WHEN JUDGES ERR: IS CONFESSION GOOD FOR THE SOUL?

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"Love," as the doomed heroine in the 1970 film *Love Story* famously pronounced, "means never having to say you're sorry."[1] So, it appears, does being an appellate judge. Although judges are human, and as such, surely make at least some mistakes, the published opinions are largely bereft of genuine mea culpas.

I speak here not of the familiar practice of a judge documenting that his views about the correct rule of law have changed over time or that he now would decide a previous case differently.[2] Flexibility is the hallmark of the common law tradition, and the judicial literature is replete with explanations for such judicial "180s," perhaps the most familiar of which is Justice Jackson's concurrence in *McGrath v. Kristensen*:

> Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. *See* Chief Justice Taney, *License Cases*, 5 How. 504, 12 L.Ed. 256, recanting views he had pressed upon the Court as Attorney General of Maryland in *Brown v. State of Maryland*, 12 Wheat. 419, 6 L.Ed. 678. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." *Andrew v. Styrap*, 26 L.T.R.(N.S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error, however, can furnish no

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1. LOVE STORY (Paramount Pictures 1970).

2. *See, e.g.*, Linda Greenhouse, Editorial, *When Judges Don't Know Everything*, N.Y. TIMES, Oct. 31, 2013, at NA ("In what Judge Posner now says he considered little more than an 'entirely innocuous' throwaway line, he wrote, 'I plead guilty to having written the majority opinion' for his appeals court rejecting a constitutional challenge to Indiana's voter-identification law.").

> ground for its being adopted by this Court.' *United States v. Gooding*, 12 Wheat. 460, 478, 6 L.Ed. 693.[3]

This essay focuses not on commendable explanations of why judges change their minds about the appropriate rule of law after mature reconsideration, but instead on, for want of a better description, how courts handle the judicial "goof"—getting the applicable facts or existing law dead wrong. Interestingly, although many examples can be found of judges explaining why their previous view of the law has evolved, there are relatively few published decisions acknowledging common human error. My thesis is that we all would be better off if judges freely acknowledged and transparently corrected the occasional "goof." Confession is not only good for the soul, it also buttresses respect for the law and increases the public's understanding of the human limitations of the judicial system.

I.

My interest in this topic stems from painful personal experience. As former New York Mayor Fiorello H. La Guardia once reputedly said, "when I make a mistake, it's a beaut."[4] My transforming moment occurred in a bar disciplinary matter, *In re Dean*, that came before the Arizona Supreme Court while I was privileged to serve on that body. The petitioner, Nancy E. Dean, was a prosecutor who had a romantic relationship with a superior court judge, Michael C. Nelson, in whose courtroom she very regularly appeared.[5] When allegations of the affair first arose, Dean categorically denied the relationship and the State Bar dropped its inquiry.[6] After additional information came to light, the investigation resumed. The State Bar began disciplinary proceedings against Dean, and the Commission on Judicial Conduct brought charges against the judge.[7]

The State Bar recommended that the Arizona Supreme Court suspend Dean from the practice of law for a year.[8] The Court, in an opinion I authored, unanimously found that sanction "entirely appropriate" in light of Dean's conduct.[9] We nonetheless reduced the sanction to six months, and then imposed it retroactively so as to allow Dean to immediately resume the practice of law.[10] Why? Because, as the opinion documents, we had goofed in parallel proceedings against the judge.

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3. 340 U.S. 162, 177–78 (1950) (Jackson, J., concurring).

4. William Safire, *When I Make a Mistake . . .* (from *On Language* column), N.Y. TIMES, Feb. 22, 1987, at SM10.

5. *See In re* Dean, 129 P.3d 943, 943–44 (Ariz. 2006) (en banc) ("From the time the affair began until Dean resigned from the County Attorney's Office in 2003, she appeared in court before Nelson 485 times.").

6. *Id*. at 944 ("Dean categorically stated, 'I am not now nor have I ever been involved in an intimate or improper relationship with the Hon. Michael Nelson.'") (internal quotation marks omitted).

