

THE EXECUTION OF THE INNOCENT

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No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some.

Thurgood Marshall¹

I

INTRODUCTION

In February 1997, the (usually conservative) House of Delegates of the American Bar Association (“ABA”) overwhelmingly adopted a report from its section on Individual Rights and Responsibilities and went on record as being formally opposed to America’s current system of capital jurisprudence, calling for an immediate moratorium on executions.² The motion was supported by twenty former presidents of the ABA (some who counted themselves as supporters of the death penalty), and passed in the House of Delegates by a two-thirds margin. Among the issues of concern to the ABA were the lack of competent counsel in death penalty cases, restricted access to appellate courts even when new evidence of innocence is present, and racial disparities in the administration of capital punishment.³ In this article, we focus on one of the problems that gave rise to the ABA resolution: the continuing and regular incidence of American trial courts sentencing innocent defendants to death.

Elsewhere, we have published accounts of more than four hundred cases where persons were wrongfully convicted in capital (or potentially capital) cases and described several dozen of these cases in detail.⁴ Our discussion in this article falls into three parts. First, we explore the conceptualization of the term “innocence.” (Without a precise concept, we have no suitable criterion for deciding who should and should not be considered innocent despite a crimi-

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1. *Furman v. Georgia*, 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring) (footnote omitted).

2. See American Bar Ass’n, *Whatever You Think About the Death Penalty, A System That Will Take Life Must First Give Justice: A Report from the IR&R Death Penalty Committee*, 24 W.T.R. HUM. RTS. 22 (1997).

3. See *id.* at 22-24.

4. See MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992) [hereinafter RADELET ET AL., INNOCENCE]; Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996) [hereinafter Radelet et al., *Doubts*].

nal homicide conviction.) Second, we review the kinds of evidence we have relied on previously to support our conclusion that some defendants sentenced to death and executed were actually innocent. Finally, we consider how government officials and the general public are currently reacting to the issue of possible executions of the innocent and what role this issue plays in contemporary death penalty debates.

II

CONCEPTUALIZING THE PROBLEM OF INNOCENCE

If we are to study how often innocent people are convicted of murder, sentenced to death, and/or executed, special care must be taken in determining when a given convicted defendant can and cannot be judged to be innocent. Previous work on this problem⁵ touches what is probably only the tip of an iceberg. Undoubtedly, there are many more cases in which innocent persons have been convicted of homicide that have yet to be thoroughly documented and acknowledged by government officials, much less publicized in a way that will allow those who care to learn lessons from them.

In our initial research on this problem, we included in our inventory of exonerated defendants only those who were totally uninvolved in the capital offense of which they were convicted, or who were convicted of a capital crime that never occurred (for example, consensual sexual relations tried in court as capital rape),⁶ or a criminal homicide in which the victim was later discovered alive, which happened, most recently, to our knowledge, in 1974 in California.⁷ Such narrow inclusion criteria yield an extremely conservative set of cases. Almost any other plausible conceptualization of innocence would yield a much larger set.

Of course, including only cases where government officials admitted error would result in an even more conservative estimate. To be sure, in some ninety percent of the cases described in our previous publications, there is some acknowledgement by public officials in one or more branches of government that the trial court's judgment of guilt was incorrect. But our investigations failed to disclose a single case in the twentieth century where a government official in this country admitted that an execution carried out under his authority, or to his knowledge in his jurisdiction, took the life of an innocent defendant.⁸ By it-

5. See, e.g., C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); RADELET ET AL., INNOCENCE, *supra* note 4; Bedau & Radelet, *supra* note 4; Radelet et al., *Doubts*, *supra* note 4.

6. For example, see the case of William Henry Anderson, in RADELET ET AL., INNOCENCE, *supra* note 4, at 282. In a five-month period in 1945 in Ft. Lauderdale, Anderson, who was black, was arrested for rape, tried, found guilty, sentenced to death, and executed. Much evidence indicates that the relationship between Anderson and the "victim," who was white, was consensual.

7. See RADELET ET AL., INNOCENCE, *supra* note 4, at 269-70.

8. As far as we know, the last execution that was later officially acknowledged to have been in error occurred in Illinois in 1887, when four Haymarket defendants were hanged in Illinois. A fifth defendant took his own life on the eve of the scheduled executions. Six years later, Governor John Altgeld pardoned the three surviving codefendants because all eight "had been wrongfully convicted

self, however, that is hardly reason to believe that innocent defendants have not been executed.

