

CONVICTING THE INNOCENT IN CAPITAL CASES: CRITERIA, EVIDENCE, AND INFERENCE

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I. INTRODUCTION

From their earliest days, criminal justice systems have been plagued with the problem of erroneous convictions—irreversibly erroneous in cases in which the sentence is death, and the sentence is carried out. In this Essay, we will look back on our research on this issue¹ (first begun by the

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1. See, e.g., MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE* (1992) (addressing causes of conviction errors); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21 (1987) (presenting 350 cases in which defendants were wrongly convicted of capital or potentially capital murder or rape offenses); Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 *T.M. COOLEY L. REV.* 907

senior author some four decades ago²), discuss how public perceptions of the problem have changed, and focus on some of the implications of those changes.

Little controversy exists over whether erroneous convictions have occurred, and indeed continue to occur, in cases in which the sentence is less than death, such as imprisonment or another type of nonlethal punishment.³ When the penalty is death, however, the friends of capital punishment (with rare exceptions⁴) stoutly deny that any errors as egregious as executing an innocent person have occurred or are likely to occur. At least, the claim is, no erroneous executions have been carried out in the American criminal justice system in modern times (after the landmark ruling in *Furman v. Georgia*⁵ in 1972). Advocates of capital punishment probably would not dispute that the innocent are often convicted, sentenced to death, and executed in non-American jurisdictions.⁶ Nor would they deny that, prior to 1972, a few wrongful

(1996) (studying cases in which the defendants were erroneously convicted, sentenced to death, and subsequently released because of doubt about their guilt).

2. Hugo A. Bedau, *Murder, Errors of Justice, and Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 434 (Hugo Adam Bedau ed., 1964).

3. See generally SCOTT CHRISTIANSON, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* (2004) (addressing erroneous convictions and guilty pleas in capital and noncapital cases); C. RONALD HUFF ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* (1996) (citing examples of erroneous convictions in non-death penalty cases).

4. Exceptions include the late Ernest van den Haag and former Congressman Bill McCollum, both strong supporters of capital punishment. Responding to reports in 1985 that twenty-five prisoners had been erroneously executed in the twentieth century, Professor van den Haag stated that he found the figure to be “a very acceptable number,” and added: “All human activities—building houses, driving a car, playing golf or football—cause innocent people to suffer wrongful death, but we don’t give them up because on the whole we feel there’s a net gain. Here, a net gain in justice is being done.” David Margolick, *25 Wrongfully Executed in U.S., Study Finds*, N.Y. TIMES, Nov. 14, 1985, at A19, available at LEXIS, News Library, N.Y. Times File. Congressman McCollum, then a member of the Judiciary Committee of the U.S. House of Representatives, said in 1997: “We have enormous protections, the best by far, but we’re never going to have a system that will never execute an innocent person . . .” Aaron Epstein, *Group Warns That More Innocent People Could Die As Executions Increase*, KNIGHT RIDDER/TRIB. NEWS SERV., July 13, 1997, available at LEXIS, News Library, Wire Service Stories File.

5. *Furman v. Georgia*, 408 U.S. 238 (1972).

6. See ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 132-34 (3d ed. 2002) (discussing execution of the innocent in foreign countries); AMNESTY INT’L, *FATAL FLAWS: INNOCENCE AND THE DEATH PENALTY IN THE USA* (Nov. 12, 1998), available at <http://web.amnesty.org/library/index/engamr510691998>

executions have been recorded.⁷ Defenders of the death penalty have vigorously challenged many of the cases in which other investigators, including the authors of this Essay, have urged that the evidence is sufficient to justify a reasonable person drawing the inference that the executed prisoner was indeed not guilty as charged, and was, therefore, wrongfully executed.⁸ They have not challenged all such cases, however. For example, to the best of our knowledge, critics have ignored the case of Jesse Tafero (executed in Florida in 1990), whom we classified in the category of wrongful executions a decade ago in the preface to the paperback edition of our book, *In Spite of Innocence*.⁹

Arguments designed to show that the innocent have been executed rely on various kinds of evidence. We, for instance, have relied in part on the cases we have dubbed “close calls” to support the conclusion that innocent persons have been executed in the past century. Close calls are cases in which execution was averted at the last moment, sometimes with only a few days or even hours to spare, and if the death sentence had been carried out, a demonstrably innocent prisoner would have been executed.¹⁰ It is too much to believe that the close calls we have identified exhaust the category of cases in which an innocent defendant could have been

(setting forth examples of wrongful execution of innocent defendants throughout the world).

7. For example, one such case from “pre-modern” times has recently been unearthed: John Snowden, executed in 1917 in Maryland, received a posthumous pardon by Governor Parris N. Glendening after he viewed enough “compelling material to conclude that the execution should never have occurred.” Matthew Mosk, *Symbol of Justice, Source of Pain; 80 Years Later, Pardon Comes for Black Man Hanged in Annapolis*, WASH. POST, June 1, 2001, at A1, available at LEXIS, News Library, Wash. Post Stories File; see JOHN F. GALLIHER ET AL., AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY 12, 60-61, 74-75 (2002) (discussing instances of innocent individuals who were executed prior to 1972).

