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INNOCENT SUFFERING: THE UNAVAILABILITY OF POST-CONVICTION RELIEF IN VIRGINIA COURTS

It is better that ten guilty persons escape than that one innocent suffer.

*Blackstone, Commentaries*¹

Among the great untold stories of our time is this one: the last half of the twentieth century saw America's criminal justice system unravel.

*William J. Stuntz,
The Collapse of American Criminal Justice*²

In 1984 in Richmond, Virginia, Thomas Haynesworth was convicted of raping two women and indicted for raping three others.³ The first rape occurred on January 3, 1984.⁴ The assailant attacked his victim at her place of employment, threatened her with a knife, and raped her.⁵ On January 21, another woman was sodomized and robbed at knife point in Richmond.⁶ On January 30, a man pointed a gun at a woman and forced her into a secluded wood.⁷ The man forced the woman to orally sodomize him.⁸ He also unsuccessfully attempted to rape her.⁹ While committing these crimes, the gunman told the woman this was not his first time, but he usually used a knife rather than a gun.¹⁰ On February 1, a gunman confronted a woman in front of her Richmond home, and forced her back inside.¹¹ The woman told her assailant her grand-

1. 4 WILLIAM BLACKSTONE, COMMENTARIES *357.

2. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1 (2011).

3. Haynesworth v. Commonwealth, 59 Va. App. 197, 201, 717 S.E.2d 817, 819 (2011) (Elder, J., dissenting).

4. *Id.* at 201, 717 S.E.2d at 819.

5. *Id.*

6. *Id.* at 202, 717 S.E.2d at 819.

7. *Id.* at 202–03, 717 S.E.2d at 820.

8. *Id.*

9. *Id.* at 203, 717 S.E.2d at 820.

10. *Id.*

11. *Id.* at 204, 717 S.E.2d at 820–21.

mother was in the house, but the attacker told the woman if she yelled he would “take care” of the grandmother.¹² Upon entering the home, the woman cried out.¹³ The attacker fled.¹⁴

The case against Thomas Haynesworth appeared to be beyond reproach. After all, Haynesworth was identified by all four of his alleged victims.¹⁵ And he would spend twenty-seven years in prison.¹⁶ But Haynesworth was innocent.¹⁷

Obtaining Haynesworth’s release and exoneration was not easy. Only after two Virginia prosecutors and the Attorney General of Virginia allied with and advocated for Haynesworth was he finally able to achieve complete exoneration.¹⁸

According to many, the criminal justice system in the United States is approaching crisis.¹⁹ The notion of equal justice and fair play appear to be disappearing.²⁰ Substantial national criticism has been directed toward Virginia’s system of criminal justice, and for good reason.²¹ A spate of innocent Virginians have been released from prison, wrongfully convicted of heinous crimes and saved from doom only by happenstance, calling into question the Commonwealth’s criminal courts. Virginia’s criminal procedures

12. *Id.* at 204, 717 S.E.2d at 821.

13. *Id.* at 205, 717 S.E.2d at 821.

14. *Id.*

15. *Id.* at 199, 717 S.E.2d at 818.

16. *Thomas Haynesworth*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/thomas-haynesworth/> (last visited Oct. 3, 2016).

17. *Id.*

18. Maria Glod & Anita Kumar, *Thomas Haynesworth Exonerated in Rape Case After 27 Years in Prison*, WASH. POST (Dec. 6, 2011), https://www.washingtonpost.com/local/thomas-haynesworth-exonerated-in-rape-case-after-27-years-in-prison/2011/12/06/gIQAua5yaO_story.html.

19. See, e.g., STUNTZ, *supra* note 2, at 1; Nathan Deal, *How to Defeat the Criminal Justice Crisis*, HUFFINGTON POST (Apr. 13, 2015, 10:44 AM), http://www.huffingtonpost.com/nathan-deal/how-to-defeat-the-criminal-justice-crisis_b_7042638.html; Stephen M. Krason, *On Our Dysfunctional Criminal Justice System*, CRISIS MAGAZINE (May 1, 2013), <http://www.crisismagazine.com/2013/on-our-dysfunctional-criminal-justice-system>; Eric T. Schneiderman, *Ending the Crisis of Confidence in Our Criminal Justice System*, HUFFINGTON POST (July 19, 2015, 3:30 PM), http://www.huffingtonpost.com/eric-t-schneiderman/ending-the-crisis-of-conf_b_7828304.html.

20. STUNTZ, *supra* note 2, at 1–2.

21. *Virginia’s Justice System: Expensive, Ineffective and Unfair*, JUST. POL’Y INST. (Nov. 2013), http://www.justicepolicy.org/uploads/justicepolicy/documents/va_justice_system_expensive_ineffective_and_unfair_final.pdf; Rob Poggenklass, *Our Criminal Justice System Failed Jamycheal Mitchell*, ACLU (Sept. 3, 2015), <https://www.aclu.org/blog/speak-freely/our-criminal-justice-system-failed-jamycheal-mitchell>.

are inflexible. Its evidentiary rules are based too much on custom and not enough on science. And the country's preeminent crime laboratory has admitted grave errors, which Virginia's courts and legislators have done nothing to rectify.

This comment examines actual innocence in Virginia: the progress it has made, the problems it still faces, and the possibilities for reform. Part I addresses past reform to the system, spurred by the shocking tales of Thomas Haynesworth and others. Part II identifies three of the most prevalent systemic challenges marring Virginia's justice system: (1) flawed scientific evidence; (2) the premature destruction of evidence; and (3) false confessions and guilty pleas. Part III suggests ways in which Virginia can, and should, address these challenges to ensure that the justice system is actually serving justice.

I. ACTUAL INNOCENCE IN VIRGINIA

A. *Pre-2001 Post-Conviction Law*

Prior to 2001, persons convicted in Virginia were unable to assert newly realized evidence of their innocence with the courts unless they did so within twenty-one days of the entry of the final order.²² Within those twenty-one days, the convicted person could file a motion for a new trial, but following that three-week time period, the trial court would lose jurisdiction over the matter.²³ Once the trial court lost jurisdiction, defendants attempting to assert their innocence post-conviction had two options: petition for habeas corpus or seek a pardon from the Governor.²⁴

Any prisoner may file a writ of habeas corpus to attack the constitutionality or legality of his trial.²⁵ However, for a prisoner seeking exoneration, such a collateral attack falls short, as it does not actually prove the person's innocence, just the technical ille-

22. VA. STATE CRIME COMM'N, WRITS OF ACTUAL INNOCENCE (2008), <http://vsec.virginia.gov/documents/write%20of%20actual%20innocence.pdf>.

23. See VA. SUP. CT. R. 1:1 (Supp. 2016); *In re Commonwealth*, Dep't of Corr., 222 Va. 454, 463, 281 S.E.2d 857, 862 (1981).

