light, *The Castle Doctrine—The Lobby is My Dwelling*, 22 WIDENER L.J. 219, 225 (2012) (noting that one reason for the expansion of self-defense laws is the belief that "the justice system favors due process rights of criminals over the rights of victims") (footnote omitted); Maria Massucci & James A. Pitaro, *Victimization as a Defense: Valid Protection for the Innocent or Escape from Criminal Responsibility?*, 8 ST. JOHN'S J. LEGAL COMMENT. 305 (1992).

258. Berger v. United States, 295 U.S. 78, 88 (1935). *See generally* James R. Acker, *Reliable Justice: Advancing the Twofold Aim of Establishing Guilt and Protecting the Innocent*, 82 ALB. L. REV. 719 (2019).

259. Thirty-five states and the District of Columbia, as well as the federal government, currently have enacted such compensation statutes. A helpful chart identifying the state and federal statutes that authorize compensation for wrongfully convicted and incarcerated individuals is available at *Compensation Chart by State—22 May 2018*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Compensation.aspx [https://perma.unl.edu/FHZ3-

aims to recognize that the innocent victims of miscarriages of justice are entitled to compensation for their losses without having to navigate the considerable obstacles and uncertainties associated with pursuing other remedies such as lawsuits or private compensation bills.[260] The legislative findings that introduce Nebraska's law, enacted in 2009, detail its rationale:

> The Legislature finds that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been uniquely victimized, have distinct problems reentering society, and have difficulty achieving legal redress due to a variety of substantive and technical obstacles in the law. The Legislature also finds that such persons should have an available avenue of redress. In light of the particular and substantial horror of being imprisoned for a crime one did not commit, the Legislature intends by enactment of the Nebraska Claims for Wrongful Conviction and Imprisonment Act that persons who can demonstrate that they were wrongfully convicted shall have a claim against the state as provided in the act.[261]

To recover damages under the law, a claimant must prove by clear and convincing evidence "[t]hat he or she was innocent of the crime or crimes"[262] underlying the conviction and imprisonment.

But there is a catch. Individuals wrongfully convicted and incarcerated following a failed self-defense claim need not apply. The Nebraska Supreme Court so ruled while considering a claim for damages under the act brought by Charlene Marie, who had been pardoned following her convictions and service of two years in prison for using a deadly weapon to commit a felony and making terroristic threats.[263] The convictions were based on Marie shooting her husband, Kurt Oldenburg, during an incident in which Marie "pointed a gun at [Olden-

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PZAP] (last visited June 13, 2019). Although most of the information on the chart is accurate and current, Indiana and Nevada recently adopted compensation statutes that are not included. *See* Ind. House Enrolled Act, No. 1150 (codified as IND. CODE § 5-2-23 (2019)); Assemb. Bill No. 267, 80th Sess. (Nev. 2019). *See generally Nevada Governor Signs the Strongest Compensation Law in the Country*, INNOCENCE PROJECT (June 15, 2019), https://www.innocenceproject.org/nevada-governor-signs-the-strongest-compensation-law-in-the-country/ [https://perma.unl.edu/NF8G-Y7CJ]. The amount of monetary awards and other forms of compensation vary dramatically among jurisdictions. *See* Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369 (2017); Alanna Trivelli, *Compensating the Wrongfully Convicted: A Proposal to Make Victims of Wrongful Incarceration Whole Again*, 19 RICHMOND J.L. & PUB. INT. 257, 260–64 (2016).

260. *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999); *see also* Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 82 DRAKE L. REV. 703 (2004) (discussing jurisdictions with laws in place to compensate individuals who were unjustly convicted and later exonerated).

261. NEB. REV. STAT. § 29-4602 (Reissue 2009).

262. NEB. REV. STAT. § 29-4603(3) (Reissue 2009). Claimants must also establish three additional matters. NEB. REV. STAT. §§ 29-4603(1), (2), (4) (Reissue 2009).