8. See generally BARRY SCHECK ET AL., ACTUAL INNOCENCE (2000) (describing numerous cases of wrongfully convicted individuals through interviews and court records); GRASSROOTS INVESTIGATION PROJECT, EQUAL JUSTICE USA, REASONABLE DOUBTS: IS THE U.S. EXECUTING INNOCENT PEOPLE?, available at <http://www.quixote.org/ej/grip/reasonabledoubt/index.html> (last visited Apr. 20, 2004) (describing study of sixteen cases in which “compelling evidence [existed] that the defendant was convicted of the crime he did not, in fact, commit”).

9. MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE, at xi-xii (paperback ed. 1994).

10. See Bedau & Radelet, *supra* note 1, at 71-72, 119, 167-68 (discussing examples of close calls when execution was narrowly averted). It is important to recognize that, had the innocent prisoner been executed rather than saved at the last minute, it would have been far more difficult (if not impossible) to prove he or she was indeed innocent.

vindicated just prior to his execution but was not—and there is no good reason to think that all such cases, even in recent decades, have been identified. Those who argue that innocent people are never executed woefully underestimate the significance of these close calls.

The reason these cases are so significant is that they show how haphazard, unpredictable, and fortuitous the discovery of innocence is that moots an execution. We (and others) have often pointed out that relief in these close call cases was gained *in spite of* the system, rather than *because of* the system. We believe that the number and variety of such cases suffice to cast doubt on the reliability of the criminal justice system as a whole, especially in cases involving the death penalty.

The recognition of close calls should help undermine naïve confidence in the reliability of our vaunted system of criminal justice, its strong points notwithstanding. Close calls, by themselves, do not provide evidence sufficient to enable us to point to the innocence of a particular individual defendant who was executed. Obviously, only facts about a particular case in conjunction with the relevant criteria allow one to classify a case as an example of wrongful execution. We also grant that most of the close call cases we have identified and reported are dated prior to the landmark year of 1972, which opens for death penalty defenders the possibility of arguing that close calls are a matter of the past and shed no light on recent or current cases.

Yet the facts show that close calls are *not* a thing of the past. In 1983, Joseph Green Brown came within thirteen hours of execution in Florida,¹¹ only to win a stay of execution, and eventually, a new trial because “the prosecution knowingly allowed material false testimony to be introduced at trial.”¹² In Illinois, Anthony Porter received a stay of execution and was saved just over two days before his scheduled execution in 1998.¹³ After sixteen years on death row, his execution was stayed only because his case raised the question of whether his low IQ of fifty-one prohibited his

11. See Radelet, Lofquist & Bedau, *supra* note 1, at 929 (documenting Joseph Brown's case).

12. *Id.* (quoting *Brown v. Wainwright*, 785 F.2d 1457, 1458 (11th Cir. 1986)). All charges against Brown were subsequently dropped. *Id.* (citing Barry Siegel, *Sentencing the Wrong Man to Die*, L.A. TIMES, May 10, 1987, at 1; RADELET, BEDAU & PUTNAM, *supra* note 1, at 290-91).

13. Lucio Guerrero, *40 off Death Row Push End to Executions; Exonerated Inmates Will Carry Letter to Ryan Today in Walk from Stateville*, CHI. SUN-TIMES, Dec. 16, 2002, at 7, available at 2002 WL 6482677.

execution, not because of doubts about his guilt.¹⁴ He was finally exonerated in 1999.¹⁵ There have been other recent cases in which execution was mooted, even if not at the last minute, hour, or day, by discovery that the defendant was innocent.¹⁶ It was just such cases that impelled Governor George Ryan of Illinois to declare a moratorium on executions in 2000.¹⁷

II. DECLINING SUPPORT FOR THE DEATH PENALTY

Beginning some time in the early 1990s (to choose a convenient, if somewhat arbitrary, benchmark), public uneasiness over the death penalty in America widened in scope and deepened in intensity to a greater degree than at any time since the 1960s. During most of the previous decades, sustained criticism of the death penalty was largely confined to particular cases in which carrying out the death sentence provoked national concern—notably Sacco and Vanzetti,¹⁸ Hauptmann,¹⁹ the Rosenbergs,²⁰

14. Pam Belluck, *Convict Freed After 16 Years on Death Row*, N.Y. TIMES, Feb. 6, 1999, at A7, available at LEXIS, News Library, N.Y. Times File.