7. *Id*. at 944–45.

8. *Id*. at 944.

9. *Id*.

10. *Id*. at 947.

The Commission on Judicial Conduct had recommended that Judge Nelson be removed from office and ordered to pay costs of the disciplinary proceedings.[11] Before the Supreme Court could act on the Bar's recommendation, Nelson resigned, and we reasonably concluded that there was no need to review the removal recommendation.[12] We did, however, consider Nelson's relatively minor objections to the proposed costs, and reduced them.[13] We tacitly assumed at the time that State Bar disciplinary proceedings against Nelson could then follow, because an Arizona rule expressly provided that judges were not immune from Bar discipline for conduct on the bench.[14]

We had misread, however, the applicable rule, which allowed Bar proceedings against a judge only if "the misconduct was not the subject of a judicial discipline proceeding as to which there has been a final determination by the court."[15] Our refusal to consider the removal recommendation, coupled with the taxing of costs, it turned out, was such a "final determination."[16] Nelson was therefore able to resume the practice of law after our decision, free from any possible State Bar discipline.[17]

So, here was the dilemma: Dean faced a significant Bar sanction, but the judge, seemingly at least equally culpable, faced none because we had misunderstood the law when "terminating" the judicial disciplinary proceedings. What were our options? We could have said that the law often punishes guilty people differently—something beyond dispute—and that the treatment of Nelson had nothing to do with the punishment that Dean deserved. Or we could have said nothing and simply handled Dean's appeal. Instead, we fessed up. We noted that we had created the problem by making further discipline of Nelson impossible, and decided to reduce the consequences of our error by modifying the recommended sanction against Dean to allow her also to resume the practice of law. In so doing, the Arizona Supreme Court expressly noted that the mess was entirely of our own creation.[18] The opinion quoted Justice Jackson's oft-cited remark that supreme courts "are not final because we are infallible," and noted that "[t]his case requires this Court to confront the consequences of our fallibility."[19]

Whether the *Dean* decision was right or wrong is today of little consequence. But it ignited an interest in what other courts did and said when they made mistakes. The answers surprised me.

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11. *Id*. at 945.
12. *Id*. (citing *In re* Nelson, 86 P.3d 374, 376 n.1 (Ariz. 2004) (en banc)).
13. *Id*.
14. *See* ARIZ. R. SUP. CT. 46(c).
15. *Dean*, 129 P.3d at 946 (quoting ARIZ. R. SUP. CT. 46(c)).
16 *Id*.
17. *Id*.
18. *Id*. at 947 ("Our own orders caused the disparity in treatment of Dean and Nelson, and we thus should cure the problem.").
19. *Id*. at 943 (citing Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

II.

It is surprisingly difficult to find examples of appellate judges who admit to "goofs." In some cases, of course, the original judges on a panel simply do not have the opportunity to own up to their mistakes in a published opinion. A mistake may go unnoticed after the case is decided and the particular judge or the panel may not hear another case with similar issues again.

And, even when the original panel deals with its own errors, the predominant response to "goofs" is simply to issue an amended disposition. For example, in the last five years, the Ninth Circuit has amended 593 published opinions and 107 unpublished memorandum dispositions.[20] Most of these amended dispositions do not explain why the change was made. This is understandable. In some instances, the amendments simply correct technical or formatting errors.[21] In other cases, the panel rejects the contention that intervening case law or arguments not previously raised required a different result.[22] And, federal judges in my circuit shoulder a crushing caseload.[23] The important thing is that the changes are made and justice done; it is hard to fault a panel that has corrected a disposition for also not fully explaining why.

But, whatever the reason, it is clear that explaining why a disposition was changed is the exception, not the rule. And, even when an appellate court acknowledges a putative mistake, it often does so grudgingly. A recent paradigm is the U.S. Supreme Court's opinion in *Kennedy v. Louisiana*.[24]

Justice Kennedy's majority opinion in *Kennedy* supported the finding of a "national consensus" against the death penalty for rape of a child by stressing that "Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain

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20. Statistics on file with the Ninth Circuit Clerk's Office.