263. Marie v. State, 302 Neb. 217, 922 N.W.2d 733 (2019).

burg], he charged her, and while doing so he was shot and seriously injured."[264] The couple's marriage was described as a "stormy relationship . . . and mutual tormenting in ways many people would find abusive."[265]

In seeking compensation for wrongful conviction and incarceration following her pardon, Marie alleged that she was innocent of the alleged crimes because she acted in self-defense.[266] Her claim was properly dismissed, the court ruled, because a person acting in self-defense is not "innocent of the crime or crimes,"[267] as contemplated by the statute. Although acting in self-defense may support a claim of "legal innocence," the court reasoned, it fails to establish "actual innocence,"[268] a prerequisite for recovery under the compensation law. In a prior case, the court "defined actual innocence to mean that the 'defendant did not commit the crime for which he or she is charged.'"[269] Relying on this and other precedent, the court concluded that "actual innocence is akin to factual innocence—in other words, where the State has convicted the wrong person."[270] The court stressed that "Marie does not allege that someone else shot Oldenburg or that she is

264. State v. Oldenburg, 10 Neb. App. 104, 628 N.W.2d 278, 280 (2001). At the time of her conviction, Marie went under the name Charlene M. Oldenburg. *See Marie*, 302 Neb. at 218 n.2, 922 N.W.2d at 734–36 n.2.

265. *Oldenburg*, 10 Neb. App. at 106, 628 N.W.2d at 280.

266. *Marie*, 302 Neb. at 223, 922 N.W.2d at 738 ("Marie alleges that she was actually innocent of the crime for which she was convicted, because she acted in self-defense and thus had not formed the requisite intent."). At her 1999 trial, she had been charged with felonious assault, making a terroristic threat, and with using a deadly weapon in the commission of both crimes. No self-defense instruction had been given regarding the assault charge.

> The jury was . . . instructed on the elements of terroristic threats, and a self-defense instruction was given for that crime . . . . The jury found Charlene not guilty of first-degree assault, guilty of making a terroristic threat, and guilty of using a gun to commit a felony.

Oldenburg, 10 Neb. App. at 109–10, 628 N.W.2d at 283.

267. NEB. REV. STAT. § 29-4603(3) (Reissue 2009).

268. *Marie*, 302 Neb. at 225, 922 N.W.2d at 739 ("Marie alleges that she acted in self-defense. This defense does not inform her claim of actual innocence, but is relevant to a claim of legal innocence.").

269. *Id.* at 222, 922 N.W.2d at 738 (quoting Hess v. State, 287 Neb. 559, 843 N.W.2d 648, 653 (2014)).

270. *Id.* at 224, 922 N.W.2d at 739. In support of this conclusion, the court relied on its decision in *Rodriguez v. Nielsen*, 264 Neb. 558, 650 N.W.2d 237 (2002), which rejected a defendant's claim of malpractice against an attorney based on the theory that the lawyer had not argued that she was innocent of assault because she acted in self-defense. The court in *Rodriguez v. Nielsen* noted that the plaintiff

> did not allege that she was absent at the time of the incident or that she did not commit the acts which occurred. Instead, [the plaintiff] alleged she committed the acts but the acts were in self-defense. In the context of this civil malpractice action, these allegations of fact do not demonstrate actual innocence.

Id. at 241, 650 N.W.2d at 562.

otherwise factually innocent, but alleges that she acted in self-defense and that her actions lacked the requisite intent. This is insufficient to allege that she was innocent"[271] to qualify for statutory compensation.

Consider the irony of this ruling. Had Marie been elsewhere—perhaps relaxing on a beach—and mistakenly identified by an eyewitness as firing the shot that wounded Oldenburg and then convicted and incarcerated, she would be considered innocent and entitled to compensation under the statute. But if instead of being elsewhere, out of harm's way, she was at imminent risk of death or serious injury while under unlawful attack—which she reasonably believed required her to defend herself or be killed by a violent assailant—and thus wounded Oldenburg in justifiable self-defense, she is not eligible for compensation for the two years of incarceration resulting from the erroneous rejection of her self-defense claim. The incongruity of these outcomes is beyond ironic—it is indefensible both in principle and on policy grounds.