24. INNOCENCE COMM'N FOR VA., A VISION FOR JUSTICE 96–97, 100–01 (2005) [hereinafter A VISION FOR JUSTICE].

25. *Id.* at 97.

gality of the conviction.²⁶ Furthermore, even a showing of actual innocence by the prisoner may not be sufficient evidence for a court to grant the writ, as many wrongful convictions occur in trials that are entirely legal and procedurally error free.²⁷ Habeas petitions are also subject to strict time constraints, in both Virginia and federal courts.²⁸ For any evidence found after the expiration of these limitations, a habeas petition is unavailable.²⁹

The pardon process provides a potential means by which a prisoner could obtain a remission of punishment *and* guilt.³⁰ However, although such an outlet allows the convicted person to escape the strict confines of the judicial process, it remains an imperfect means. “Clemency is a matter of the grace and discretion of the executive granting it.”³¹ There is no mandatory review of applications for clemency, regardless of the strength of the exonerating evidence.³² And despite the importance of the credibility of either the defendant or a newly discovered witness in making these determinations, the governor must decide the issue based on the application alone.³³ Furthermore, political pressures may dissuade a governor from granting, or even examining, many of these applications.³⁴

Virginia prisoners are not able to escape these stringent boundaries by seeking relief in federal courts. As is widely recognized, the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) severely limits the scope of federal habeas corpus review.³⁵ The AEDPA “modifies the habeas corpus statute in a number of ways, affecting the disposition of federal post-

26. VA. STATE CRIME COMM’N, *supra* note 22.

27. See *Lovitt v. Warden*, 266 Va. 216, 239–40, 585 S.E.2d 801, 814–15 (2003) (barring an assertion of actual innocence as outside the scope of habeas corpus review, which concerns only the legality of the petitioner’s detention).

28. VA. STATE CRIME COMM’N, *supra* note 22.

29. *Id.*

30. A VISION FOR JUSTICE, *supra* note 24, at 100.

31. *Id.* at 101.

32. *Id.*

33. *Id.*

34. *Id.* (noting the adverse political effects a pardon can have on a governor when his constituents disapprove).

35. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1 (1997). The AEDPA was one of two major statutes on which the Republican Congress and the Democratic President collaborated in 1996. *Id.* Both statutes limited the legal protections available to criminals. *Id.* at 1–2.

conviction challenges to all criminal convictions, not just those resulting in death sentences.”³⁶

But even before the AEDPA, the ability of an inmate to make an actual innocence claim in federal court was limited. In *Herrera v. Collins*,³⁷ the Supreme Court found that it had no jurisdiction over Herrera’s claim, because Texas rules required him to make such a claim within thirty days of his conviction in a Texas court, and he had failed to do so.³⁸ The Supreme Court assured that habeas jurisprudence would not “cast[] a blind eye” toward actual innocence or a fundamental miscarriage of justice, but actual innocence standing alone was not a cognizable constitutional claim rather “a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”³⁹

Schlup v. Delo also highlights these procedural difficulties.⁴⁰ Again, the Supreme Court found that the prisoner faced “procedural obstacles” that could only be overcome if he established a fundamental miscarriage of justice.⁴¹ The Court adopted a “probably” innocent standard for those cases where the petitioner claims a constitutional violation and a claim of actual innocence, requiring a finding that “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.”⁴²

With such stringent standards surrounding federal habeas proceedings, very few cases actually result in a finding of actual in-

36. *Id.* at 1.

37. 506 U.S. 390 (1993). Herrera challenged his murder conviction and pending capital sentence, claiming that the Eighth and Fourteenth Amendments prohibited his execution, because he was actually innocent of the crime. *Id.* at 393.

38. *Id.* at 400, 418–19.

39. *Id.* at 404. This concept was reiterated in *McQuiggin v. Perkins*. 133 S. Ct. 1924, 1928 (2013).

40. 513 U.S. 298 (1995). Schlup, who had been convicted of a prison murder, filed a procedurally barred habeas petition, claiming that ineffective assistance of counsel at trial resulted in his failure to present exculpatory evidence in the form of witness testimony and a videotape establishing that he was not at the scene of the murder. *Id.* at 303, 306. Although Schlup claimed actual innocence, his argument was procedural, not substantive. *Id.* at 314. Schlup asserted a constitutional claim that he was denied the opportunity to present his actual innocence, due to his denial of effective assistance of counsel and due process. *Id.*

41. *Id.* at 314.

42. *Id.* at 327.

nocence on federal habeas review.⁴³ Thus, there is little hope for Virginia prisoners to escape the rigid confines of Virginia post-conviction law through federal remedies.

The Virginia State Crime Commission called Virginia's limited post-conviction scheme the most restrictive in the country.⁴⁴ Despite the acknowledgement of the problem, there were limited calls for reform. It was not until Earl Washington's case that the majority of Virginia lawmakers started to pay attention.

B. *The Tragedy of Earl Washington*

In 1982, Rebecca Williams, a nineteen-year-old mother of three, entered her home with her children.⁴⁵ Shortly after closing, but not locking, the door behind her, a stranger burst through the door. He stabbed her several times.⁴⁶ He then dragged her into the bedroom, raped her, and stabbed her again before fleeing.⁴⁷ Police arrived on the scene shortly thereafter, but Rebecca Williams' wounds were fatal.⁴⁸ All she was able to say was that a black, bearded man had attacked her.⁴⁹

A year later, Earl Washington, a twenty-two-year-old black male, was arrested for burglary and malicious wounding.⁵⁰ While he was in police custody, he allegedly confessed to five different crimes.⁵¹ Due to inconsistencies, four of these confessions were

43. BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 205 (2011).

44. JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* 162 (2008).

45. Zak M. Salih, *Earl Washington Case Shows Reforms to Death Penalty, Criminal Cases Needed, Neufeld Says*, U. VA. SCH. L. NEWS & EVENTS (Feb. 6, 2006), http://www.law.virginia.edu/html/news/2006_spr/neufeld.htm?feed.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Earl Washington*, INNOCENCE PROJECT [hereinafter *Earl Washington*, INNOCENCE PROJECT], <http://www.innocenceproject.org/cases-false-imprisonment/earl-washington> (last visited Oct. 3, 2016).

51. *Earl Washington*, NAT'L REGISTRY EXONERATIONS [hereinafter *Earl Washington*, NAT'L REGISTRY OF EXONERATIONS], <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3721> (last visited Oct. 3, 2016).

dismissed, but one confession remained: the murder of Rebecca Williams.⁵²

Washington's confession was far from reliable. He originally stated the race of his victim as black.⁵³ Rebecca Williams was white.⁵⁴ He did not know the address of her apartment or that he had raped her.⁵⁵ He stated the apartment was empty aside from the victim, but her children were in the home at the time of the attack.⁵⁶ He claimed that the woman was short, when she was in fact 5'8", and that he had "stuck her . . . once or twice," when she had in fact been stabbed thirty-eight times.⁵⁷

Washington had an IQ of sixty-nine, which is considered "extremely low."⁵⁸ Psychological analyses revealed his willingness to defer to authority figures, and the record showed that he was fed many of the details in the confession, which he ultimately did not get right until law enforcement's fourth attempt.⁵⁹ Upon this fourth attempt, Washington signed the confession and the prosecution used it as the sole means to link him to the crime.⁶⁰

There were other issues that should have been evident during Washington's trial. The serology report on a semen stain found at the crime scene detected a rare plasma protein.⁶¹ As soon as Washington, who lacked this protein, became a suspect, the report was amended to reflect that the test for the rare protein had been "inconclusive."⁶² Washington's trial lawyer failed to introduce potentially exculpatory evidence, including semen on the victim's sheets that did not match Washington's DNA, fingerprints found at the scene that did not match Washington's, incon-

52. *Id.*

53. Brooke A. Masters, *Missteps on Road to Injustice*, WASH. POST (Dec. 1, 2000), <https://www.washingtonpost.com/archive/politics/2000/12/01/missteps-on-road-to-injustice/767d1625-f6fc-4ab3-9ead-66b8dad8d1c0/>.