21. *See, e.g.*, Aleman v. Uribe, 716 F.3d 1288 (9th Cir. 2013), *withdrawn and superseded by amended opinion*, 723 F.3d 976 (9th Cir. 2013) ("'United States District Court for the Eastern District of California' is deleted and replaced with 'United States District Court for the Central District of California.'"); Singh v. Mukasey, 536 F.3d 149, 151 n.1 (2d Cir. 2008) ("In *Singh I*, we mistakenly referred to 8 C.F.R. § 216.5(e)(1), which applies to the Department of Homeland Security. 8 C.F.R. § 1216.5(e)(1) is an identical provision that applies to the BIA and is applicable to the BIA's consideration of Singh's motion to remand."); Adams v. United States, 255 F.3d 787, 796–97 (9th Cir. 2001) ("In the introductory fact section of *Adams I*, we mistakenly stated that the Culinary Spring is on the Adamses' land.").

22. *See, e.g.*, Talk of the Town v. Dep't of Fin. & Bus. Servs., 353 F.3d 650 (9th Cir. 2003) ("We consider any such argument waived.").

23. In 2013, 22% of all filings in the federal courts of appeals were filed in the Ninth Circuit—466 filings per active judge, 3.7 times more cases per active judge than the D.C. Circuit. *See U.S. Courts, Caseload Statistics 2013*, tbl. B, USCOURTS.GOV, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx (last visited Apr. 12, 2014).

24. 554 U.S. 945 (2008).

nonhomicide offenses; but it did not do the same for child rape."[25] Apparently unbeknownst to the Court, however, Congress *had* added child rape to the list of capital offenses in the military justice system only two years previously.[26]

The government petitioned for rehearing, noting the error, and what followed was a Supreme Court rarity—an amended opinion.[27] But, rather than acknowledging that it had missed something, the majority simply issued an order amending one of the footnotes to the original opinion, stating only that the opinion "neither noted nor discussed the military penalty for rape," and an order denying rehearing, explaining why that penalty didn't make any difference.[28] Justice Scalia, concurring in the denial of rehearing, seemed to disclaim any error at all on the Court's part: "This provision was not cited by either party, nor by any of the numerous amici in the case; it was first brought to the Court's attention after the opinion had issued, in a letter signed by 85 Members of Congress."[29]

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25. Kennedy v. Louisiana, 554 U.S. 407, 423, *modified on denial of reh'g*, 554 U.S. 945 (2008).

26. Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, Jul. 2, 2008, at A1.

27. My research has only found 20 modified opinions issued by the Supreme Court in the last 85 years. An acknowledgment of error, even implicit, is quite rare. *Compare, e.g.*, Graham v. Florida, 560 U.S. 48, 110 n.10 (2010) ("The Court has amended its opinion in light of the Acting Solicitor General's letter."), *with* Swenson v. Stidham, 409 U.S. 224 (1972), *modified*, 410 U.S. 904 (1973) ("The penultimate paragraph of the opinion is amended by striking the sentence reading-'Neither the District Court nor the Court of Appeals reached this issue.' and substituting therefor the following: 'The Court of Appeals did not reach this issue.'").

28. Kennedy v. Louisiana, 554 U.S. 945, 945 (2008) (Kennedy, J., statement respecting the denial of rehearing), *denying reh'g to Kennedy*, 554 U.S. 407.

29. *Id.* (Scalia, J., joining the denial of rehearing). A dissent by Justice Scalia has recently undergone similar critical scrutiny. In his original dissenting opinion in *EPA v. EME Homer City Generation, L.P.*, Justice Scalia made the following statement:

> This is not the first time EPA has sought to convert the Clean Air Act into a mandate for cost-effective regulation. *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457 (2001), confronted EPA's contention that it could consider costs in setting NAAQS.

No. 12-1182, slip op. at 12 (U.S. filed Apr. 29, 2014) (Scalia, J., dissenting), *available at* http://www.supremecourt.gov/opinions/13pdf/12-1182_bqm1.pdf.