15. *Id.*

16. See SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 9 (2003) (noting the 1999 release of Anthony Porter, who was at one point fifty hours away from execution in Illinois). In Louisiana in 1999, John Thompson came within two days of being executed; he was finally freed in 2003 following his acquittal after a retrial after spending eighteen years on death row. Brett Barrouquere, *Number of Wrongful Convictions in La. Immense*, ADVOCATE (Baton Rouge, La.), Nov. 23, 2003, at 1B, available at 2003 WL 4892691; Gwen Filosa, *N.O. Man Cleared in '84 Murder; New Trial in Liuzza Killing Brings an Emotional End to Epic Case*, TIMES-PICAYUNE (New Orleans, La.), May 9, 2003, at 1, available at 2003 WL 4008280. Kerry Max Cook was sentenced to death twice and once came within eleven days of execution in Texas for a crime he did not commit. Rena Pederson, *When 'Justice' Has Been Blind to Truth*, DALLAS MORNING NEWS, at 5J, available at LEXIS, News Library, Dallas Morning News File. In 1996, Virginia Governor George F. Allen commuted the death sentence of Joseph Payne because of doubts about his guilt. Mike Allen, *Virginia Prisoner Receives Rare Mercy on Death Row*, N.Y. TIMES, Nov. 10, 1996, at 20, available at LEXIS, News Library, N.Y. Times File. The commutation was granted about three hours before his scheduled execution. *Id.*

17. Press Release, George H. Ryan, Governor, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www.state.il.us/gov/press/00/Jan/morat.htm>; see Governor George Ryan, "I Must Act," Address at Northwestern University College of Law (Jan. 11, 2003), in *DEBATING THE DEATH PENALTY* 218 (Hugo Adam Bedau & Paul Cassell eds., 2004).

18. *Commonweath v. Sacco*, 151 N.E. 839 (Mass. 1926). Nicola Sacco and Bartolomeo Vanzetti were Italian immigrants who were executed in 1927. GALLIHER

and Chessman.²¹ (Concerns arose in these cases for a considerable variety of reasons, to be sure.) The story at present is quite different. Although there have been, and continue to be, cases scattered across the nation—especially in Oklahoma and Texas—that have provoked national attention,²² no one case or handful of actual cases has been the propelling force for criticism of capital punishment in recent years. It is the typical, not the atypical, case that has caused public support for the death penalty to decline.²³ What explains this interest? What, if anything, does it

ET AL., *supra* note 7, at 220.

19. *State v. Hauptmann*, 180 A. 809 (N.J. 1935). Bruno Hauptmann was a German immigrant who was executed in 1936 for kidnapping and murdering the Lindbergh baby. Steven Limbaugh, *The Case of New Jersey v. Bruno Richard Hauptmann*, 68 UMKC L. REV. 585, 585-86, 597 (2000).

20. *See Rosenberg v. Carroll*, 99 F. Supp. 630, 631 (S.D.N.Y. 1951) (stating that Ethel Rosenberg was convicted of espionage and sentenced to death on April 5, 1951); *see also United States v. Rosenberg*, 195 F.2d 583, 588 (2d Cir. 1952) (affirming the grand jury indictments of Julius and Ethel Rosenberg for giving national defense information to the Soviet Union). *See generally* Atossa M. Alavi, Comment, *The Government Against Two: Ethel and Julius Rosenberg's Trial*, 53 CASE W. RES. L. REV. 1057, 1065-70 (2003) (discussing the great level of public exposure received by the Rosenbergs' trial through the media).

21. *See People v. Chessman*, 238 P.2d 1001, 1004-05 (Cal. 1952) (affirming Caryl Chessman's conviction of seventeen felonies committed in January 1948, two of which, kidnapping for the purpose of robbery with infliction of bodily harm, carried the death penalty); Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C.L. & C.R. 191, 193 (2003) (stating that the lowest level of public support for the death penalty occurred in 1966, largely due "to the national controversy that surrounded the California execution of Caryl Chessman").

22. There is no shortage of cases in which defendants have been executed in recent years despite strong doubts about their guilt. *See, e.g.*, JOHN C. TUCKER, *MAY GOD HAVE MERCY* (1997) (describing the case of Roger Keith Coleman, executed in Virginia in 1992 despite strong doubts about his guilt); DEATH PENALTY INFO. CTR., *ADDITIONAL INNOCENCE INFORMATION: EXECUTED DESPITE DOUBTS ABOUT GUILT*, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#executed> (last visited Apr. 21, 2004) (discussing the circumstances surrounding the cases of five individuals with strong claims of innocence executed since 1976); Mandy Welch & Richard Burr, *The Politics of Finality and the Execution of the Innocent: The Case of Gary Graham*, in *MACHINERY OF DEATH* 127-43 (David R. Dow & Mark Dow eds., 2002) (discussing the evidence presented and not presented at trial, subsequent proceedings, and new evidence suggesting the innocence of Gary Graham, who was executed in Texas in 2000); William S. Lofquist & Talia Roitberg Harmon, *Fatal Errors: Compelling Claims of Executions of the Innocent in the Post-Furman Era* (unpublished manuscript on file with the authors) (discussing sixteen cases between 1972 and 2002 that involved compelling claims of factual innocence).

23. *See* DEATH PENALTY INFO. CTR., *SUMMARIES OF RECENT POLL FINDINGS*, at <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210> (last

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foreshadow?