54. *Id.*

55. *Earl Washington*, INNOCENCE PROJECT, *supra* note 50.

56. *Id.*

57. *Id.*; Masters, *supra* note 53.

58. See Masters, *supra* note 53; *IQ Classifications*, ASSESSMENT PSYCHOLOGY ONLINE, <http://www.assessmentpsychology.com/iqclassifications.htm> (last visited Oct. 3, 2016).

59. *Earl Washington*, INNOCENCE PROJECT, *supra* note 50.

60. *Earl Washington*, NAT'L REGISTRY OF EXONERATIONS, *supra* note 51.

61. *Earl Washington*, INNOCENCE PROJECT, *supra* note 50.

62. *Id.*

sistencies in Washington's confession, and Washington's low mental capacity.⁶³

Washington was convicted and (absent any counter argument from his counsel) sentenced to death.⁶⁴ Appellate courts upheld his conviction, and an execution date was set.⁶⁵ Fortunately for Washington, a New York law firm was alerted about his case and achieved a stay of execution just nine days before he was scheduled to die.⁶⁶ After years of the attorneys' attempts to show that the blood type of the semen found at the crime scene did not match Washington's blood type,⁶⁷ the Virginia state laboratory finally conducted a DNA test and determined that the genetic material found on the victim's body could not have come from Washington.⁶⁸ Unfortunately, the twenty-one day rule prevented Washington from returning to Virginia courts to prove his innocence.⁶⁹ Then-Governor L. Douglas Wilder changed Washington's sentence to life in prison in 1994 but did not pardon him.⁷⁰ Washington remained in custody.

In 2000, then-Governor James S. Gilmore III was alerted of the Washington case and ordered further testing.⁷¹ Further DNA tests found absolutely no trace of Washington in the victim's apartment.⁷² Finally, Governor Gilmore pardoned Washington for the rape and murder of Rebecca Williams, and in 2001, Washington was released from prison.⁷³

63. See A VISION FOR JUSTICE, *supra* note 24, at 79–80; *Earl Washington*, INNOCENCE PROJECT, *supra* note 50; Masters, *supra* note 53.

64. A VISION FOR JUSTICE, *supra* note 24, at 79–80; *Earl Washington*, INNOCENCE PROJECT, *supra* note 50.

65. *Earl Washington*, NAT'L REGISTRY OF EXONERATIONS, *supra* note 51.

66. *Id.* Interestingly, an attorney at the firm found out about the case from one of Washington's fellow death row inmates. *Id.* She brought the case to the attention of her firm, which decided to represent Washington pro bono. *Id.*

67. See Masters, *supra* note 53 (providing a full timeline of Washington's arduous struggles with the justice system).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* Though Washington had also been convicted of burglary and malicious wounding, the VDOC determined that he would have been eligible for parole on those charges in 1991. *Id.*; A VISION FOR JUSTICE, *supra* note 24, at 22.

The tragedy experienced by Earl Washington was not entirely in vain. His case led to the first comprehensive study of the Virginia laws that led to his wrongful imprisonment, and quickly spurred changes to the post-conviction justice system in Virginia.⁷⁴

C. Virginia's Attempts to Avoid Another Earl Washington

In 2001, the Virginia legislature created a writ that allowed a prisoner to petition the Supreme Court of Virginia for relief upon the discovery of exonerating biological evidence, namely DNA found in blood, saliva, sperm, hair, or other bodily fluids.⁷⁵ This relief is available to currently incarcerated persons who pleaded not guilty, unless they pleaded guilty and were convicted of a Class 1 or 2 felony, a felony that had a maximum penalty of life imprisonment, or a death sentence.⁷⁶ Furthermore, the existence of the exonerating evidence must have been unknown to the prisoner or his trial attorney at the time of the conviction, or it must not have been subject to scientific testing at the time.⁷⁷ If a prisoner who meets the specifications files a writ with the Supreme Court of Virginia, and it is found that “no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt,” the court has the power to directly vacate that prisoner’s conviction.⁷⁸

Importantly, the time limitations in which to file such a writ are independent of the date of conviction.⁷⁹ The new rule requires that the writ petition be filed within sixty days of the discovery of the exonerating evidence, allowing prisoners to escape the rigidity of the twenty-one day rule.⁸⁰

In 2004, the Virginia legislature continued to increase the availability of relief to wrongly convicted individuals. The legisla-

74. Maria Glod, *Former Death-Row Inmate Would Get \$1.9 Million*, WASH. POST (Mar. 28, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR20070327022240.html>; Masters, *supra* note 53.

75. VA. CODE ANN. § 19.2-327.2 (Repl. Vol. 2015).

76. *Id.*

77. VA. CODE ANN. § 19.2-327.3 (Repl. Vol. 2015).

78. *Id.*

79. VA. STATE CRIME COMM’N, *supra* note 22.

80. VA. CODE ANN. § 19.2-327.3 (Repl. Vol. 2015).

ture developed a writ to handle instances where the newly discovered evidence was non-biological in nature.⁸¹ Such evidence can include anything from fingerprints to witness testimony. Non-biological petitions may be filed with the Virginia Court of Appeals.⁸² While this writ does not require that the convicted person be currently incarcerated, it does require that the person pleaded not guilty, with no exceptions.⁸³ Furthermore, the petitioner is limited to the filing of one such writ for any given conviction.⁸⁴ Again, the evidence must have been unknown to the defendant and his attorney at the time of his conviction.⁸⁵ If the Court of Appeals finds that “no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt,” it has the power to reverse the petitioner’s conviction.⁸⁶

Clearly, the reforms moved the system forward by leaps and bounds. Compared to the dreary state of affairs before 2001, the current system does not look so dire. But, as many legislators, officials, and law enforcement personnel have noticed, it has a long way to go.⁸⁷ There have been attempts to further reform the system in recent years, but they have for the most part failed.⁸⁸ And though there have been some successful reforms, the impact of these reforms is unclear.⁸⁹ Recent pronouncements from the Federal Bureau of Investigation (“FBI”) cause even greater cause for concern. A National Academy of Sciences Report on FBI forensic

81. VA. CODE ANN. § 19.2-327.10 (Repl. Vol. 2015).

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* VA. CODE ANN. § 19.2-327.11 (Repl. Vol. 2015).

86. VA. CODE ANN. § 19.2-327.13 (Repl. Vol. 2015).

87. *See* Spencer S. Hsu, *After Va. Man is Exonerated, Critics See a Broken Justice System*, WASH. POST (May 14, 2015), https://www.washingtonpost.com/local/crime/after-first-taste-of-freedom-exonerated-va-man-urges-changes-in-state-law/2015/05/14/2f4acd0a-fa55-11e4-9ef4-1bb7ce3b3fb7_story.html.