Although the conceptualization of innocence could be broadened in several different ways from the conservative definition we have used in our research, we have made no attempt to do so or to investigate the new types of cases that would, as a result, need to be included in our inventory. The task is simply overwhelming. However, we can cite examples of cases that illustrate these alternative ways to broaden the conceptualizations of innocence.

A. Acquittal After Appellate Reversal

One way to broaden the definition is to include all those cases in which the case against the defendant was ultimately dismissed or the defendant was acquitted at retrial. To be sure, in our research, we treat a dismissal of charges after reversal of a defendant's conviction, or a verdict of acquittal at retrial, as evidence of innocence, but we do not regard it as either a necessary or sufficient condition of innocence.⁹ Prosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty "beyond a reasonable doubt," but for reasons wholly unrelated to guilt or innocence (for example, the prosecution's chief witnesses may have died or disappeared). Such cases could be included among those we count as miscarriages of justice, on the rationale that, if a trial court conviction is to be treated as conclusive evidence of (legal) guilt, then by parity of reasoning *nolle prosequi* after a reversal could reasonably be treated as evidence of (legal) innocence. Other reasonable observers have included such cases, notably the authors of a 1993 House Subcommittee Staff Report on innocence and the death penalty. They collapse the distinction between being acquitted of charges and being innocent, arguing that "[u]nder the law, there is no distinction between the definitely innocent and those found innocent [that is, acquitted] after a trial but about whom there may remain a lingering doubt."¹⁰

Other ways to expand the concept of innocence would permit us to include cases where a capital crime was indeed committed but by accident, in self-defense,¹¹ or by an offender who is certifiably mentally ill. Yet another class of cases consists of defendants who are guilty of criminal homicide, but not of

and were innocent of the crime. . . ." PAUL AVRICH, *THE HAYMARKET TRAGEDY* 423 (1984). On August 21, 1993, Governor Walter D. Miller formally apologized for the wrongful hanging of Thomas Egan in 1882. See generally C. JOHN EGAN, JR., *DROP HIM TIL HE DIES* (1994).

9. "Defendants are acquitted for many reasons, the least likely being innocence." Louis B. Schwartz, "Innocence"—*A Dialogue with Professor Sundby*, 41 *HASTINGS L.J.* 153, 154 (1989).

10. 1 STAFF OF THE SUBCOMM. ON CIV. AND CONST. RIGHTS, OF THE HOUSE COMM. ON THE JUDICIARY, 103D CONG., *REPORT ON INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS* 13 (Subcomm. Print 1993).

11. Our most recent work extends those parameters slightly by including three cases in which the defendant, initially sentenced to death, was later able to show that the homicide was committed in self-defense. See Radelet et al., *Doubts*, *supra* note 4, at 912.

first-degree murder, and who—for any of several reasons—are erroneously convicted of capital murder nevertheless.

B. Accidental Killings

There are many cases in which a defendant, after being convicted of homicide and even sentenced to death, wins a retrial and is acquitted after persuading the jury that the homicide was accidental. Legally, such a defendant is innocent of murder and always was; the original conviction of criminal homicide was a miscarriage of justice.

In this context, consider the Florida case of Clifford Hallman, sentenced to death for killing a waitress in a barroom brawl in Tampa in 1973. Hallman's death sentence was eventually commuted to life imprisonment after it was shown that with proper medical care, the victim would not have died (indeed, the victim's family successfully sued Tampa General Hospital for malpractice). Hallman unquestionably cut the victim during the brawl, but almost certainly did not intend for her to die. Despite being guilty only of accidentally causing death, he remains imprisoned a quarter of a century later.¹²

C. Homicides in Self-Defense

Depending on what theory of legal excuse and legal justification one accepts, homicide in self-defense is either excusable or justifiable and thus not criminal. Yet, persons have been sentenced to death for killing others in self-defense. In 1979 in California, Patrick "Hooty" Croy was sentenced to death for killing a police officer, but at retrial in 1990 he was acquitted when he was able to show his jury that the killing had been done in self-defense.¹³ In South Carolina in 1979, Michael Linder was sentenced to death for killing a highway patrol officer, but he was acquitted two years later at retrial when ballistics evidence supported Linder's self-defense claims.¹⁴

D. Homicide by the Mentally Ill

In another class of cases, the defendant does cause the death of another person but lacks the requisite *mens rea* to be held responsible for the crime. Nevertheless, the trial court convicts the defendant and sentences him to death. Why? Because of the incompetence of his attorney, or the absence or incompetence of expert psychiatric witnesses, or the jury's refusal to believe defense experts, or for other reasons.¹⁵ The result in any case is the same: Innocent de-

12. See Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 309 (1993).

13. See Radelet et al., *Doubts*, *supra* note 4, at 933-34.

14. See *id.* at 948.

15. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) [hereinafter Bright 1994]; Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849 (1992) [hereinafter Bright 1992]; Stephen B. Bright, *The*

fendants (that is, defendants not properly held responsible for their acts) are convicted and sometimes sentenced to death.

