The last decade has seen a rise in the number of post-conviction claims of factual innocence around the world. This has led many countries to adopt new laws, policy reforms, and other mechanisms to address a gap in national, criminal legal systems. And while many human rights treaties do recognize extensive fair trial and appeal rights, there is still no international human right that explicitly and fully recognizes the right to assert a claim of innocence.

We call this omission an innocence gap in international law. In closing international laws innocence gap, a paper written by myself and two of my colleagues at Duke Law, Professor Larry Helfer and Professor Brandon Garrett, we argue that now is the time to close this gap by recognizing this new international human right. In that paper, we detail all the advantages of recognizing a new right to claim innocence, offer the mechanics of both the derivative and free standing approaches for so doing, and finally, provide a framework for adapting the right to national models.

And I'm really thrilled to have my co-authors with me in the pod today for us to have a discussion about this timely and important issue. First, Professor Helfer, an expert in the areas of international law and institutions and a human rights scholar. Professor Helfer is also currently serving as a member of the UN Human Rights Committee. Professor Helfer, it's great to have you here.

LAURENCE HELFER: It's a pleasure to be here, Professor Huckerby.

JAYNE HUCKERBY: And next, Professor Garrett, the faculty director of the Wilson Center for Science and Justice here at Duke Law. Professor Garrett is a leading authority on criminal justice outcomes, evidence, and constitutional rights, and is the author of the acclaimed Autopsy of a Crime Lab. Professor Garrett, it's also wonderful to have you here.

BRANDON GARRETT: It's great to be on the pod with all of us co-authors to talk about our work.

JAYNE HUCKERBY: And as I mentioned, my name is Jayne Huckerby, I direct the International Human Rights Clinic here at the law school, and my scholarship covers issues related to gender, trafficking and persons, and human rights and foreign policy. Starting off our discussion, I think it would be really helpful for listeners to understand a bit more about what's currently driving this global increase in the number of post-conviction claims of innocence and exonerations. Professor Garrett, can you start us off on understanding a bit better what is driving this shift and how courts around the globe are responding to innocence claims?

BRANDON GARRETT: Sure. This is a great way to start, because I don't think when I came to Duke five years ago I ever thought that I would be doing international human rights work with you, Jayne, or with you, Larry. I mean, I was excited to work with you all but I didn't really think that our research had
anything in common because I'm not really an international human rights scholar in any way. You know, my early work was like about habeas and certainly studying wrongful convictions.

But the innocence movement has become quite international. There's now an international network of innocence projects, and it's because people are being exonerated around the world. The first wave of those exonerations was driven by a new technology in the late 80s, at least-- not new now-- that was post-conviction DNA testing. And the US was ground zero for post-conviction DNA exonerations.

And so in my early work, in fact, the first talk I ever gave about that book was here at Duke Law School in my book called Convicting the Innocent. I tracked the outcomes in the first 250 DNA exonerations in the US. We're now getting very close to the 400th DNA exoneration in the US. And that technology changed things, because in any given state in the United States and in any given country around the world, there have been traditional rules of finality where for understandable reasons, after a certain number of years after a conviction, it is final, and your appeal is done, and normally you can't reopen a conviction unless there's something very, very unusual.

And there are some procedures for that-- habeas in the US, revision in many civil law countries and other procedures with different names. But typically, it's too late to introduce new evidence after a certain amount of time passes. In some states in the US, it was really short, like in Virginia, it was infamously 21 days for a long time. DNA changed that, because normally the idea was like, months or years after a conviction, people's memories do not get better. Evidence, whether it's memory or documents or things, it degrades, and there's no reason to think that having a trial three, or four, or five years later is going to be a particularly reliable thing. Witnesses will have moved on, forgotten, passed away.

DNA changed that, because if DNA is kept in a fairly dry place, like an envelope or a package, you can test it 10 years later, 20 years later, 30 years later. And in certain types of cases, particularly cases where there is biological evidence from a stranger assailant, that test could tell you something far more reliable than the memories of the witnesses and the like at the time of the original trial.