The list of eleven factors that follows could no doubt be expanded, but these eleven, taken together, give plausible explanations for the decline:

- DNA testing (starting in the late 1980s) showed that dozens of felony convictions, including convictions that have put defendants on death row, were imposed on the innocent (we return to this topic below).²⁴
-
- The creation of the Innocence Project in 1992 by Barry Scheck at the Benjamin N. Cardozo School of Law and the Innocence Network subsequently created by his colleagues in law schools across the nation has resulted in postconviction DNA testing for indigent capital defendants (and other convicted felons) being made available.²⁵
- The moratorium on executions in Illinois in 2000, owing to the initiative of then-Governor Ryan, culminated in his granting clemency (commutations or pardons) in 2003 to all 167 prisoners then on Illinois's death row.²⁶ The moratorium continues today by order of his successor, Governor Rod Blagojevich.²⁷
- Starting with Randall Dale Adams, released from prison in Texas in 1990 thanks in part to the 1988 documentary film, *The Thin Blue Line*,²⁸ the public has encountered former death row prisoners who were wrongly convicted with increasing frequency,²⁹ thus putting a

visited Apr. 21, 2004) (containing a catalog of state, national, and international polls that show waning support for the death penalty). An October 2003 Gallup Poll found that support for the death penalty had dropped to a twenty-five-year low. *Id.* Indeed, polls now show that only a minority of Americans support the death penalty when the alternative of sentencing convicted murderers to prison terms of life imprisonment with no chance of parole is available. *Id.*

24. See discussion *infra* Part V.

25. INNOCENCE PROJECT, ABOUT THIS INNOCENCE PROJECT, at <http://innocenceproject.org/about/index.php> (last visited Apr. 21, 2004).

26. State v. Breton, 824 A.2d 778, 848 n.4 (Conn. 2003) (Norcott, J., dissenting) (citing Adam Lasker, *First One, Then Another . . . Then Everyone*, CHI. DAILY L. BULL., Jan. 13, 2003, at 1).

27. See Courtney Flynn, *Last Death Penalty Change Approved*, CHI. TRIB., Jan. 21, 2004, at 1, available at 2004 WL 65044272 (reporting Governor Rod Blagojevich's refusal to lift the state's moratorium on executions).

28. THE THIN BLUE LINE (Anchor Bay Entm't 1988).

29. See Andrew Hammel, *Diabolical Federalism: A Functional Critique and*

human face on the threat of executing the innocent. Adams spent over ten years on death row.³⁰ More recently, such cases are being made known through performances across the United States of *The Exonerated*, a play created in 2000 by Jessica Bland and Erik Jensen from the words of innocent, released, death row prisoners.³¹ These real-life characters have been played in several instances by well-known actors.³²

- The film *Dead Man Walking*,³³ while hardly an abolitionist tract (in contrast to the book of that title³⁴), stimulated its millions of viewers to think about and discuss the death penalty to an unprecedented extent.
- The creation of the Death Penalty Information Center in 1990 has made a continuous flow of information on the current status of the death penalty in America easily accessible to scholars, litigators, the media, countless term-paper writers, and the public.³⁵
- Death penalty courses have been made part of the curriculum in a growing number of law schools and in numerous undergraduate institutions.
- The hostility of foreign governments to our death penalty practices, increasingly at odds with their understanding of the international law of human rights, has begun to become part of the discussion when international trade agreements or foreign investment opportunities in the United States have been at issue.³⁶

Proposed Reconstruction of Death Penalty Federal Habeas, 39 AM. CRIM. L. REV. 1, 38 (2002) (discussing several wrongful conviction cases).

30. *Id.*

31. See Jesse McKinley, *True Stories of Injustice, Drawing Some Big Names*, N.Y. TIMES, Nov. 13, 2000, at E3, available at LEXIS, News Library, N.Y. Times file (outlining the development of Bland and Jensen's theatrical production).

32. See *id.* (stating that performers such as Charles S. Dutton, Susan Sarandon, Tim Robbins, Richard Dreyfuss, Steve Buscemi, David Morse, Cherry Jones, Martha Plimpton, Polly Bergen, and Cyndi Lauper have performed in the production).

33. DEAD MAN WALKING (MGM/UA Studios 1995).

34. HELEN PREJEAN, DEAD MAN WALKING (1993).

35. See DEATH PENALTY INFO. CTR., WHAT IS DPIC?, available at <http://deathpenaltyinfo.org/article.php?scid=54&div=114> (last visited Apr. 21, 2004) (stating the goals of the Death Penalty Information Center).

36. One recent critic is Cherie Blair, spouse of British Prime Minister Tony

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- A virtual flood of books, in which all aspects of our current death penalty practices have been dissected, has reached the reading public;³⁷ more such books are on the way, and none supports capital punishment.³⁸
- The increasing use of “Life Without Parole” (LWOP) as a sentence for those convicted of capital offenses but not sentenced to death, which is now available in thirty-five of the thirty-eight death penalty states,³⁹ has arguably attained all the benefits of the death penalty without lethality.
- There is an increased recognition of the high fiscal costs of death sentences⁴⁰ and a growing debate over whether such funds could be better spent to help families of homicide victims or to fund programs that have some prospect of reducing rates of criminal violence.⁴¹

These and other related events combine to constitute a newly visible and ongoing source of publicity for everything having to do with capital punishment in the United States, on the local and the national levels. The cumulative effect has been to fix in the public’s mind the fact that our death penalty system is far from perfect—that it is, in fact, so unreliable that the risk of executing the innocent is an ever-present worry. Add to this the

Blair. See Catherine Milner, *Cherie Blair Attacks US over Death Penalty in Catholic Paper*, SUNDAY TELEGRAPH (London), Feb. 8, 2004, at 8, available at LEXIS, News Library, UK News Stories File (quoting Mrs. Blair as stating: “Capital cases are uniquely prone to error and thus call into question whether we can ever be really sure of obtaining the just result.”).