A classic example of this type of error involves Erwin Charles Simants, sentenced to death in 1976 for killing six members of a Nebraska family.¹⁶ At retrial in 1979, he was found not guilty by reason of insanity.¹⁷ Not so lucky was Varnall Weeks. On May 13, 1995, readers of *The New York Times* learned that "Varnall Weeks, a convicted killer described by psychiatric experts as a paranoid schizophrenic who believed he would come back to life as a giant flying tortoise that would rule the world, was put to death . . . in Alabama's electric chair."¹⁸ At trial, Weeks's inexperienced court-appointed attorney never raised the issue of the defendant's insanity. As the *Times* editorialized a few days before the execution, "if Alabama is allowed to take this sorry life, it will . . . expose just how barbaric and bloodthirsty this nation has become in its attempt to see justice done."¹⁹ No one knows how many mentally ill convicts there are on America's death rows who do not deserve to be punished, but the number is unquestionably significant.²⁰

These three categories of cases are familiar and have been discussed before by others, notably Charles Black; all illustrate what he rightly called the "caprice and mistake" in the criminal justice system where the death penalty is used.²¹ But three other categories of innocence that have received less recognition also deserve attention.

E. Noncapital Murderers

Not all convicted murderers are candidates for the executioner. Death penalty abolitionists and retentionists alike agree that capital punishment is not supposed to apply to all murderers; it is to be applied only to the worst among the bad. David Baldus and his colleagues have estimated that "death-eligible" murder cases number at present around 2,000-5,000, or ten to twenty-five percent of all murders and nonnegligent manslaughters in the nation.²² Data on death sentencing practices in Florida suggest the number of death-eligible defendants may be even smaller; in any case, the system transforms only a few of these defendants into death row prisoners. In Florida, there are about a thou-

Politics of Crime and the Death Penalty: Not "Soft on Crime," but Hard on the Bill of Rights, 39 ST. LOUIS U. L.J. 479 (1995) [hereinafter Bright 1995].

16. See Fred W. Friendly, *A Crime and Its Aftershock*, N.Y. TIMES MAG., Mar. 21, 1976, at 16.

17. See *Man Guilty of Oklahoma Murders; Defendant in Nebraska Acquitted*, N.Y. TIMES, Oct. 18, 1979, at 16.

18. Rick Bragg, *A Killer Racked by Delusions Dies in Alabama's Electric Chair*, N.Y. TIMES, May 13, 1995, at A7.

19. Andrew L. Shapiro, *An Insane Execution*, N.Y. TIMES, May 11, 1995, at A29.

20. See KENT S. MILLER & MICHAEL L. RADELET, EXECUTING THE MENTALLY ILL (1993); Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).

21. CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 17-18 (2d ed. 1981).

22. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 22 & n.* (1990).

sand homicides per year. Yet, despite the popularity of the death penalty, only about three dozen defendants, 3.6%, are actually convicted of first-degree murder and sentenced to death.²³ If we arrange Florida's thousand murders per year on a scale from the most aggravated (perhaps a multiple rape-murder) to the least aggravated (perhaps a mercy killing), we can define "capital murder" (based on the verdicts and sentences of the trial courts themselves) as the crimes committed by the worst three or four percent.

However, some of those three to four percent are not sentenced to death, while some of the others are. Ted Bundy, for example, qualifies in the judgment of most people as one of the nation's worst murderers. Yet he was offered a plea bargain in both of his Florida murder trials.²⁴ Had he wished to do so, he could have escaped a death sentence by pleading guilty to noncapital murder. His case is not unique. It is common for defendants accused of some of the worst murders to escape the death penalty through plea bargaining. Often the prosecution has little choice: either accept a plea bargain or risk not getting a conviction because of lack of convincing evidence. As the O.J. Simpson case showed, prosecutors may quickly decide not to seek the death penalty—even for those they believe are multiple murderers—when they learn the defendant is able to employ top-notch attorneys.²⁵