And so you had people exonerated, 10, 20, 30 years after they were convicted. And that overturned long held notions of finality and really illustrated that new evidence of innocence and claims of innocence could be really, really powerful. And that was the initial bread and butter work of innocence projects in the US. They then branched out and started doing many more cases that didn't just rely on DNA testing. That's been true around the world as well, where there are many times more exonerations that don't involve DNA, even if the first wave was from DNA cases. And so the innocence movement really grew in the US because in the US, we were quick to-- you know, enterprising lawyers that are interested in science were quick to take advantage of this new technology. But now it really is a global challenge that we know wrongful convictions happen, we've learned a lot about how these errors occur. They occur really the same way everywhere in the world, because it's not like human error, whether it's eyewitnesses or how interrogations work or different types of biases, these things happen the same way in every system. And so now we have this global problem and where we started working together was, well, is there a human rights solution?

JAYNE HUCKERBY: And what's striking, Professor Garrett, is despite the success of domestic and transnational innocent movements, despite the increased recognition domestically of a new right to claim innocence despite the enhanced technology, international law really has lagged on this point of recognizing the contours of a right to claim innocence. Professor Helfert, can you talk us through what international law has, or probably more importantly, hasn't said on the right to claim innocence?
LAURENCE HELFER: Yes, I'd be happy to do that. But I should first clarify that my remarks today are made in my personal capacity and don't express views on behalf of the UN Human Rights Committee. So with respect to the current state of international law and our collaboration, I vividly remember a conversation that we had over dinner, I think it was a Professor Garrett's house, where we were talking about these issues and where we all came to understand that international law was indeed lagging developments that had occurred at the National level and transnationally across borders.

BRANDON GARRETT: I think you called it a gap at that time. And told me like, having a gap in international human rights law is actually like a big deal.

LAURENCE HELFER: It is a big deal. And I'm sure we'll get into why that is the case.

BRANDON GARRETT: I was used to the idea that huge gaps in our constitutional rights, that's kind of typical.

LAURENCE HELFER: But not so much in international law. I think that's true. And I think it was a bit of an eye opener for Professor Huckerby and for me. And especially because if you think about the foundation for what protections exist in international human rights law relating to the criminal legal process, there really are quite a few. So international human rights law is sometimes challenged as being too vague, or aspirational, or not sufficiently precise in specifying what obligations of governments are. But in the area of criminal law, human rights treaties, especially civil and political rights treaties, are really quite detailed, concerning issues such as the presumption of innocence, fair trial rights, the right to appeal, the right to counsel, and so forth. And so it really took me some time to appreciate that what had been happening at the domestic level really was not mirrored in international law.

There is, in a few human rights treaties, a right to receive compensation for miscarriages of justice, but there isn't any settled understanding of what miscarriages of justice actually mean. They could mean that an individual is factually innocent. They could mean that the trial or appeals process was defective in some particular way. But that had not been settled in international law, nor was there any international right to be able to raise a claim of innocence.

So it was a very unusual situation where there was, at least in some treaties, the possibility of a remedy, that is, compensation, without any kind of institutional mechanism to vindicate that remedy. And so international law, in some ways, has many rights in the criminal process, but this is one that is glaringly omitted. And when you see its omission, it really is striking, and it's especially striking in light of the developments that Professor Garrett and his colleagues have documented at the National level.

BRANDON GARRETT: It seems like this is part of the story of just when international human rights laws surrounding criminal procedure grew up, right? These rights were all developed, '60s, '70s before the innocence revolution.

LAURENCE HELFER: Yes, I think that's right. And it's even more ironic perhaps because international human rights law is a famously evolutionary-- it evolves in response to new changes and circumstances. And yet, this was one area where because of the particular period in time when the treaties were adopted, they did not include what I think surely would be included today if we were negotiating or states were negotiating a new international human rights agreement, it would include a right to claim innocence. But it didn't, and thus far at least, there hasn't been a full-fledged movement at the International level to close that innocence gap, and that's really what our article is intended to begin to do.