At least one careful reader quickly noted that *Whitman* did not support this assertion. *See* Ann Carlson, *Richard Lazarus Formally Notified the Supreme Court of Scalia's Error*, LEGALPLANET (May 1, 2014, 11:24 AM), http://legal-planet.org/2014/04/30/richard-lazarus-formally-notified-the-supreme-court-of-scalias-error/ (praising Professor Lazarus for pointing out the mistake to the Court). The dissent was amended to instead state:

> This is not the first time parties have sought to convert the Clean Air Act into a mandate for cost-effective regulation. *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457 (2001), confronted the contention that EPA should consider costs in setting NAAQS.

Perhaps it is nit-picking to view the *Kennedy* omission as a "mistake"—there is arguably nothing wrong about the Court's opinion, just a failure to cite all available authority.[30] (I assume some law clerk's head is still ringing, however.) But what resonates for today's purposes is the Court's response to being notified of the problem: "so what." Rather than acknowledge a perfectly understandable and human omission, the denial of rehearing simply states why this additional argument is unpersuasive; Justice Scalia even intimates that the parties were at fault for not raising it earlier. That may be correct, but I wonder whether the Court's authority would have suffered a whit had it just acknowledged its collective humanity. If one views the Supreme Court as Olympian, of course, failure to know everything is unthinkable. But in reality, it is quite understandable how nine distinguished Justices overlooked a recent amendment to the Uniform Code of Military Justice when reviewing a civilian criminal conviction.

Indeed, when judges do admit errors, sometimes they go to extraordinary lengths to avoid changing the ultimate outcome. A painful example (I was counsel for the unsuccessful appellant, so discount my bias) is *Rhue v. Dawson*.[31] In that case, the panel originally noted that certain evidence about the defendant's alleged alcoholism had been incorrectly admitted, but held that any error had been waived because of the absence of a proper objection at trial.[32] The court then went on to address, at some length, the most difficult and interesting issues in the case, which concerned partnership law and punitive damages, and issued a scholarly opinion often thereafter cited on these issues.[33] A motion for rehearing pointed out that the defendant had specifically objected to the evidence at issue in a motion in limine, and the trial judge had responded by uncategorically finding it admissible.[34] After the motion for rehearing was filed, the court amended its opinion, acknowledging that the issue had in fact been preserved for appeal, but holding, "on reconsideration," that the evidence was relevant after all and properly admitted.

Although I disagree with the conclusions in the amended opinion, it is not my purpose today to deconstruct it. And, unlike the Court's *Kennedy* sequel, the

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EPA v. EME Homer City Generation, L.P., No. 12-1182, slip op. at 12 (U.S. filed Apr. 29, 2014) (Scalia, J., dissenting), *available at* http://www.supremecourt.gov/opinions/13pdf/12-1182_553a.pdf. The subheading above this passage was also changed from "Plus Ça Change: EPA's Continuing Quest for Cost-Benefit Authority" to "Our Precedent." *Id*. The initial errors were not otherwise acknowledged. *See* Jacob Gershman, *Supreme Court Corrects Scalia's 'Cringeworthy' Error in Pollution Case*, WALL ST. J. L. BLOG (May 1, 2014, 11:11 AM), http://blogs.wsj.com/law/2014/04/30/supreme-court-corrects-scalias-cringeworthy-error-in-pollution-case.

30. *Cf.* Paul H. Edelman, *Getting the Math Right: Why California Has Too Many Seats in the House of Representatives*, 59 VAND. L. REV. 297, 298 (2006) (arguing that *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 445 (1992), "was based on a mathematical error").

31. 841 P.2d 215 (Ariz. Ct. App. 1992).

32. Rhue v. Dawson, 1 CA-CV 89-543, 1992 WL 91295 (Ariz. Ct. App. May 7, 1992) (original opinion on file with author), *amended and superseded by* 841 P.2d 215 (Ariz. Ct. App. 1992).