Construing analogous provisions of their states' wrongful conviction compensation statutes, courts in other jurisdictions rejected arguments that claimants who acted in self-defense are for that reason disqualified from recovering damages.[272] For instance, Ohio's law requires individuals seeking compensation to demonstrate, among other matters, "that the offense of which the individual was found guilty . . . was not committed by the individual or that no offense was committed by any person."[273] Reasoning that one who acts in self-defense has committed no "offense," the Ohio Supreme Court concluded "that a person acquitted by reason of self-defense may seek compensation for wrongful imprisonment" under the state's act.[274]

Under California law, a claimant must prove "that the crime with which he or she was charged was either not committed at all, or, if committed, was not committed by him or her . . . ."[275] This requirement, the California Court of Appeal ruled, does not preclude recovery for wrongful conviction and incarceration by one who acted in self-defense. "Murder and manslaughter are defined as *unlawful* killing. A person who kills in *lawful* self-defense does not do the definitional 'act' of either crime. A person innocent because of justifiable homicide can

271. *Marie*, 302 Neb. at 225, 922 N.W.2d at 739.

272. *See* Annotation, *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R. 6th 305 § 11 (2010 & Supp.).

273. OHIO REV. CODE ANN. § 2743.48(A)(5) (West 2019).

274. Walden v. State, 547 N.E.2d 962, 965 (Ohio 1989) (construing OHIO REV. CODE ANN. § 2748(A)(4) (West 2019), which subsequently was revised with the relevant wording retained in OHIO REV. CODE ANN. § 2743.48(A)(5) (West 2019)).

275. CAL. PENAL CODE § 4903(a) (West 2014).

demonstrate the crime charged 'was not committed at all,'"[276] and thus may be eligible for compensation under the statute.

By their terms, the compensation statutes in some states effectively prevent persons from recovering damages if they were wrongfully convicted because their self-defense claims were erroneously rejected. Thus, the laws in Missouri[277] and Montana[278] restrict compensation to wrongfully convicted individuals who demonstrate their innocence through DNA evidence, which will almost always be irrelevant in self-defense cases because identity is not at issue. Statutes in other states arguably, although less certainly, render compensation unavailable in failed self-defense wrongful conviction cases. Legislation in some jurisdictions requires that innocence must be demonstrated through "newly discovered evidence."[279] Such a requirement introduces ambiguity into whether recovery is allowed in failed self-defense cases when, for example, an acquittal or dismissal results after the original conviction was upset because of erroneous jury instructions, improper arguments, or other circumstances that do not directly concern the discovery of new evidence.

In still other jurisdictions, statutes require proof that the individual seeking compensation "committed *neither the act nor* the offense that served as the basis for the conviction and incarceration."[280] These

276. Diola v. Bd. of Control, 185 Cal. Rptr. 511, 515–16 (Cal. Ct. App. 1982) (citations omitted) (emphasis in original).

277. MO. ANN. STAT. § 650.058(1) (West 2016) ("[A]ny individual who was found guilty of a felony in a Missouri court and was later determined to be actually innocent of such crime solely as a result of DNA profiling analysis may be paid restitution.").

278. MONT. CODE ANN. § 53-1-214(1) (West 2019) ("[A] person who was convicted in this state of a felony offense, who was incarcerated in a state prison for any period of time, and whose judgment of conviction was overturned by a court based on the results of postconviction forensic DNA testing that exonerates the person of the crime for which the person was convicted is entitled to receive educational aid at the state's expense."). Educational assistance is the sole form of compensation available under the statute.