88. *See, e.g.*, Reform of Writs of Actual Innocence, H.B. 1278 Gen. Assemb., Reg. Sess. (Va. 2012) (proposing the availability writs of actual innocence regardless of the plea); Frank Green, *Sheriff Gauges Support for Innocence Panel*, RICH. TIMES-DISPATCH (Mar. 29, 2014), http://www.richmond.com/news/local/crime/sheriff-gauges-support-for-innocence-panel/article_07adbdb5-e2e4-5fdc-924b-9d65c6bf23d3.html (discussing the proposed implementation of a government-sponsored board tasked with reviewing convictions).

89. Frank Green, *Appeals Court: Change to Innocence Statute Makes Little Difference*, RICH. TIMES-DISPATCH (July 26, 2014), http://www.richmond.com/news/local/appeals-court-change-to-innocence-statute-makes-little-difference/article_5421335c-c85c-5514-bb7-7f10b7ac7d36.html.

laboratory practices calls into question much of that laboratory's work and training over the past three decades. Those failures directly impact Virginia cases.

II. PROBLEMS WITH THE CURRENT SYSTEM

A. *Scientific Evidence*

1. Flawed Forensic Techniques

Some prisoners incarcerated in the Virginia penal system were convicted based upon flawed science.⁹⁰ Under Virginia's current statutory regime, there is no outlet in the law for a petitioner to dispute the validity of evidence that has already been tested, even upon the discovery of false laboratory reports or prior faulty testimony by forensic experts.⁹¹ Unless the evidence was unknown or untestable at the time of the trial, one may not file an evidentiary-based writ.⁹²

Furthermore, the Virginia Department of Forensic Science (the "Virginia DFS") has done very little in response to a nationwide acknowledgement of problems with typical evidentiary testing procedures. Although often considered infallible, recent studies call into question much of the forensic science employed in trials in the United States. Concerned with reports of shoddy laboratory work forming the basis of wrongful convictions, Congress ordered the National Academy of Sciences ("NAS") to examine ways to improve forensic sciences.⁹³ In response, the NAS produced a report (the "NAS Report"), which arrived at the shocking conclusion that most of the forensic disciplines lacked validity, and the only discipline "rigorously shown to have the capacity to consistently

90. Of course, we only know conclusively about those who have since been exonerated. See, e.g., *Julius Ruffin*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/julius-ruffin/> (last visited Oct. 3, 2016); *David Vasquez*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/david-vasquez/> (last visited Oct. 3, 2016); *Troy Webb*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/troy-webb/> (last visited Oct. 3, 2016).

91. See VA. CODE ANN. §§ 19.2-327.3, 327.13 (Repl. Vol. 2015).

92. *Id.* § 19.2-327.3.

93. See COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMICS, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD xix (2009) [hereinafter STRENGTHENING FORENSIC SCIENCE].

and with a high degree of certainty support conclusions about . . . ‘matching’ [] an unknown item of evidence to a specific known source” was nuclear DNA analysis.⁹⁴ Interestingly, the NAS Report noted that many of the older forensic sciences (the non-biological sciences) were called into question by the newest forensic science—DNA (the biological sciences).⁹⁵ “New doubts about the accuracy of some forensic practices have intensified with the growing numbers of exonerations resulting from DNA analysis (and the concomitant realization that guilty parties sometimes walk free).”⁹⁶

The NAS Report called into question established forensic tests—such as those used to identify the source of toolmarks or bite marks—which had never been subjected to critical review because “researching their limitations and foundations was never a top priority.”⁹⁷

For example, the notion that tires and shoes leave identifiable impressions appears to have no scientific basis. Such items can certainly be differentiated, as wear over time results in individualized characteristics. However, because these features *continue* to change after the commission of the crime, elapsed time following a crime can weaken any certainty of identification.⁹⁸ Furthermore, those engaging in such analysis are not governed by any recognizable benchmark.⁹⁹ Although this calls the validity and reliability of the method into question, the Virginia DFS has not altered its procedures regarding impression evidence, and continues to rely upon the same techniques and testimonial principles as it did prior to the NAS Report.¹⁰⁰

94. *Id.* at 87.

95. *Id.*

96. *Id.* at 37.

97. *Id.* at 42. The shortcomings of bite mark evidence are demonstrated by the recent exoneration of Keith Allen Harward. See Spencer S. Hsu, *Va. Exoneration Underscores Mounting Challenges to Bitemark Evidence*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/local/public-safety/va-exoneration-underscores-to-mounting-challenges-to-bite-mark-evidence/2016/04/08/55bbfe98-fd9a-11e5-886f-a037dba38301_story.html. Harward was convicted of a 1982 rape and murder in Virginia, based largely upon the testimony of six experts who agreed that bite marks on the victim’s leg matched Harward’s bite. *Id.* After serving thirty-three years of his life sentence, Harward was exonerated by DNA testing and released. *Id.*

98. STRENGTHENING FORENSIC SCIENCE, *supra* note 93, at 149.

99. *Id.*

100. See generally VA. DEP’T OF FORENSIC SCI., IMPRESSIONS—FOOTWEAR AND TIRE

Toolmark and firearm analyses suffer from the same limitations as impression evidence.¹⁰¹ Data on the variability of guns and toolmarks is limited, with little known about the variability or similarity of various tools and weapons.¹⁰² The NAS observed that “in some cases, [individual patterns can be] distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable.”¹⁰³ However, toolmark and firearm analysis lacks a precisely defined process.¹⁰⁴ The analysis has no defined protocol and universal terms are given different meanings by different analysts, requiring analysts to derive scientific conclusions from their own experience rather than from established industry-wide criteria.¹⁰⁵ Despite the NAS’s observations, the Virginia DFS relies upon toolmark and firearm analysis to the same extent it did prior to the release of the NAS Report.¹⁰⁶

Hair analysis was vigorously criticized in the NAS Report. In fact, the report concluded that “[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population. There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a ‘match.’”¹⁰⁷ It determined the microscopic analysis of hair samples was deeply flawed to such a degree that there was “[n]o scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA.”¹⁰⁸ The Virginia DFS has tweaked its reliance and testing of hair analysis, now only doing DNA testing of hair if the hair sample still has an intact root.¹⁰⁹ Human hair can be exam-

TREAD PROCEDURES MANUAL (Sept. 21, 2016), <http://www.dfs.virginia.gov/wp-content/uploads/2016/09/241-D300-Imprints-Footwear-and-Tire-Tread-Procedures-Manual.pdf> (outlining Virginia’s current procedures for handling impression evidence).

101. STRENGTHENING FORENSIC SCIENCE, *supra* note 93, at 154.

102. *Id.*

103. *Id.*

104. *Id.* at 155.

105. *Id.*

106. See generally VA. DEP’T OF FORENSIC SCI., FIREARM/TOOLMARK PROCEDURES MANUAL (Nov. 5, 2015), <http://www.dfs.virginia.gov/wp-content/uploads/2015/11/240-D100-FX-TM-Procedures-Manual.pdf> (outlining Virginia’s current toolmark and firearm analysis procedures).

107. STRENGTHENING FORENSIC SCIENCE, *supra* note 93, at 160.

108. *Id.* at 161.