JAYNE HUCKERBY: It's clear from that overview, Professor Helfer and Professor Garrett as well, that there are these huge normative gaps with regard to the right to claim innocence under international
human rights law, and also lots of areas where the transnational innocence movements and other affected communities would really benefit from normative clarity on existing guarantees. So filling that normative gap is clearly one benefit we identify in our article. There are also additional benefits to recognizing a right to claim innocence under international human rights law. These include quite obvious benefits, such as reframing claims as legal entitlements that can inform advocacy approaches and social movements rather than purely aspirational goals. But also, quite tangible enforcement benefits that come from enabling access to a whole range of regional and international human rights mechanisms. Are there other benefits that we should be really considering here in thinking through what the tangible outcomes might be of recognizing a new human right to claim innocence?

LAURENCE HELFER: Sure, I can get started on that. I think there really are some very concrete benefits and we thought through them quite carefully, I know, in our article. So let me just highlight three of them. So first, and it seems very basic, but it’s foundational, is the right to innocence would entail an obligation of governments to establish some kind of domestic mechanism that would enable individuals who have been convicted and sentenced to introduce fresh evidence of their factual or legal innocence, either on direct appeal or after a conviction and sentence has become final and it’s a post-conviction process. That exists in many countries, but it is not clarified at all in international law. And I think international law can provide quite a bit of guidance here, in terms of what such a mechanism would look like. And in our paper, we talk about a number of the existing national models, and it was important to think through what an international standard might look like that it would incorporate those national models that we think are working well but would also hopefully build on their successes so that there would be some convergence among national legal systems over the question of what this relief mechanism might look like, but not so much that we would constrain states in ways that go against the different ways that they’ve entirely structured their domestic criminal legal processes.

So that’s one. The second more micro-level question, I suppose, relates to the evidentiary standards that should be adopted in such proceedings. So it’s quite common, I think, to have situations in which a government may have a mechanism in place, but the evidentiary standards or burdens of proof are so high or placed in such a way that there is no practical way for an individual who claims innocence to obtain relief. And so that’s something else, a second thing that international law can speak to. And finally, more thought should be given to the kind of remedies that should be provided to individuals whose innocence claims are upheld-- not just compensation, but also the possibility of retrial, or even the possibility of release, depending on what the showing actually is. And that, too, is a gap that exists in international law and that we think the proposal that we make would help to fill.

BRANDON GARRETT: Yeah, just to give a really concrete example-- I mean, we’ve had lawyers who do innocence work around the world come to us and say, look, this is a really important project. We all need to work on this. What do we do? Do we go to the UN? We’ve heard lots of unrealistic proposals for how do we gain this kind of recognition.

But I think lawyers who’ve represented people who were exonerated feel this very concretely, that there could be quite arbitrary treatment of people who have really powerful evidence of innocence or would like to get it, and there’s no human rights dimension to this. It's up to each state or country how they want to
handle it. And in response to all these wrongful convictions, many states in the US and countries around the world really have adopted robust standards.

That wasn't always the case. I was at this really moving investiture of my friend, Nina [Morrison, ?] who's in now in Eastern District of New York judge. And at her at her -- where she's formally received the oath to be a federal judge, Anthony Wright was there, and that was a case I knew well and I'd done some research that was of benefit to the Innocence Project at the time because when he sought DNA testing, the Pennsylvania courts initially said, oh, well, you can't get DNA testing post-conviction because you confessed.

Now, it took years to fight that through the Pennsylvania courts and actually, ultimately, they said that, wait a minute, that's an arbitrary bar to DNA testing. The DNA tests cleared him. Prosecutors still said, well, he confessed, and they tried to convict him again at a retrial. The jury readily acquitted him. It was a terrible injustice. It took many more years than it should have to get him out, and he spoke movingly about how Nina [Morrison ?] fought for him all those years at this investiture in the courthouse.

Never could it be said during any of that this was-- this raised human rights concerns. That this person was being aggressively denied access to the DNA testing that ultimately proved his innocence, and even once that evidence was there, the remedies were very slow moving. And this is something that has happened around the world. There have been cases where people confessed and despite powerful evidence of innocence, their exonerations are hard fought, which has led to new laws being passed in all sorts of countries.