279. *See* MD. CODE ANN., CRIM. PROC. §§ 8-301(a), (b)(3), (f)(2)(ii) (West 2018); MICH. COMP. LAWS ANN. §§ 691.1752(b), 691.1754(1)(c), 691.1755(1)(c) (West 2017); UTAH CODE ANN. §§ 78B-9-401.5(1), (3), 78B-9-402 (2)(a)(i), (v), 78B-9-404 (4)(a), (8)(b) (West 2019); VA. CODE ANN. §§ 19.2-327.3(A)(iv) (biological evidence of actual innocence), 19.2-327.11 (A)(iii)-(viii), 19.2-327.13 (non-biological evidence of actual innocence) (West 2013). *See also* WASH. REV. CODE ANN. § 4.100.060(c) (West 2013) (claimant must be "(i) . . . pardoned consistent with innocence for the felony or felonies that are the basis for the claim; or (ii) [t]he claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed.").

280. FLA. STAT. ANN. § 961.03(7)(a) (West 2017) (emphasis added); FLA. STAT. ANN. § 961.02(7) (West 2017). *See also* COLO. REV. STAT. ANN. § 13-65-102(3)(a) (West 2013) ("The person committed neither the act or offense that served as the basis

provisions stand in contrast to more commonly worded laws that allow recovery if the person failed to commit *either* the act *or* an offense,[281] or which condition recovery simply on proof that no crime or offense was committed.[282] Of course, even statutes of the latter type do not

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for the conviction and incarceration that is the subject of the petition, nor any lesser included offense thereof"); Assemb. Bill No. 267, 80th Sess. § 2(2) (Nev. 2019) ("The court shall award damages for wrongful conviction . . . if the person proves by a preponderance of the evidence that . . . (b) He or she did not commit the felony for which he or she was convicted and the person . . . (2) Did not commit the acts that were the basis of the conviction . . . .").

281. *See, e.g.*, D.C. CODE ANN. § 2-422(a)(4) (West 2017) ("the person did not commit any of the acts charged or the person's acts or omissions in connection with such charge constituted no offense . . . ."); MISS. CODE ANN. § 11-44-7(1)(b) (West 2019) ("He did not commit the felony or felonies for which he was sentenced and which are the grounds for the complaint, or the acts or omissions for which he was sentenced did not constitute a felony"); N.Y. Ct. Claims Act § 8-b(5)(c) (2007) ("he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged . . . did not constitute a felony or misdemeanor against the state"); 28 U.S.C.A. § 2513 (a)(2) (West 2004) ("He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense . . . .").

282. *See, e.g.*, HAW. REV. STAT. ANN. § 661B-1(b)(1), (2) (West 2019) ("the petitioner was actually innocent of the crimes for which the petitioner was convicted"); 735 ILL. COMP. STAT. ANN. 5/2-702(g)(3) (West 2014) ("the petitioner is innocent of the offenses charged . . . or his acts or omissions charged . . . did not constitute a felony or misdemeanor against the State"); Ind. House Enrolled Act No. 1150 § (2)(1) (2019); IND. CODE ANN. § 5-2-23 (West 2019) ("did not commit the offense"); IOWA CODE ANN. § 663A.1(2) (West 2019) ("the offense for which the individual was convicted . . . was not committed by the individual [or] . . . the offense . . . was not committed by any person, including the individual."); KAN. STAT. ANN. § 60-5004(c)(1)(C) (West 2018) ("the claimant did not commit the crime or crimes for which the claimant was convicted . . . ."); LA. STAT. ANN. § 572.8(B) (2012) ("the petitioner did not commit the crime for which he was convicted and incarcerated nor did he commit any crime based upon the same set of facts used in his original conviction."); MASS. GEN. LAWS ANN. 258D § 1(C)(vi) (West 2018) ("he did not commit the crime or crimes charged . . . or any other felony arising out of or reasonably connected to the facts supporting the indictment or complaint, or any lesser included felony"); ME. REV. STAT. ANN. § 8241 (2)(D) (2019) ("the person is innocent of the crime for which the person was convicted"); MINN. STAT. ANN. § 590.11(3)(b) (West 2014) ("a crime was not committed or . . . the crime was not committed by the petitioner"); N.H. REV. STAT. ANN. § 541-B:14(II) (2018) ("when a person is found to be innocent of the crime for which he was convicted"); N.J. STAT. ANN. § 52:4C-3(b) (West 2013) ("He did not commit the crime for which he was convicted"); N.C. GEN. STAT. ANN. § 148-84(a) (West 2010) ("the crime was not committed at all [or] . . . the crime was not committed by the claimant, or . . . the claimant was determined to be innocent of all charges by a three-judge panel under G.S. 15A-1469 . . . ."); OHIO REV. CODE ANN. § 2743.48(A)(5) (West 2019) ("the offense of which the individual was found guilty . . . was not committed by the individual or . . . no offense was committed by any person"); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(e) (West 2019) ("the offense for which the individual was convicted . . . was not committed by the individual"); TENN. CODE ANN. § 40-27-109 (West 2019) ("any person whom the governor finds did not commit the crime for which the person was convicted"); VT. STAT. ANN. tit.