37. Several books undertake to provide both sides of the argument. See, e.g., HOOD, *supra* note 6; TUROW, *supra* note 16; FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003); *DEBATING THE DEATH PENALTY*, *supra* note 17.

38. See, e.g., PETER HODGKINSON & WILLIAM A. SCHABAS, *CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION* (2004); HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL CONVICTIONS* (2004).

39. DEATH PENALTY INFO. CTR., *LIFE WITHOUT PAROLE*, at <http://deathpenaltyinfo.org/article.php?did=555&scid=59> (last visited Apr. 21, 2004).

40. See DEATH PENALTY INFO. CTR., *COST OF THE DEATH PENALTY*, at <http://deathpenaltyinfo.org/article.php?did=108&scid=7> (last visited Apr. 21, 2004) (summarizing the fiscal impact of executions in numerous states).

41. See, e.g., Richard C. Dieter, *What Politicians Don’t Say About the High Costs of the Death Penalty*, at <http://fnsa.org/v1n1/dieter1.html> (last visited Apr. 21, 2004) (arguing that state funds spent for capital punishment may better reduce crime if those same funds were instead directed towards other prevention programs).

diversity of evidence showing the racist aspects of the death penalty system⁴² and the highly debatable claims of superior deterrent effects achieved by executions,⁴³ and it is hardly any wonder that public support for the death penalty today is not what it was a decade ago.

III. ELEMENTS OF THE DEBATE

Debate over convicting and executing the innocent involves three independent, but related, elements, which are not always kept as distinct as they ought to be by either friends or opponents of capital punishment. First, there are the *criteria* to be used in determining whether a defendant was innocent. For example, was the evidence of guilt “beyond a reasonable doubt” or secured by a secret plea bargain with a jailhouse snitch? Did appellate courts overturn the conviction or the death sentence? Did the prosecution decide not to pursue the indictment after an appellate court had reversed the conviction or death sentence? Did the police eventually conclude they had arrested the wrong man? Did another person confess to the crime? Did the evidence support the confession of another person? Did the former prisoner receive an executive pardon? Did the courts or the legislature vote an indemnity for wrongful imprisonment? These criteria are not of equal weight, and there is no canonical list of such criteria. Our set⁴⁴ is probably not beyond improvement. For example, Barry Scheck and his colleagues use more narrow criteria than we have; they focus on cases in which innocent

42. See generally David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) (discussing the influence of race discrimination in the administration of the death penalty since 1972).

43. For examples of recent research by econometricians that purport to find that executions have a stronger deterrent effect than imprisonment, see Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003), and H. Naci Mocan & R. Kaj Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003). On the other hand, the issue has been studied far more extensively by criminologists, and none of their research over the past three decades has supported the deterrence argument. For a summary of this research, see Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 251 (James R. Acker et al. eds., 2d ed. 2003).

44. RADELET, BEDAU & PUTNAM, *supra* note 1, at 15-19; Bedau & Radelet, *supra* note 1, at 47-64.

defendants were exonerated by DNA evidence.⁴⁵ On the other hand, James Liebman and his colleagues focus on a wide array of errors, not solely on errors that cause innocent people to be convicted.⁴⁶

Second, there is the *evidence* available and relevant to show the status of each criterion as it applies to a given defendant. In this connection, we might note that we have not taken up the cudgels with our critics⁴⁷ to contest their evaluation of the evidence regarding the individual cases of alleged wrongful executions we claim to have identified. We stand by our previous work. Moreover, the lack of resources necessary for the requisite thorough investigations and the absence of any person or group that all sides would view as an unbiased judge in determining guilt or innocence together render a case-by-case debate unfeasible (particularly in light of the reply we made to these critics years ago).⁴⁸ In any case, the issue of wrongful convictions in capital cases does not turn on settling the factual details in any given case in an ever-more-refined fashion. Such details can be indefinitely contested. We believe, furthermore, that the issue turns on the *risk* of such error in the nature of the case, the *impossibility*—not just the difficulty—of avoiding such errors in the future by various procedural reforms,⁴⁹ and the *reasonableness* of ending the death penalty system altogether once its fallibility is recognized and acknowledged.

Finally, there is the *inference* from the criteria and the evidence supporting the conclusion in this or that case that the defendant was very likely—in some cases, unquestionably—innocent and that the police, the

45. See generally SCHECK ET AL., *supra* note 8.

46. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000), at <http://www.justice.policy.net/jpreport/liebman2.pdf> (finding that, between 1973 and 1993, two out of three capital convictions in the United States were reversed because of serious error).