109. See VA. DEP’T OF FORENSIC SCI., TRACE EVIDENCE PROCEDURES MANUAL, at ¶ 8.1 (July 18, 2016), <http://www.dfs.virginia.gov/wp-content/uploads/2016/07/222-D100-Trace->

ined if it contains tissue, generally the hair root, that is suitable for DNA testing.¹¹⁰ Hair fragments have been deemed unsuitable for DNA testing, as well as for comparison purposes.¹¹¹ Unfortunately, this change in testing procedure does not address the circumstances in which Virginia citizens have been previously convicted by means of the now debunked hair comparison analysis.

Even fingerprint analysis, long deemed infallible, has been called into question.¹¹²

For nearly a century, fingerprint examiners have been comparing partial latent fingerprints found at crime scenes to inked fingerprints taken directly from suspects. Fingerprint identifications have been viewed as exact means of associating a suspect with a crime scene print and rarely were questioned. Recently, however, the scientific foundation of the fingerprint field has been questioned, and the suggestion has been made that latent fingerprint identifications may not be as reliable as previously assumed.¹¹³

The NAS Report recommended that validation studies be performed on the forensic sciences.¹¹⁴ Nevertheless, the Virginia DFS has not changed its protocols.¹¹⁵

Unfortunately, testing procedures are not the only evidentiary flaw in Virginia's criminal justice system. Even with an improved understanding of forensic science and its limits, many who are actually innocent would be unable to challenge their convictions because the evidence against them no longer exists.

2. Destruction of Evidence

Remarkably, most of the Virginia cases that have resulted in a finding of actual innocence were only discovered because a Virginia laboratory technician failed to follow protocol. DFS protocols

Evidence-Procedures-Manual.pdf.

110. *Id.* at ¶ 8.4.

111. *Id.*

112. STRENGTHENING FORENSIC SCIENCE, *supra* note 93, at 43.

113. *Id.*

114. Paul C. Giannelli, *The 2009 NAS Forensic Science Report: A Literature Review*, 48 CRIM. L. BULL. 378, 380 (2012).

115. *See generally* VA. DEP'T OF FORENSIC SCI., LATENT PRINT PROCEDURES MANUAL (Dec. 8, 2014), <http://www.dfs.virginia.gov/wp-content/uploads/2016/05/241-D100-Latent-Print-Procedures-Manual.pdf> (outlining Virginia's current fingerprint and palm print analysis procedures).

require that evidence samples be returned to the agency requesting the results.¹¹⁶ Evidence retention in Virginia is governed by statute. For misdemeanor cases, Virginia law requires the retention of physical evidence until after the time period expires for a direct appeal.¹¹⁷ For felony cases the prescribed retention period is one year after the conclusion of the time period for a direct appeal.¹¹⁸ For biological evidence, such as blood and DNA evidence, the preservation and retention standards allow for retention of such evidence for fifteen years, and in capital cases, until final judgment.¹¹⁹

These standards fall short of those recommended by the United States Department of Commerce's National Institute of Standards and Technology ("NIST"), the agency responsible for setting guidelines for national forensic testing.¹²⁰ In general, the NIST recommends that the evidence be retained for open cases for the period of the statute of limitations.¹²¹ For adjudicated cases, the NIST found that standard practice requires evidence retention in most serious felonies for the period of incarceration.¹²²

Virginia protocol does not measure up to these proposals. But one serologist in the Virginia laboratory, Mary Jane Burton, violated protocol.¹²³ Instead of returning the entire samples, she attached a swatch to the case file.¹²⁴

Burton's violation of protocol preserved evidence that would have otherwise been destroyed, in which case Marvin Anderson would likely still be incarcerated. Anderson was sentenced to 210 years for rape in 1982.¹²⁵ The woman that Anderson allegedly raped testified that Anderson was the rapist, stating "[h]is face

116. Frank Green, *Scientist's Legacy: Freedom for Two*, RICH. TIMES-DISPATCH (Feb. 18, 2003), <http://truthinjustice.org/mjburton.htm>.

117. VA. CODE ANN. § 19.2-270.4(A) (Repl. Vol. 2015).

118. *Id.* at § 19.2-270.4(A)(ii)(i).

119. *Id.* at § 19.2-270.4:1(A)–(B).

120. NAT'L INST. OF STANDARDS AND TECH., U.S. DEPT OF COMMERCE, THE BIOLOGICAL EVIDENCE PRESERVATION HANDBOOK: BEST PRACTICES FOR EVIDENCE HANDLERS iv (Apr. 2013) [hereinafter BIOLOGICAL PRESERVATION HANDBOOK], <http://nvlpubs.nist.gov/nistpubs/ir/2013/NIST.IR.7928.pdf>.

121. *Id.* at 4.

122. *Id.*

123. Green, *Scientist's Legacy*, *supra* note 116.

124. *Id.*

125. *Marvin Anderson*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/marvin-anderson/> (last visited Oct. 3, 2016).

will always haunt me.”¹²⁶ Despite Burton’s testimony at Anderson’s trial that the fluids collected from the victim provided inconclusive results and that it was impossible to identify the blood type of the woman’s attacker, Anderson was convicted.¹²⁷

Anderson always maintained his innocence.¹²⁸ He believed DNA evidence would exonerate him, and he sought to have the evidence tested, but was told it had already been destroyed.¹²⁹ Finally, after a request by the Innocence Project to search files related to Anderson’s case, the Virginia DFS discovered a sample attached to Anderson’s file, a consequence of Burton’s violation of protocol.¹³⁰ As a result of the findings, Mark Warner, then-Governor of Virginia, ordered additional testing of all of Burton’s files, resulting in two additional findings of actual innocence.¹³¹

Spurred in part by the findings gleaned from the Burton files, the Department of Justice tasked the Urban Institute¹³² with studying the physical evidence associated with the state’s convictions for homicide and sexual assault from 1973 to 1987.¹³³ In its resulting report (the “Urban Institute Report”), the Urban Institute answered the question, “What proportion of convicted offenders in serious person crimes with retained forensic evidence could be exonerated if that evidence were DNA tested?”¹³⁴ The Institute had more than 534,000 files that involved possible qualifying crimes, but physical evidence had been retained in only 3000 of

126. Kristen Gelineau, *Saving Grace*, WASH. POST (Oct. 9, 2005), <https://www.washingtonpost.com/archive/lifestyle/2005/10/09/saving-grace/d15ff40d-51c1-4a79-97a9-f4b1f98b562b/>.

127. *Id.*

128. Anthony Brooks, *Virginia Case Review Revives DNA Debate*, NAT’L PUB. RADIO (Jan. 25, 2006, 6:30 PM), <http://www.npr.org/templates/story/story.php?storyId=5171456>.

129. *Id.*

130. *Id.* The sample not only exonerated Anderson, but also implicated another man, who was subsequently convicted of rape. Green, *Scientist’s Legacy*, *supra* note 116; *see supra* text accompanying notes 123–24.

131. Brooks, *supra* note 128.

132. The Urban Institute, headquartered in Washington, D.C., is a research and advocacy organization that “helps identify solutions for neighborhoods, cities, states, and national criminal justice systems” by “analyz[ing] crime trends and evaluat[ing] prevention initiatives.” *Crime and Justice*, URBAN INST., <http://www.urban.org/research-area/crime-and-justice> (last visited Oct. 3, 2016).