ensure eligibility for recovery when failed self-defense wrongful convictions are at issue, as in Nebraska.[283]

Even if individuals who were wrongfully convicted and incarcerated in failed self-defense cases meet basic eligibility requirements, they may find it difficult to prevail on their compensation claims. Compensation statutes demand more than a showing that claimants succeeded in having their convictions invalidated and were subsequently exonerated by acquittal on retrial, by having the original charges dismissed, or by pardon. They must also affirmatively demonstrate their actual innocence, typically by clear and convincing evidence.[284] The gap between reasonable doubt and actual innocence may be especially difficult to close when affirmative defenses are at issue. Failed self-defense claims rarely involve erroneous identifications, forensic errors, rejected alibi offenses, or other essentially objective evidentiary factors that typically contribute to wrongful convictions. They depend to a greater extent on more elusive, relatively subjective factors such as whether the accused acted with the reasonable belief that he or she was at imminent risk of harm.[285] Which way this elusiveness should tip the scales may be debatable, although there is little reason to favor crediting the initial decision rejecting the defense, made at an error-plagued trial, over the later decision to accept it.

Establishing by clear and convincing evidence that the use of force to defend oneself was justifiable may be quite difficult. For instance, the compensation claim made under New York's statute by Lydia Salce, one of the individuals in our sample of failed self-defense wrongful convictions,[286] was rejected by the New York Court of Claims. After undertaking an extensive review of the proof presented at Salce's retrial, where she was acquitted by reason of self-defense, the court concluded that she "failed to establish her innocence by clear and convincing evidence. As a result, the claim is dismissed."[287] Salce's two and one-half years of incarceration following her original, invalidated conviction for attempted murder thus went uncompensated.

13, § 5574(a)(3) (West 2019) ("he or she did not engage in any illegal conduct alleged in the charging documents for which he or she was charged, convicted, and imprisoned").

283. *See supra* text accompanying notes 259–71.

284. *See Compensation Chart by State—22 May 2018*, *supra* note 259.

285. *See supra* text accompanying notes 20–28.

286. *See supra* text accompanying notes 136–41.

287. *Salce v. State*, No. 2018-015-130, Claim No.126391 (N.Y. Ct. Cl. 2018), http://vertumnus.courts.state.ny.us/claims/search/display.html?terms=Salce&url=/claims/html/2018-015-130.html [https://perma.unl.edu/5L6F-P9TP] (last visited June 13, 2019).