You know, Taiwan has revisited its standards for innocence claims twice now, and that can be really productive to learn from these terrible cases. But as things stand now, if someone is denied compensation after exoneration, that would be a topic of human rights concern. If someone is denied a fair trial, certainly, if they aren't presumed innocent at trial, certainly. There's no appeal or no meaningful appeal, we have human rights bodies, human rights courts opining on that, if there's no real appeal in a country.

But if there is no real procedure to claim innocence and if it's arbitrarily cut off, there's nothing to talk about. The gap is really salient to people who are trapped in prison despite powerful evidence of their innocence and to the lawyers and others who are working on these cases.

JAYNE HUCKERBY: The benefits of recognizing a new human right to claim innocence are clearly immense, but despite these benefits or maybe even because of them, we often do see reluctance of states and some other stakeholders to recognize new rights claims. So something that we really took on in our paper of trying to understand what the key objections might be to recognizing a new right to claim innocence, and also to assess what the validity of those objections might be and whether there was something about this particular new right that might mitigate concerns of different government and other stakeholders. Professor Helfer, maybe you could reflect a bit more for us on what you see as some of the key obstacles to establishing a right to claim innocence under international law.

LAURENCE HELFER: That's a question we've thought a lot about in the paper and subsequently, and there is a real choice that we laid out in the paper in terms of different pathways by which such a right could be recognized. And as I think back on the work we did, we were quite deliberate in setting out these two pathways and not necessarily choosing among them. So one pathway was the new rights approach, and I think Professor Huckerby, you were going to say a little bit more about that. And the other is the derivative rights approach that is building on the existing rights.
And one of the reasons that we set forth these two pathways was we wanted advocates to have the option of pursuing one or the other, or even potentially pursuing them in tandem. So let me say something a little bit about that. So in terms of a new rights approach, one could imagine developing a new UN general assembly resolution, which might be based upon the findings of some of the UN Human Rights bodies that would investigate this particular area or the jurisprudence generated by some of those bodies. And that might, over time, lead to recognition, both at the political level or even at the legal level in a new treaty or a new protocol to an existing treaty. But that pathway is politically fraught, it's a heavy lift to ask for a new human right, freestanding right to be recognized. It's not clear that states will be entirely on board with that. As we explore in the paper, there are some concerns that have been raised by governments and by commentators about so-called rights proliferation or rights fatigue.

And so we wanted to have another pathway, and that pathway would allow for those advocating for this right to build on some of the existing provisions that I mentioned that are already recognized, very widely recognized in key human rights treaties, and interpret them in a way that would allow for those existing provisions to be interpreted to encompass such a right. And I think it's worth noting that we see some of this approach already existing.

So the Human Rights Committee, the body on which I currently serve, about five years ago adopted what is known as a general comment, which is a general interpretive document, and this was on the right to life. And when we started our work, I had not really delved as deeply into that document as I have since. And I noticed that in referencing provisions relating to the obligations that states must take with respect to the right to life, there's a mention of wrongful convictions in death penalty cases. So this is limited to that context.

 But a recommendation that states review procedural barriers to reconsidering convictions, and to re-examining past convictions on the basis of new evidence, including specifically DNA evidence. So that's a great example of how an existing right, in this case, the right to life, can be interpreted in light of new circumstances, and new concerns, and new technologies, in a way that would allow for recognition within an existing set of international legal instruments.

So having said that, those are the two pathways, but each of them have a range of potential obstacles, in terms of how much time they would take, what sort of advocacy would be most effective in overcoming potential barriers or opposition, whether by governments or other actors, and which institutions in international law would be best suited to address those issues.

JAYNE HUCKERBY: What we cover in the article to is really trying to understand how many of these, in many ways, quite generic objections to new rights, actually played out with regard to the particular right to claim innocence. So for example, we looked at the ways in which concerns about devaluing human rights, or complicating compliance, or creating new conflicts between rights, may or may not eventuate with regard to a new right to claim innocence.

And what was really interesting and getting into that analysis of the core generic objections to so-called rights inflation or hypertrophy, is that when you apply it to the particular circumstance of the right to claim innocence, many of those concerns didn't have a lot of purchase. So for example, with the right to claim innocence being a right that has been widely recognized in domestic jurisdictions, all range of the concerns around creating partisan positions or new conflicts between human rights, or overburdening machinery at the global level, didn't really play out with regard to this particular right.
BRANDON GARRETT: Yeah, this right fits in so well with the existing rights. I mean, it's like a gap, but it's like this puzzle piece is missing.