133. JOHN ROMAN, KELLY WALSH, PAMELA LACHMAN & JENNIFER YAHNER, URBAN INST. JUSTICE POLY CTR., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION 1–2 (June 2012), <http://www.urban.org/research/publication/post-conviction-dna-testing-and-wrongful-conviction>.

134. *Id.* at 2.

those, with potential suspects identified in 2100 of those cases.¹³⁵ In 230 cases, data existed that allowed the Urban Institute to evaluate the DNA evidence and come to some conclusions regarding the validity of the underlying convictions.¹³⁶ Much, though not all, of this evidence was from the Burton files.¹³⁷

The findings of the Urban Institute Report were astounding. In 56 of those 230 testable cases, the convicted offender was eliminated as the source of DNA evidence, and for 38 convictions, DNA elimination supported exoneration.¹³⁸ Considering the limited volume of testable data, much of it from the Burton files, as a matter of purely statistical analysis, a significant number of those convicted before that widespread advent of DNA testing may have been wrongfully convicted.

3. Official Reaction to the Reports

Spurred partially by the results of the NAS Report and the Urban Institute Report, the FBI began a review of all its forensic practices—a review that is still ongoing—and concluded that its laboratories were riddled with errors and faulty reporting.¹³⁹ To date, hair analysis has been most intensely criticized, and various governmental and private organizations have taken some form of action in response to the flaws in hair analysis. Regarding its hair analysis and training of hair and fiber analysis examiners, the FBI “agree[d] that error has been found in over 90 percent of the trial transcripts that were reviewed.”¹⁴⁰ The FBI also concluded “nearly all of the FBI analysts who testified exceeded the limits of science in their testimony or lab work (26 of 28 examiners).”¹⁴¹ And the problem was not limited to the FBI analysts, because almost every state’s examiners were trained by the FBI laborato-

135. *Id.* at 4.

136. *Id.* at 5.

137. *Id.* at 12.

138. *Id.* at 5.

139. Amelia Maxfield, *FBI Microscopic Hair Comparison Review: State and Local Hair Reviews*, CHAMPION, Mar. 2016, at 59 (citing Press Release, Federal Bureau of Investigation, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (Apr. 20, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-error-in-at-least-90-percent-of-cases-in-ongoing-review>).

140. *Id.*

141. *Id.*

ries, and thus committed the same errors in analysis and testimony.¹⁴²

Some state agencies took action as a result of the FBI announcement. The Texas Forensic Science Commission is conducting a Texas Hair Microscopy Case Review.¹⁴³ The Review's purpose is to bring together subject matter experts and attorneys to determine a process and criteria to review Texas convictions that were based in whole or in part on hair analysis.¹⁴⁴

Iowa's Governor, in cooperation with Iowa's State Public Defender, created a Wrongful Conviction Division at the Office of the State Public Defender.¹⁴⁵ Iowa's Wrongful Conviction Division will work in partnership with the Innocence Project of Iowa and the Midwest Innocence Project to investigate and, where appropriate, litigate those cases in which individuals claim they have been wrongfully convicted.¹⁴⁶ Additionally, the National Association of Criminal Defense Lawyers is assisting lawyers nationwide in initiating hair analysis reviews.¹⁴⁷ While some states have taken steps to review cases involving hair analysis, few federal or state courts have reacted to the FBI's renouncement of hair analysis, and almost no courts have excluded evidence based upon the NAS Report. Few have even expressed concern.

For example, eminent jurist Judge Richard Posner of the Seventh Circuit Court of Appeals cited to the NAS Report, but he did so in a fashion that indicated he was essentially unaware of the nature of the report. In *United States v. Herrera*,¹⁴⁸ Judge Posner, writing for the Court, relied upon the NAS Report to describe the analysis, comparison, evaluation, and verification ("ACE-V") method of fingerprint analysis, but never referenced the NAS's concerns about fingerprint analysis, or the general conclusions

142. Maxfield, *supra* note 139, at 59.

143. *Texas Hair Microscopy Case Review*, TEX. FORENSIC SCI. COMM'N, <http://www.fsc.texas.gov/texas-hair-microscopy-case-review> (last visited Oct. 3, 2016).

144. *Id.*

145. *Governor, SPD Announce Creation of Wrongful Conviction Division*, OFF. STATE PUB. DEF. (Oct. 26, 2015, 8:30 AM), <https://spd.iowa.gov/governor-spd-announce-creation-wrongful-conviction-division>.

146. *Id.*

147. Maxfield, *supra* note 139, at 60.

148. 704 F.3d 480 (7th Cir. 2013).

about forensic sciences in general.¹⁴⁹ Instead, Posner found fingerprint analysis to be a solid methodology.

Fingerprint experts such as the government's witness in this case—who has been certified as a latent print examiner by the International Association for Identification, the foremost international fingerprint organization (there are only about 840 IAI-certified latent examiners in the world, out of 15,000 total examiners)—receive extensive training; and errors in fingerprint matching by expert examiners appear to be very rare.¹⁵⁰

While nodding to the NAS's concern about subjective judgment, the Seventh Circuit determined that “responsible fingerprint matching is admissible evidence, in general and in this case.”¹⁵¹

Further, in *Herrera*, the Seventh Circuit was examining the fingerprint evidence applying the *Daubert* test.¹⁵² Thus, even under a standard formulated to prevent the introduction of “junk science,” testimony that may have been flawed is regularly allowed before federal and state juries, including federal juries in the Fourth Circuit.¹⁵³

Virginia does not follow *Daubert*, but instead employs a less stringent test that merely requires the witness to be an expert and have scientific, technical, or other specialized knowledge.¹⁵⁴ Additionally, Virginia courts do not follow the *Frye* test,¹⁵⁵ the

149. *Id.* at 484.

150. *Id.* at 486–87.

151. *Id.* at 487. Other challenges based upon the NAS Report have been rejected. *See, e.g., United States v. Otero*, 849 F. Supp. 2d 425, 438 (D. N.J. 2012); *Johnston v. State*, 27 So.3d 11, 23 (Fla. 2010).

152. *Herrera*, 704 F.3d at 486–87. Under *Daubert*, evidence is admissible when it meets the requirements of Federal Rule of Evidence 702. *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). Rule 702 states that an expert may testify if: “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” FED. R. EVID. 702.

153. *See United States v. Council*, 777 F. Supp. 2d 1006, 1011 (E.D. Va. 2011) (holding that a forensic scientist’s method for examining palm prints was sufficiently reliable, and although mentioning the findings of the NAS Report, referring to the NAS as “commentators,” and omitting the fact that the report was commissioned by the Department of Justice); *United States v. Aman*, 748 F. Supp. 2d 531, 536 (E.D. Va. 2010) (finding that the NAS Report does “not bind federal courts”).

154. *Spencer v. Commonwealth*, 240 Va. 78, 97–98, 393 S.E.2d 609, 621 (1990).

155. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test is a rather stringent evidentiary standard requiring general acceptance in the “particular field in which it

standard that *Daubert* replaced.¹⁵⁶ When scientific evidence is offered, Virginia courts make a threshold finding of fact regarding the reliability of the scientific method offered, but if “it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis,” then it is admissible.¹⁵⁷ On the other hand, if the methodology has been deemed unreliable in the past and its exclusion has become a rule of law, as is the case regarding lie-detector tests, it is inadmissible.¹⁵⁸

Thus, Virginia’s evidentiary rules do little to inhibit flawed science from being introduced at trial, and rely on inherently unreliable hair analyses, fingerprints, and other forensic sciences that have been called into question by the NAS.

B. *False Confessions and Guilty Pleas*

In Virginia, most confessions are not taped, and once a defendant pleads guilty, the guilty plea is infallible against attack. If an innocent person is challenging a plea based upon non-biological evidence, Virginia courts cannot grant relief based upon actual innocence if the person pled guilty at trial.¹⁵⁹ And in cases involving biological evidence, a guilty plea prevents an innocent person from challenging the plea, even if that person is completely innocent or is sentenced to death, or convicted of “(i) a Class 1 felony, (ii) a Class 2 felony, or (iii) any felony for which the maximum penalty is imprisonment for life.”¹⁶⁰

These restrictions would have little impact on the integrity of criminal justice in Virginia if all confessions were sound and all guilty pleas valid. But one of the most significant and indeed most disturbing findings of recent studies is the number of false confessions and false guilty pleas that infect the justice system. Of the 250 first DNA exonerations in the United States, forty were supported at least in part by a false confession.¹⁶¹ And 6 per-

belongs.” *Id.* at 1014.

156. *Spencer*, 240 Va. at 97, 393 S.E.2d at 621.

157. *Id.*

158. *Id.*

159. VA. CODE ANN. § 19.2-327.10 (Repl. Vol. 2015).

160. *Id.* § 19.2-327.2.

161. GARRETT, *supra* note 43, at 18.

cent of those exonerated pleaded guilty.¹⁶² Earl Washington's case, discussed above, is just one example of this phenomenon.

What explains these numbers? A recent study examined how "the bluff technique" led to a large number of false confessions.¹⁶³ The study's subjects were instructed to complete a task and then were falsely accused of such things as crashing the computer or cheating.¹⁶⁴ By introducing bluffs, false evidence, and false eye-witnesses, the study's authors identified variables that might produce a false confession.¹⁶⁵ The study's findings are remarkable and, in the context of false confessions, disturbing. In one test group, forty-three of seventy-one participants confessed that they had pressed a computer key they had been instructed to avoid when, in fact, they had not.¹⁶⁶ Another group produced similar results.¹⁶⁷ Some of those who wrongfully confessed did so because they simply wished to finish the interrogation, and some even confessed because they felt sympathy for the interrogator.¹⁶⁸ Ninety percent of subjects who believed that a hidden camera had captured their actions confessed, while only 27 percent of control subjects did.¹⁶⁹

Though usually unwittingly, police often contribute to false confessions. Frequently, the false confessions are contaminated with details that only the real perpetrator or the police would know.¹⁷⁰ Even though trained to avoid doing so, the police may release details of the crime in an attempt to coax the suspect to tell a story.¹⁷¹ "These false confessions [are] so persuasive, detailed, and believable that judges repeatedly [uphold] the convictions during appeals and habeas review."¹⁷² In response to concerns about false confessions, twenty-one states and the District of Columbia now require or at least encourage electronic recordings of

162. *Id.* at 150.

163. Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 L. & HUMAN BEHAV. 327, 328–29 (2011).

164. *Id.* at 329–30.

165. *Id.*

166. *Id.* at 330.

167. *Id.* at 331.

168. *Id.* at 332.

169. *Id.* at 334.

170. GARRETT, *supra* note 43, at 19–20, 23–31.

171. *Id.* at 22–23.

172. *Id.* at 21.

some or all interrogations, and many additional states' supreme courts have opinions either requiring or encouraging the recordings of interrogations.¹⁷³ Virginia is not one of these states.

While false confessions may be explained by faulty interrogation techniques, it still does not explain why innocent people go so far as to plead guilty. United States District Court Judge Jed S. Rakoff of the Southern District of New York is not surprised by false guilty pleas. Considering the personal circumstances of those confessing—often mentally ill, impaired, or poorly educated—Judge Rakoff believes that under the circumstances, the person pleading guilty is making a rational decision.¹⁷⁴

While, moreover, a defendant's decision to plead guilty to a crime he did not commit may represent a "rational," if cynical, cost-benefit analysis of his situation, in fact there is some evidence that the pressure of the situation may cause an innocent defendant to make a less-than-rational appraisal of his chances for acquittal and thus decide to plead guilty when he not only is actually innocent but also could be proven so. Research indicates that young, unintelligent, or risk-averse defendants will often provide false confessions just because they cannot "take the heat" of an interrogation. Although research into false guilty pleas is far less developed, it may be hypothesized that similar pressures, less immediate but more prolonged, may be in effect when a defendant is told, often by his own lawyer, that there is a strong case against him, that his likelihood of acquittal is low, and that he faces a mandatory minimum of five or ten years in prison if convicted and a guidelines range of considerably more—but that, if he acts swiftly, he can get a plea bargain to a lesser offense that will reduce his prison time by many years.¹⁷⁵

Why then are writs of actual innocence not available to defendants who are faced with the dilemma that Judge Rakoff describes? Does a defendant's inability to "take the heat" mean that person should later be denied the opportunity to retract his false confession? And if someone is facing likely conviction, should he be punished for his attempt to achieve a lower sentence for a

173. See GARRETT, *supra* note 43, at 248; Thomas P. Sullivan, Nat'l Ass'n of Criminal Def. Lawyers, *Compendium: Electronic Recording of Custodial Interrogations* (2014), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33287&libID=33256> (including Alaska, Arkansas, California, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Texas, Vermont, Wisconsin, and the District of Columbia).

174. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

175. *Id.*

crime he did not commit? This statutory limitation may be well-intentioned, but surely it has some consequences that must be taken into account.

III. RECOMMENDATIONS

Despite some steps in the right direction, Virginia's criminal justice system remains fundamentally flawed in that it stifles review of past convictions and relies on outdated methods. The discredited testimony called into question by the NAS and the FBI may have been (and may continue to be) the basis for many of the convictions in Virginia. Additionally, Virginia has systematically, albeit innocently, destroyed evidence that may be exculpatory. Furthermore, false confessions may be the result of imperfect interrogation procedures. And guilty pleas, even those made by innocent people, act as a bar from future relief under Virginia's rigid statutory framework. Virginia must expand the ability of post-conviction remedies in its courts so that the truly innocent can prove their actual innocence. Significant strides can be taken to ensure, to the best of the Commonwealth's ability, that no innocent person stands wrongfully convicted. To do so, the Commonwealth should take these five substantial but feasible steps.