Whether compensation should be provided to individuals who were convicted and incarcerated after their affirmative excuse defenses were erroneously rejected raises different considerations than compensation claims that are based on failed justification defenses. People justified in acting as they did made the right choice, conducting themselves in a manner that society approved and would approve again under similar circumstances. In contrast, the choices made by individuals who are excused from criminal responsibility are unambiguously wrong. Punishment is not imposed only because such persons are not blameworthy because of a compromised cognitive or volitional condition.[288]

It seems manifestly unjust to deny compensation to one wrongly imprisoned for defending against a potentially lethal criminal assault. The equities are different when it is determined, for example, that Andrea Yates, who drowned her five children,[289] or Erwin Charles Simants, who shot and killed six family members,[290] were erroneously imprisoned after their meritorious insanity defenses were rejected. It feels wrong, somehow, to raise the question of monetary compensation for individuals who committed such horrifying acts. The courts have not been receptive to compensation claims stemming from wrongful convictions occasioned by erroneously rejected insanity defenses.[291]

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288. *See supra* text accompanying notes 29–31.

289. *See supra* text accompanying notes 186–207.

290. *See supra* text accompanying notes 171–85.

291. *See* Ebberts v. State Bd. of Control, 148 Cal. Rptr. 543 (Cal. Ct. App. 1978) (The court rejected a claim for compensation brought under CAL. PENAL CODE §§ 4900 *et seq.* by Ebberts. Ebberts spent more than a year in prison after being convicted of burglary when a jury rejected his plea of not guilty by reason of insanity. He then gained a retrial on the issue of insanity and was found not guilty by reason of insanity. In California, trials involving the insanity defense are bifurcated, with the first phase of the trial adjudicating guilt, and the second phase deciding whether the defendant was insane at the time of committing the acts. The court interpreted the compensation statute's requirement of proof of "innocence" to mean that the claimant "did not do the *acts* which characterize the crime . . . . Ebberts did not contend . . . that he did not commit the acts which are elements of the crime. The plea of insanity is a plea of confession and avoidance and as such is a *defense* . . . . If the Legislature intended to include a finding of not guilty by reason of insanity (after a finding of guilt as to the commission of the offense itself) under the circumstances of a retrial" it would have amended the statute, the court reasoned, but it had not done so. *Ebberts*, 148 Cal. Rptr. at 546–47 (emphasis in original)); Diola v. Bd. of Control, 185 Cal. Rptr. 511, 515–16 (Cal. Ct. App. 1982) (distinguishing claim for compensation for wrongful conviction and incarceration following failed self-defense claim following erroneous rejection of insanity defense); Munroe v. State, 25 Ill. Ct. Cl. 286, 1966 WL 6276 (1966) (The court rejected Munroe's claim for compensation for wrongful conviction and incarceration, in which he sought damages for twenty-two years he spent in prison after being convicted of a 1936 murder. That conviction was reversed in 1958, and the following year Munroe was found not guilty by reason of insanity for the original, charged offense. He then was released from custody and later sought compensation under the state's Court of Claims Act, with its requirement

Perhaps these decisions seem right because it is so difficult to consider awarding damages to people like Yates and Simants, whose acts were so wrong. At the same time, there lingers a nagging illogic in automatically denying compensation in all such cases, where the same legal system that acknowledged the legitimacy of a criminal defense erred in refusing to credit it, thus punishing a person racked by mental illness when no punishment was deserved. Unlike Yates and Simants, most individuals who invoke the insanity defense have not been accused of murder, and a healthy number have not been charged with crimes of violence.[292] Cast in this light, it is at the very least debatable whether compensation should in all cases be unavailable to individuals who were subjected to punitive incarceration rather than treated for their debilitating mental illness, as would have followed had they been found not guilty by reason of insanity and civilly committed.