JAYNE HUCKERBY: And exactly as Professor Garrett just said and Professor Helfer talked us through, many of the questions around obstacles and benefits also turn, to some degree, on what pathway is utilized to recognize a new human right to claim innocence. And as Professor Helfer foreshadowed, there are essentially two pathways under international law for recognition, the first of which is the derivative pathway, which as the name would imply, enables us to read protections from existing rights guarantees. And the other approach to a pathway is a pathway toward standalone or freestanding recognition, which is a bit more complicated. It requires applying quality control criteria, that in essence require that a new right be consistent with existing rights, fundamental, precise, enforceable, and that it also enjoy broad international support.

As Professor Helfer mentioned, in our paper, we argue that actually, a new claim innocence can emerge via either pathway and that each one comes with its own set of disadvantages and advantages which can be addressed. But once I've actually crossed the threshold of recognizing a right, which I'm not implying it's not a heavy lift, it comes with many opportunities and challenges, the next big question is what the right itself would actually protect. So let's dig into that particular point. What would a new international human right to assert a claim of factual innocence actually mean in practice? What would be the core components of the right, and how would it benefit individuals who seek its protection?

BRANDON GARRETT: Yes, there's a part of our article which is very much on point, which is titled draft text of a new right to claim innocence. And maybe that was a little forward of us to actually draft a new international human right as a proposal, but we did that. We said it could be drafted concisely as follows, and it's pretty concise. After a person has, by a final decision, been convicted of a criminal offense, the person shall have the right to seek relief from that conviction, including on the ground that newly discovered evidence of innocence shows that the conviction lacks factual support.

So basically, right, if you've been convicted, you can bring up new evidence of innocence and factual innocence, specifically. And so our focus is on a factual innocence. There may be other concepts of innocence that relate to other types of legal errors and the like with convictions. There's more of an understanding that those types of legal errors, for example, can be asserted during traditional appeals. It's the new facts which have created so many problems around the world because the idea that you could have new facts really shook systems like we were describing earlier.

And so we talk a lot about different ways that this right could be recognized, but that's the basic idea. After conviction, new evidence of an innocence should be a claim. Now notably, like in this very short draft that we shared, we don't say before what body should one present this new evidence of innocence. Do you have a right to counsel representing you? Do you have a right to investigative resources? Is the body that considers this claim, must it be judicial or could it be administrative, like in some countries that have conviction review bureaucracies basically, or officials that have a job to investigate claims of innocence as part of conviction integrity work.

We don't say, can there be appeals of the initial decision to reject your claim of innocence. But there are lots of choices in terms of how this would get implemented on the ground and Professor Helfer said earlier, countries have different models currently. And they've responded in different ways and quite different models that it can be quite robust given the way the system works on the ground. But the
elemental idea is that there should be a meaningful way to raise new evidence of innocence after you've been convicted.

LAURENCE HELFER: The only thing I would add to that, Professor Garrett, is you're right. I think we deliberately tried to encapsulate the right in very concise text. We explain all the things you've just mentioned around what-- or it might be implicit in that right. But I think we did that proposal, we put out actual language for what could go into some kind of instrument, whether non-binding or binding, because we wanted our readers to understand that this idea of this right did not have to be complicated. That you would be able to implement it in a fairly clear and focused way, and then have a number of the questions that you raised could have some variation across different legal systems. So we wanted to paint with a broad brush, because we felt that would enable advocates, in whatever situation they were facing, to turn to this language or some of the arguments that Professor Huckerby articulated today, and use that in a way that would be most meaningful.

JAYNE HUCKERBY: The only other element that I would add is our understanding that a new right to claim innocence would, as with any human right, under regional or international human rights law, be applied in a way that it's non-discriminatory and on the basis of equality. And that's particularly important given the ways in which criminal justice systems around the globe discriminate on the basis of race and other prescribed grounds. Are there any final thoughts that we should share with our listeners about the new right to claim innocence?