47. See, e.g., Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (criticizing a 1987 article authored by two of the authors and arguing that the risk of convicting an innocent person is too small to be a significant factor in the death penalty debate).

48. See Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) (responding to Markman and Cassell's comments).

49. Bedau & Radelet, *supra* note 1, at 86-90; see also GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 207 (Apr. 15, 2002), available at http://www.state.il.us/defender/report/complete_report.pdf ("The Commission was unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death.").

prosecution, and the jury were all in error. The judgment that the criteria and the evidence permit the inference of innocence in a given case has, for us, always been a cumulative one. That is, when the facts showed that several, rather than only a few, of our criteria were satisfied, our inclination to infer that the defendant indeed was innocent was all the greater. We did not rigidly conform to this rule in every case, and, of course, “several” and “few” are hardly fixed measures. Inferences of this sort are therefore obviously not infallible, and reasonable interpreters could disagree over whether the available evidence was sufficient to warrant an inference of innocence for cases at the margin. Nonetheless, viewed in the aggregate, we still believe that the total of twenty-four cases we have identified (twenty-three in our 1987 and 1992 publications plus our addition of Tafero to the list in 1994) were indeed cases in which innocent persons were executed. We continue to believe that this small fraction of the more than 400 capital or potentially capital cases we identified between 1900 and 1985 (including more than 150 cases in which innocent defendants were sentenced to death), was surely a very conservative count. This is not to deny that further investigation might lead us to reject some of the two dozen cases we originally entered in the innocence column—just as further investigation might lead us to accept some other cases we initially overlooked or rejected or that emerged only later as examples of innocents executed.⁵⁰

IV. PROCEDURAL VERSUS FACTUAL INNOCENCE

Elsewhere, we have argued that, from a legal point of view, a decision to acquit, to “*nol prosequi*” (*nolle prosequi*), or to overturn a conviction constitutes a legal judgment of innocence.⁵¹ We might say that in such cases the defendant was judged to be *procedurally* innocent. Whether such a defendant was also *factually* innocent is a further question never settled just by the fact that some appellate court correctly found procedural or due process objections to the defendant’s conviction or sentence. (In our 1987 law review article and our 1992 book, we did not include any cases of procedural innocence unless we were convinced that the defendant was also factually innocent.) We are, of course, aware that a factually guilty

50. Mathematics professor Joe McKenna at the University of Connecticut pointed out that if you rely on standard Bernoulli trials, “you can be 95% certain that after you’ve executed 300 people, you’ve killed at least one innocent person in the bunch.” Joe McKenna, Editorial, *Dead Reckoning—Calculating the Odds That Innocent People Are Being Executed*, HARTFORD COURANT, June 27, 2003, at A13.

51. Bedau & Radelet, *supra* note 1, at 51; Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, LAW & CONTEMP. PROBS., Fall 1998, at 105, 107.

defendant might receive a judgment of procedural innocence. It is always possible that a death row prisoner who has been pardoned, acquitted, or vindicated by new evidence is factually guilty, even though he is procedurally innocent. Obviously, the prosecution's failure to establish guilt beyond a reasonable doubt, at best, yields a judgment that the defendant is procedurally innocent, not that he is factually innocent. It remains true that appellate courts virtually never rule in favor of a defendant on the ground that the evidence is insufficient or otherwise defective.⁵² The result is that all one can hope for in most cases is a (perhaps very strong) judgment of procedural innocence. Consider in this light the case of Andrew Golden in Florida, released from death row in 1993.⁵³ The Supreme Court of Florida ruled that the state "failed to prove beyond a reasonable doubt that [the victim's] death resulted from the criminal agency of another person rather than from an accident."⁵⁴ Any judgment of factual innocence is, incidentally, usually beyond the powers of law courts to render.

We are aware that public discussion about the possible innocence of death row prisoners is typically based on the assumption that factual innocence, not procedural innocence, is at stake. This is why DNA evidence has become so influential—because its results can establish factual innocence, not just procedural innocence. However, the distinction between factual and procedural innocence is not always evident in the statistics. For example, it is clear that Lizzie Bordon, acquitted of the 1892 murders of her parents in Fall River, Massachusetts,⁵⁵ was (by virtue of her acquittal) "procedurally" innocent. That has not stopped speculation to this day over whether she was "factually" innocent.⁵⁶ We have warned

52. See, e.g., *Stamper v. Muncie*, 944 F.2d 170, 174-76 (4th Cir. 1991) (holding that the evidence was sufficient to support a guilty verdict and imposition of the death penalty, rejecting the defendant's argument that the evidence presented was insufficient as a matter of law); *Valles v. Lynaugh*, 835 F.2d 126, 128 (5th Cir. 1988) (denying defendant's challenge to the sufficiency of the evidence after finding the record contained sufficient evidence to support the jury's verdict "[d]espite inconsistencies in the testimony of some prosecution witnesses and [the] telling impeachment of one key witness").