First, the Virginia legislature should eliminate all limitations on actual innocence challenges for a ten-year period. This would allow those who may have been convicted based upon flawed scientific evidence called into question by the NAS Report to challenge those convictions. As it currently stands, if the convicted person had that evidence at trial, they are barred from filing a writ of actual innocence, notwithstanding any potential flaws in the results.¹⁷⁶ Virginia must finally explicitly address the NAS Report and allow prisoners to assert actual innocence if their conviction was indeed the result of flawed scientific evidence. The ten-year period will also allow governmental agencies such as the FBI to continue to analyze databases, examine its testing and testimonial protocols, and determine what cases may be affected by flawed scientific evidence. The ten-year timeframe appears reasonable considering it did take the FBI almost five years to debunk much of its testimony and training regarding hair analy-

176. See VA. CODE ANN. § 19.2-327.3, -327.13 (Repl. Vol. 2015).

sis.¹⁷⁷ To avoid the courts flooding with challenges, a pre-litigation innocence panel could be created to review the cases first, rather than sending each and every contested evidence case straight to the courtroom. Of course, any surge in litigation would likely only be temporary. And as Judge Henry Friendly, one of the greatest judges of the twentieth century confirmed, “[t]he policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.”¹⁷⁸

Second, the Virginia legislature should relax the prohibition for those claiming actual innocence in non-biological and biological evidence cases. Both science and practical experience establish that innocent people falsely confess, and even plead guilty.¹⁷⁹ As Judge Rakoff commented, many of those innocent people pleading guilty are making what appears to them to be a “rational” decision.¹⁸⁰ It, therefore, seems almost arbitrary to create a dividing line between those that plead guilty and those that plead not guilty. Of course, there are countless cases in which those who plead guilty are guilty. But there are also cases in which those who plead *not* guilty are guilty. So why is there a punishment for a guilty plea? Likely, the idea is that there must be some consequence for pleading guilty. But is this significant enough of a reason for society to countenance the incarceration of the innocent?

Consider, for example an innocent defendant who pleads guilty to rape. The defendant may be intellectually handicapped. Informed by counsel that he has been positively identified and that facing a jury could result in a substantial sentence, he pleads guilty. Consider, also, a guilty defendant who pleads not guilty to rape, but is still convicted. After all, he is guilty. Based upon the pleas of these defendants, the guilty man would be able to file a writ (though likely it would fail) and the innocent man would be barred. With the requirement to register, often for life, for sexually related offenses, the innocent man would be subjected to a potential lifetime of ostracism, even after his prison sentence was

177. See Maxfield, *supra* note 139, at 59.

178. Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. CHI L. REV. 142, 150 (1970) (quoting Note, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98, 101 n.13 (1958)).

179. See *supra* Part II.B.

180. Rakoff, *supra* note 174.

completed, although he was entirely innocent. Recent studies and court cases establish that this has, and is, happening.¹⁸¹ The integrity of Virginia's criminal justice system demands protections be placed into the system to prevent it from happening again.

Deleting the "guilty/not guilty" requirement from statutes would result in equity among those convicted, regardless of the circumstances under which they were convicted. And, considering the multitude of evidence regarding the inconsistencies between pleas and actual guilt of defendants, it is unreasonable to maintain such a distinction.

Third, Virginia must substantially modify its procedures for retaining evidence. As described above, five innocent men were exonerated only through Mary Jane Burton's failure or refusal to comply with evidence-retention standards.¹⁸² Had she abided by the rules, there would have been no evidence to test and, therefore, no way of proving the innocence of these wrongfully convicted men. Retention of evidence should become an absolute requirement in Virginia. The current practice of retaining evidence in capital cases must be maintained, but efforts must be made to retain evidence for longer periods in other cases as well.

To further that aim, the Virginia forensic crime labs should adopt the retention recommendations of the NIST.¹⁸³ Labs should retain evidence for open cases for the period of the statute of limitations.¹⁸⁴ For adjudicated cases, they should retain all evidence in serious felony cases for the period of incarceration.¹⁸⁵ These evidence retention policies balance the needs of justice with the fiscal and practical limitations faced by municipalities in the Commonwealth.

Fourth, to combat the problem of false confessions, the Commonwealth should adopt those standards governing taped confessions followed by a number of other states.¹⁸⁶ Such taping will allow for review and regulation of interview procedures, increasing accountability and possibly leading officers to think twice about

181. *See supra* Part II.B.

182. *See supra* notes 123–31 and accompanying text.

183. BIOLOGICAL PRESERVATION HANDBOOK, *supra* note 120, at 1–5.

184. *Id.* at 4.

185. *Id.*

186. GARRETT, *supra* note 43, at 248; Sullivan, *supra* note 173.

the manner in which they are conducting interviews. While, of course, taping confessions alone will not likely reduce the number of false confessions, it would likely contribute to a reduction in the number of false confessions that result in convictions. Taped confessions could be viewed by the jury, and, if necessary, could be accompanied by testimony from experts attesting to the manner in which the defendant made his confession. Viewing the nature of the confession is often important to a jury in its determination of guilt.¹⁸⁷ Certainly, had a jury seen the full confession of Earl Washington, they would have seen how he was led to the “correct” confession, getting it wrong numerous times before he finally said what the detectives wanted to hear.

Adopting a practice of taped confessions would help to ensure that coerced or false confessions were seen as just that: coerced or false confessions. Therefore, following the leads of the states that have adopted such practices will greatly reduce the instances of false confessions that lead to convictions in Virginia.

Fifth, Virginia should adopt an evidentiary rule similar to Federal Rule of Evidence 702 and apply *Daubert* in interpreting that new rule. Rule 702 as interpreted by *Daubert* is fashioned to allow the admission of scientific evidence that assists the trier of fact, but also carries safeguards of reliability.¹⁸⁸ The Rule has been applied to call into question precisely the type of evidence that the NAS Report found flawed.¹⁸⁹ District courts have relied on *Daubert* to reevaluate and exclude “scientific evidence that had long been accepted by the courts.”¹⁹⁰

On the other hand, the *Spencer* test employed in Virginia courts places great faith in methods that the courts are familiar with and have admitted in the past. *Spencer* allows the admission of evidence that “is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis.”¹⁹¹ But that “familiar and ac-

187. See Saul M. Kassin, *False Confessions: From Colonial Salem, Through Central Park, and into the Twenty-First Century*, in THE WITNESS STAND AND LAWRENCE S. WRIGHTSMAN, JR. 55 (Cynthia Willis-Esquesda & Brian H. Bornstein eds. 2016).

188. FED. R. EVID. 702.

189. Henry F. Fradella, Lauren O’Neill & Adam Fogarty, *The Impact of Daubert on Forensic Science*, 31 PEPP. L. REV. 323, 331 (2004).

190. *Id.*

191. *Spencer v. Commonwealth*, 240 Va. 78, 97, 393 S.E.2d 609, 621 (1990).

cepted” evidence is precisely the type of evidence called into question by the NAS Report.¹⁹² Adopting Federal Rule of Evidence 702 would force Virginia trial courts to reevaluate those forensic practices earlier deemed fundamentally reliable, allowing both those already convicted and those newly accused to challenge those methodologies in court.

CONCLUSION

Thomas Haynesworth was wrongfully convicted of rape. Other Virginians have only recently been vindicated and released. As a matter of justice, the Commonwealth must do all in its power to ensure innocent persons are not convicted and incarcerated. A system that requires two county prosecutors *and* the Attorney General of the Commonwealth to fight to free an innocent man is inherently flawed. The proposed changes offered above would move Virginia closer to having a justice system that all Virginians can trust, and a system of which all Virginians can be proud.

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192. *See generally* STRENGTHENING FORENSIC SCIENCE, *supra* note 93.

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