BRANDON GARRETT: I think there will be hard questions, and having a right, whether it's recognized as an adjunct to existing rights or as a new right, may help to clarify those questions or add weight to those questions. But you can certainly imagine what we've seen in different countries, disputes about whether something is really new. Is this really new information or are these really new facts?

A DNA test, that's not new because we had some forensics at the time, there were fingerprints that match this person, or a changed understanding of the science. We would no longer say such things about arson today. Does that count as new enough? These concepts are not necessarily beyond dispute, and that makes it all the more important that there be a meaningful remedy. One piece of feedback we've gotten on this is that there are certainly some countries where it takes a very long time for someone to be brought to trial. And so new evidence of innocence may surface years later and the person still has not yet been convicted. They are pre-trial detained for lengthy periods of time.

Now there's a question whether this new right actually might be still helpful because it highlights the importance of being able to litigate new evidence of innocence. And there are certainly fair trial concerns with holding someone for so long without trial. And so this might be a right that could operate in combination, or maybe just the presumption of innocence of another existing rights would be relevant in that type of situation. But you would certainly worry about different procedural tools at the national level that could, in different ways, frustrate the ability to raise new evidence of innocence. But that was one though that I heard in response to this. What of those countries where trials are just prolonged indefinitely.

LAURENCE HELFER: The only other thing I'll say in closing is just, I'm excited about where we take this project from here. We have engaged with a variety of different audiences and interest groups and advocacy organizations on this topic. And we recognize that to actually turn a proposal on paper into reality is going to take a substantial amount of work by many different individuals and organizations, and
that we see this as an ongoing project, one that we will contribute to but also hopefully catalyze other actors who are involved in this space outside of the legal academy to really take this idea and run with it.

JAYNE HUCKERBY: And we really are at a quite critical juncture in international human rights law and its institutions, and thinking through what the modalities are for recognizing new rights and ensuring that those protections trickle down to the domestic level as well. And thank you for both of you for reminding us that there are gaps at the domestic level. Even though we talk about the international law gap, there is an important role that this new right to claim innocence can play in informing more human rights compliant policies at the national and local level as well. So again, thank you both for your really insightful responses and a great discussion today.

LAURENCE HELFER: Thank you very much. It was a pleasure.

BRANDON GARRETT: We have lots of work to do, and I hope that listeners feel free to contact us if they have ideas for whether it's a national commission looking into adequacy of remedies for wrongful convictions or cases that raise these issues where human rights briefing might be relevant. International conferences where, like we've been trying to do, where it would be helpful to add discussion of these topics. I wanted to add that there are concerns that new technologies are going to place pressures on criminal justice systems, that we may have more use of automated decision making in AI, which may lead to new types of error and new ways of catching errors, potentially, too, which will also create opportunities to both fear and to think about remedies for wrongful convictions.

JAYNE HUCKERBY: And there really is just so much more that we could get into on this topic. And for a deeper dive for those of our listeners who would like to know more and contribute in the way that Professor Garrett just outlined, I encourage you to check out our paper, Closing International Laws Innocence Gap, published by the Southern California Law Review and available also at SSRN. Also, Professor Helfer, Garrett, and I were on a panel on international laws innocence gap at a 2022 international conference on this topic. The panel and the entire conference is available to watch on YouTube, and I would highly recommend those who are interested in this topic to view that. And before we go, Professor Garrett, do you want to let listeners know whether they can follow you and the Wilson Center on Twitter?

BRANDON GARRETT: I'm not worth following on Twitter, I don't tweet much these days, but the Wilson Center really is active and we post our work. And it's at WCSJ underscore. So I encourage people to check that out if interested.

JAYNE HUCKERBY: Professor Helfer, I know you're not on social, but Duke Law Twitter regularly tweets updates on your work.

LAURENCE HELFER: Yes. They're really terrific in doing that.

JAYNE HUCKERBY: And you can find me on Twitter at Jayne Huckerby. Lastly, please be sure to follow the Duke Law podcast on Apple Podcasts, Google Podcasts, SoundCloud, Spotify, and YouTube, to be automatically updated when new episodes are available. And thank you everyone for listening.

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