33. *Rhue*, 841 P.2d at 228–29.

34. *Id.* at 219.

Arizona court at least candidly acknowledged the error in its original opinion. But, as a confession of error, it falls short of full transparency. The original opinion contained a reasoned discussion of why, had the error only been preserved, the quite prejudicial evidence should have been excluded. The amended opinion simply repeated the very arguments that the appellee had originally made as to why the evidence was relevant. What did the court do "on reconsideration"? From my client's admittedly biased perspective, it appeared that the panel, having invested substantial time and effort in a comprehensive treatment of partnership law and punitive damages, didn't want to throw all that work away simply because of a routine evidentiary error. Perhaps that was not the case, but when a court effectively says "never mind," a more fulsome explanation of why the original error is irrelevant is beneficial.

III.

Some judges, however, do it right. Two particularly noteworthy examples involve opinions written by distinguished jurists, each a former chief judge of a federal circuit. These opinions provide useful guidance for the hopefully rare occasion when a judge learns of a "goof"—honestly identify it and correct it.

In *United States v. Board of Directors of Truckee-Carson Irrigation District* ("*TCID*"), the Ninth Circuit considered "the long-running litigation over how much water from the Truckee and Carson Rivers should be diverted to irrigation and how much should flow into the Pyramid Lake for the benefit of the Pyramid Lake Paiute Indian Tribe."[35] Former Chief Judge Mary M. Schroeder's original opinion ordered the district court to recalculate the amount of alleged excess diversions, because "the district court had failed appropriately to account for the margin of error with respect to the gauges that measured the flow of the diversions."[36] Although the body of the opinion concluded that the district court's error affected the analysis for all of the years at issue in the appeal, the final paragraph inexplicably limited the recalculation on remand to four specific years.[37]

In *TCID*, while noting the "understandable" reasons for the mistake—"the parties made only passing references in the briefs and in oral argument to the larger scope of the gauge error issue, and the government did not move for rehearing of our prior opinion to correct the mistake"—Judge Schroeder's straightforward treatment took full responsibility for any error: "We cannot fault the district court in any way, for it correctly followed our 2010 mandate. It was the mandate that was in error, and that only we can correct."[38] The panel therefore took the "rare step" of

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35. 723 F.3d 1029, 1033 (9th Cir. 2013).

36. *Id*. (citing United States v. Bell, 602 F.3d 1074, 1085 (9th Cir. 2010)). The *Bell* panel was composed of Circuit Judges Mary M. Schroeder and Marsha S. Berzon, and District Judge Milton Sadur, but the panel in *TCID* was made up of Circuit Judges Schroeder, Berzon, and Jay S. Bybee.

37. *Bell*, 602 F.3d at 1087 ("The judgment with respect to amounts of recoupment for excess diversions in 1974, 1975, 1978, 1979, and spills in 1979 and 1980 is vacated and remanded for recalculation of the effect of gauge error."); *TCID*, 723 F.3d at 1033–34.

38. *TCID*, 723 F.3d at 1035. Judge Bybee substituted for Judge Shadur on the *TCID* panel.

withdrawing its original mandate in order to amend its previous opinion.[39] It did so after concluding the error, left uncorrected, would result in harmful "systemic uncertainty in the obligations of the parties."[40]

Another example of a court forthrightly owning up to a "goof" is the Second Circuit's opinion in *United States v. Jolly*.[41] *Jolly* involved a written judgment of conviction that differed from the district court's oral pronouncement of sentence.[42] The original *Jolly* opinion, authored by Chief Judge Ralph Winter, held that on remand the district court could either "correct the oral misstatement, if it was a misstatement, and impose the original restitution requirements or to direct that the written judgment reflect the new schedule as stated orally," noting that the government agreed with that disposition.[43] Prior to the issuance of that opinion, however, the government and Jolly had filed a stipulation asking the court to direct the district court to conform the written judgment to the oral sentence.[44] This stipulation never reached the panel members, because the Clerk's Office never entered the stipulation into its computer system.[45] Compounding this error, the court mistook a letter filed by the government communicating the same position set forth in the stipulation to indicate "the government merely wanted to waive oral argument while continuing to contest the appeal."[46]