Whether compensation should be denied in cases of wrongful conviction resulting from failed excuse defenses other than insanity is similarly debatable. Consider Yun Hseng Liao's conviction and imprisonment for attempted murder when, if the later developments in his case are credited, he lacked criminal responsibility because a sleepwalking disorder was not effectively diagnosed nor substantiated at his trial owing to a combination of errors by a clerk of court and his lawyer.[293] Is labeling somnambulism as an excuse sufficient explanation for denying him monetary compensation for twelve years of lost liberty that presumably should never have happened? Similar ques-

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that he prove his "innocence" and "that the act for which he was wrongfully imprisoned was not committed by him." The court concluded that "the legislature intended only to provide a manner of recourse in the Court of Claims . . . for those who were imprisoned for an act, which they did not commit. The legislature did not intend to establish a means of recourse for an individual who in 'fact' had committed a criminal act, but an act for which one could not be held 'criminally' responsible due to a mental condition." *Id.* at 290–91). *See also* Walden v. State, 547 N.E.2d 962, 965 (Ohio 1989) (authorizing claim for compensation for wrongful conviction and imprisonment under Ohio law following rejected claim of self-defense, while noting: "The state's final contention is that compensation of persons acquitted by reason of self-defense will open the public coffers to claims by persons acquitted by reason of insanity, entrapment or other affirmative defenses. Those questions are not before us . . . . We express no opinion as to the eligibility of persons acquitted by reason of other affirmative defenses."). *See generally* Annotation, *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R. 6th 305, § 24 (2010 & Supp.).

292. Eric Silver, Carmen Cirincione & Henry J. Steadman, *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 L. & HUM. BEHAV. 63, 66–67 (1994) (after studying the use of the insanity defense in eight states between 1976 and 1985, the authors reported that 14.3% of defendants pleading not guilty by reason of insanity had been charged with murder, 54.1% were charged with other violent offenses, and 31.6% were charged with nonviolent crimes).

293. *See supra* text accompanying notes 160–70.

tions could be raised in cases involving the erroneous rejection of defenses of duress, infancy, or other types of excuses. At a minimum, legislative policy should explicitly address whether individuals whose wrongful convictions and incarceration result from the erroneous rejection of excuse defenses should in all cases, and for all such defenses, be barred from receiving compensation.

VI. CONCLUSION

The law's recognition of affirmative defenses to charged crimes is an affirmation that condemnation and punishment are unwarranted because of the circumstances confronting individuals in exceptional cases. Convictions resulting from the erroneous rejection of affirmative defenses are indeed wrongful, and arguably even more profoundly wrong than the more typical "wrong person" and other varieties of "no crime" wrongful convictions. Individuals whose otherwise criminal conduct is justified or excused by law do not ask to be put in a position to have to defend themselves from a violent unlawful assailant, for example, nor do they invite the mental illness that absolves them from blame under the terms of an insanity defense. In this sense, individuals whose affirmative defenses are erroneously rejected in criminal cases are doubly-damned, first by the unwanted circumstances precipitating their conduct, and subsequently by the legal system which wrongly convicted and punished them.

These sentiments are not simply bromides nor mere abstractions. Real people, some of whose cases are described in this article, painfully suffered these dual indignities. Their erroneous convictions occurred for various reasons, some rooted in trial-specific problems, others more closely associated with general doctrinal precepts and rules of procedure, and some essentially owing to chance circumstances beyond anyone's control. Although most jurisdictions now have statutes authorizing compensation for incarceration resulting from wrongful convictions, individuals whose convictions and imprisonment resulted from the erroneous rejection of affirmative defenses may have unusual difficulty in establishing their entitlement to an award. Others may be told that they need not even apply because they are flatly ineligible.

The law quite correctly acknowledges that criminal conviction and punishment are not deserved under the circumstances giving rise to affirmative defenses. When meritorious affirmative defenses are rejected, and the individuals who were entitled by law to rely on them are convicted of crimes and punished, justice has indeed miscarried. Wrongful convictions and punishment are wrongful. They are no less wrongful when they occur following the erroneous rejection of an affirmative defense than when they follow a straightforward plea of not guilty. The unfortunate individuals who have been convicted and pun-

ished although their conduct was justified or excused by law have suffered multiple indignities. They should not be considered somehow less worthy or less deserving because circumstances beyond their control caused them to act as they did, then raise an affirmative defense to a charged crime, only to erroneously be denied the law's protection.