53. *Golden v. State*, 629 So. 2d 109, 112 (Fla. 1993).

54. *Id.* at 111. After studying the specifics of the case, however, we became convinced that Golden was not only procedurally innocent, but also factually innocent. See Radelet, Lofquist & Bedau, *supra* note 1, at 939-40 (summarizing the *Golden* case).

55. FRANK SPIERING, *LIZZIE 175* (1984).

56. See generally *id.* The same point can be made with a more recent example: O.J. Simpson was acquitted of the 1994 murders of his ex-wife and her friend. E.g., Neil Henderson & Marc Fisher, *O.J. Simpson Acquitted; Football Legend*

against inferring from the evidence relevant to the criteria of innocence of the sort we used in 1987 (without studying the specifics of the individual case) the conclusion that a defendant is factually innocent⁵⁷—except in the rarest of cases, such as when the supposed murder victim turns out to still be alive.⁵⁸ Establishing procedural innocence is of course important. However, the failure to rectify procedural errors falls far short of the gravity of never bringing to light a defendant's factual innocence.

V. STRENGTHS AND WEAKNESSES OF DNA EVIDENCE

When assessing the role of DNA testing in vindicating the innocent, it is important to give a balanced account. One of the first death row prisoners to be vindicated based on DNA evidence was Kirk Bloodsworth, who was released in 1993.⁵⁹ Had it not been for the fact that the real culprit not only murdered his victim, but raped her as well, there would have been no DNA evidence available to show that Bloodsworth was not the felon.⁶⁰ Even so, at the time of Bloodsworth's death sentence, the DNA technology that eventually established his innocence was not yet available; it was not adequately developed until he had already spent several years on death row (convicted primarily on the basis of faulty eyewitness identification).⁶¹ In the decade since Bloodsworth was freed, there have been numerous other cases in which improved DNA technology has saved an innocent person from prison or execution.⁶² In the most

"Relieved" at Verdicts After 9-Month Double Murder Trial, WASH. POST, Oct. 3, 1995, at A1, available at 1995 WL 9265381. For many, questions remain about the factual accuracy of this judgment. E.g., Ted Anthony, *We All Know O.J. Was Guilty. We All Know Clinton Is Guilty*, COM. APPEAL (Memphis, Tenn.), at A8, available at 1999 WL 4137252.

57. See Bedau & Radelet, *supra* note 1, at 45 ("[We] are primarily concerned with wrong-person mistakes—the conviction and execution of the factually 'innocent'—and not with the erroneous conviction of those who are legally innocent . . .").

58. To our knowledge, this last happened in 1975. See *id.* at 155-56 (discussing the case of parents Antonio Rivera and Merle Walpole, who were charged with and convicted of the murder of their three year-old daughter, only to have the charges dismissed when their daughter was found alive and well and living in the San Francisco bay area several years later); see also RADELET, BEDAU & PUTAM, *supra* note 1, at 269-70 (same).

59. Paul W. Valentine, *Jailed for Murder, Freed by DNA; Md. Waterman, Twice Convicted in Child's Death, Is Released*, WASH. POST, June 29, 1993, at A1, available at 1993 WL 2184239.

60. *Id.*

61. *Id.*

62. For an up-to-date list of prisoners vindicated through DNA technology

recent half-decade (1999-2003), thirty-five exonerated prisoners have been released from death row.⁶³ Of those, seven have had their innocence established as a result of DNA testing.⁶⁴ Ray Krone, released from death row in Arizona in 2002 (nationwide, he was the one hundredth death row inmate to be released on grounds of innocence⁶⁵), and, in 2003, Rudolph Holton in Florida,⁶⁶ and Nicholas Yarris in Pennsylvania⁶⁷ are the most recent cases.

As every serious student of wrongful convictions knows, however, DNA technology—regardless of how sophisticated it becomes—is of no help when there is no DNA evidence available at the scene of the crime. Rather, research has shown that perjured testimony, good-faith but erroneous eyewitness testimony, fabrication of physical evidence, incompetence of defense counsel at trial, coerced or other false confessions, and browbeating a holdout juror in order to bring in a guilty verdict are the flaws that typically play important roles in convicting the innocent. None of these flaws is likely to result in DNA residue being available for later testing.

Fortunately, however, some of these errors are eventually uncovered. For example, after spending nearly seventeen years on death row in Missouri, Joseph Amrine was finally released in 2003 when the prosecutor announced he would not seek a new trial—after the state had earlier argued that new evidence of innocence should have no bearing on the

(and a description of their cases), see INNOCENCE PROJECT, CASE PROFILES, at <http://www.innocenceproject.org/case/index.php> (last visited Apr. 21, 2004).

63. DEATH PENALTY INFO. CTR., EXONERATIONS BY YEAR, *available at* <http://deathpenaltyinfo.org/article.php?did=412&scid=6#Year> (last visited May 24, 2004).

64. DEATH PENALTY INFO. CTR., INNOCENCE: FREED FROM DEATH ROW, *available at* <http://deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited May 24, 2004).