These errors and misunderstandings are transparently described in Judge Winter's opinion granting the petition for rehearing.[47] As in *TCID*, the opinion had real jurisprudential value in addition to acknowledging the collective failings of the judicial branch. The original panel had created "an exception to the general rule" that "the oral sentence generally controls when a variance exists between the oral pronouncement and the written judgment."[48] Without Judge Winter's detailed explanation, practitioners and future panels would not have fully understood why the court chose to depart from the new exception it had just created.[49]

IV.

Judges Schroeder and Winter have set the correct example. All judges I know work hard to avoid errors, and rarely are there "goofs" of real magnitude. But when they occur, we should acknowledge them.

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39. *Id*.
40. *Id*.
41. 142 F.3d 552 (2d Cir. 1998).
42. United States v. Jolly, 129 F.3d 287, 288 (2d Cir. 1998).
43. *Id*. at 290.
44. *Jolly*, 142 F.3d at 552–53.
45. *Id*. at 553.
46. *Id*. (describing the "[m]ultiple misunderstandings [that] followed the receipt of this letter").
47. *Id*.
48. *Jolly*, 123 F.3d at 288.
49. *Cf.* Miss. Bank & Trust Co. v. Cnty. Supplies & Diesel Serv., Inc., 253 So. 2d 828, 833–34 (Miss. 1971) (Brady, J., concurring) (candidly acknowledging that a previous decision he had authored had overlooked a dispositive change in the law).

Judges hold a special place in our society and system of government, and they are afforded special privileges commensurate with their status. They enjoy immunity from civil liability,[50] life tenure in the federal system,[51] the ability to deliberate in secret,[52] and, other than impeachment and the legislative power of the purse, rather complete autonomy from the other branches of government.[53] But judges are not infallible. We make mistakes.

Our tiered judicial system is built on the explicit assumption that errors will occur. Courts of review exist to catch errors, and some errors are not discovered until after multiple levels of review.[54] Surely more would be discovered if there were "super-Supreme Court[s]."[55]

But, whenever judges learn of significant mistakes that affect the outcome of a case, there is value to correcting them transparently. Correcting errors is not only required to do justice, but reemphasizes a sad but important truth—that although almost all judges try very hard to do their best, we sometimes fall short. More frequent admissions of human fallibility will increase the public appreciation of the role of the courts and their capacity for human error. Citizens should understand that not every case comes out right, whether decided by a lay jury or a learned judge.[56] The admission of fault not only is a strong goad to avoid future errors, but has an important educational impact on the administration of justice as a whole.

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50. Stump v. Sparkman, 435 U.S. 349, 355 (1978) ("As early as 1872, the Court recognized that it was a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions without apprehension of personal consequences to himself.") (internal citations omitted).

51. U.S. CONST. art. III, § 1.

52. The Freedom of Information Act, the Privacy Act, and the Government-in-the-Sunshine Act apply only to executive, and not to judicial, bodies. *See* 5 U.S.C. § 552(f) (2012) (defining "agency" as an "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . or any independent regulatory agency" for the purposes of the Freedom of Information Act); *id.* § 552a(a)(1) (applying the definition in § 552(f) to the Privacy Act); *id.* § 552b(a)(1) (applying the same definition to the Government in the Sunshine Act).

53. *See, e.g.*, Bankruptcy Judge, Magistrate and Law Clerk Exemption from Federal Leave Act, Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 1003, 102 Stat. 4665 (1988).

54. *See, e.g.*, Contreras-Bocanegra v. Holder, 678 F.3d 811, 813 (10th Cir. 2012) (en banc).

55. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.").

56. *See, e.g.*, *DNA Exoneree Case Profiles*, INNOCENCEPROJECT.ORG, http://www.innocenceproject.org/know/ (last visited Feb. 22, 2014) ("There have been 312 post-conviction DNA exonerations in United States history.").