65. Dennis Wagner et al., *DNA Frees Arizona Inmate 10 Years Included Time on Death Row* [sic], ARIZ. REPUBLIC (Phoenix, Ariz.), Apr. 9, 2002, at 1A, *available at* LEXIS, News Library, Ariz. Republic (Phoenix) File.

66. David Karp, *Freed After Years on Death Row*, ST. PETERSBURG TIMES, Jan. 25, 2003, at 1A, *available at* LEXIS, News Library, St. Petersburg Times File; David Karp, *Pair Admit Lying in 1986 Murder Case*, ST. PETERSBURG TIMES, Nov. 6, 2003, at 1B, *available at* 2003 WL 56478056.

67. Henry Weinstein, *DNA Tests Clear Pennsylvania Capital Inmate After 21 Years*, L.A. TIMES, Dec. 10, 2003, at A15, *available at* LEXIS, News Library, L.A. Times File. For more information, see the web page of Nicholas J. Yarris, *The Process: Nicholas Yarris—DNA to Freedom*, at <http://www.nickyarris.2itb.com> (last visited Apr. 21, 2004).

case.⁶⁸ (Amrine had been convicted on the testimony of fellow inmates who later recanted.⁶⁹) The Missouri Supreme Court cited “clear and convincing evidence” of his actual innocence.⁷⁰ Also in 2003, Timothy Howard and Gary Lemar James, who had been sentenced to death in Ohio in 1977 and resentenced to life when Ohio’s death penalty statute was ruled unconstitutional the following year, were freed when it finally became clear that crucial evidence in the first instance had not been made available to their defense attorneys.⁷¹

Even when DNA evidence is at hand, however, it does not always lead in a steady path to the vindication of an innocent defendant. The evidence still has to be handled properly, and the testing has to be done by independent and appropriately trained forensic scientists. Unfortunately, it has emerged that—in some jurisdictions—the very DNA evidence that might have settled the question of guilt or innocence has itself become unreliable because the testing was in the hands of corrupt or incompetent personnel.⁷² Thus, even when DNA evidence is theoretically available, it may not help, and it can in any event help in, at most, only a fraction of cases. As valuable as DNA testing has become, and as important as some understanding of it has been in creating the current climate of skepticism about the adequacy of the criminal justice system in capital (and other) cases, the sobering truth is that it cannot by itself serve to overturn most—much less all—wrongful convictions.⁷³

68. Lee Hill Kavanaugh & Kevin Murphy, *After Years on Death Row in Missouri, Inmate Walks Free*, KAN. CITY STAR, July 29, 2003, available at 2003 WL 57903957.

69. *Id.*

70. State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 543, 549 (Mo. 2003).

71. Alan Johnson, *Polygraph Test Frees Prisoner*, COLUMBUS DISPATCH, July 16, 2003, at 1A, available at 2003 WL 59882051; Alan Johnson, *Wrongly Convicted, Now As Free As a Bird*, COLUMBUS DISPATCH, July 18, 2003, at 1A, available at LEXIS, News Library, Columbus Dispatch File.

72. MARK FUHRMAN, DEATH AND JUSTICE 106-36 (2003); Sydney P. Freedberg, *Good Cop, Bad Cop*, ST. PETERSBURG TIMES, Mar. 4, 2001, at 1A, available at 2001 WL 6966220; Nick Madigan, *Houston’s Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003, at 20, available at 2003 WL 13609532.

73. Examples of recent cases in which innocence was established without DNA are plentiful. See, e.g., Radelet, Lofquist & Bedau, *supra* note 1, at 923-62 (providing an appendix listing cases in which convicts were exculpated after receiving a capital sentence). See generally STANLEY COHEN, THE WRONG MEN (2003) (containing chapters delineated by reasons for the wrongful convictions, such as eyewitness error, corrupt practices and misconduct, and false confessions, among others). Up-to-date information can also be found on the Internet. See, e.g., CTR. ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIV., ILLINOIS DEATH PENALTY

VI. CONCLUSION

How rapidly, or whether, this newly widespread public skepticism over the reliability of our death penalty practices will decline cannot be predicted. If a large number of jurisdictions were to adopt reforms like those recommended by the Governor's Commission in Illinois, it would go some distance toward muting criticism while preserving the main features of the current system.⁷⁴ Yet as we look at the current system—even imagining some “improvements” grafted onto it—we think those who defend it (or any plausible successor thereto) remain blind to three simple truths. If a defendant can be wrongly arrested, he or she can be wrongly convicted. If a defendant can be wrongly convicted, he or she can be wrongly sentenced. If a defendant can be wrongly sentenced to death, he or she can be wrongly executed.

EXONERATIONS, *at*

<http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Illinois.htm> (last modified Mar. 28, 2003); DEATH PENALTY INFO. CTR., INNOCENCE: FREED FROM DEATH ROW, *at* <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Apr. 21, 2004).

74. Such reforms would in any case have to be both extensive and expensive. *See generally* Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 117-234 (2003) (containing eighty-five recommendations to rectify problems identified in the California death penalty system).