Other defendants are not so lucky. If measured by statutory "aggravating" circumstances, their crimes do not place them among Florida's worst three to four percent, yet they end up on death row nonetheless. Many examples could be cited here, but consider only the case of Ernest Dobbert, executed in Florida on September 7, 1984. He had been convicted of killing his nine-year-old daughter. His Jacksonville jury, obviously troubled, recommended life imprisonment by a vote of ten to two; Florida's unusual death sentencing law allows the trial judge to reject the jury's recommendation, and the judge sentenced Dobbert to death. The key witness at trial was Dobbert's thirteen-year-old son, who testified that he saw his father kick his daughter.²⁶ In a dissent from the Supreme Court's denial of *certiorari* written just hours before Dobbert's execution, Justice Thurgood Marshall argued that while there was no question that Dobbert abused his children, there was substantial doubt about his premeditation, necessary to sustain his conviction of first-degree murder. "That may well make Dobbert guilty of second-degree murder in Florida, but it cannot make him guilty of first-degree murder there. Nor can it subject him to the death penalty in that state."²⁷ If Justice Marshall's assessment was correct, then Dob-

23. See Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 20 (1991).

24. See Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 900 (1990-91).

25. See Kenneth B. Noble, *Prosecutor in Simpson Case Won't Seek Death Penalty*, N.Y. TIMES, Sept. 10, 1994, at A6.

26. He later recanted and said his sister had actually died from choking on food.

27. *Dobbert v. Wainwright*, 468 U.S. 1231, 1246 (1984).

bert was not guilty of a capital offense, and—in this qualified sense—Florida executed an innocent man.

Although defendants like Dobbert may be unquestionably guilty of some form of criminal homicide, they are arguably not guilty of capital murder. They do not belong among the death-eligible defendants. We rarely think about this category when discussing innocence and the death penalty, but it is relevant and extremely important. The problem has been with us for at least two centuries, ever since the invention of the distinction between first-degree (capital) murder and second-degree (noncapital) murder and the inclusion of felony murder (in other words, any homicide committed in the course of committing a felony, such as rape or robbery) within first-degree murder. Proper administration of the death penalty requires us to draw careful lines in several different dimensions simultaneously, but a substantial amount of evidence shows we are doing a poor job distinguishing between those who do and those who do not deserve—in a strict legal sense—to be found guilty of capital murder and sentenced to death.²⁸

Some of those who are guilty of criminal homicide but factually innocent of capital murder end up on death row because of a politically ambitious prosecutor, a lazy or angry jury, incompetent or over-worked defense counsel, or just bad luck.²⁹ Others are on death row not out of arbitrariness, but because of systematic bias and discrimination. In Florida³⁰ and in several other states,³¹ taking into account all the relevant facts, those who kill whites are between three and four times more likely to end up on death row as are those who kill blacks.³² In short, the race of the victim is a strong predictor of which defendants end up on death row, and explains why some who are innocent of capital murder are nonetheless sentenced to death.

Sentencing defendants to death who are innocent of capital murder—or innocent of any homicide—is especially risky in states where the trial judge has the authority to disregard the jury's sentence recommendation, as in Alabama, Delaware, Florida, and Indiana. After interviewing fifty-four jurors from a dozen Florida capital juries (including the jury that judged Ernest Dobbert),

28. See GEN. GOV'T DIV., U.S. GEN. ACCOUNTING OFFICE, REP. GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 26, 1990); AMNESTY INTERNATIONAL U.S.A., THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES (1995); BALDUS ET AL., *supra* note 22; HUGO ADAM BEDAU, THE CASE AGAINST THE DEATH PENALTY 11-16 (1997); INTERNATIONAL COMMISSION OF JURISTS, ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES: REPORT OF A MISSION (1996); David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 385 (James R. Acker et al. eds., 1998); Bright 1994, *supra* note 15.

29. See generally Bright 1995, *supra* note 15; Bright 1994, *supra* note 15; Bright 1992, *supra* note 15.

30. See Radelet & Pierce, *supra* note 23, at 21.

31. See BALDUS ET AL., *supra* note 22; SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989).

32. See Radelet & Pierce, *supra* note 23, at 28.

William Geimer and Jonathan Amsterdam concluded, "The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life [imprisonment] recommendation cases studied."³³ Clearly, even when jurors believe that certain defendants are "guilty beyond a reasonable doubt," lingering doubts often remain about whether the defendant is guilty of a capital crime, and those doubts understandably make the jurors reluctant to recommend the extreme penalty.

F. Innocent Victims in the Death Row Inmate's Family

No discussion of innocence and the death penalty can be complete without considering how the death penalty affects the inmate's family.

Consider for a moment why some Americans want the death penalty rather than life imprisonment. They argue that the inmate does not suffer enough if punished only by life imprisonment. What is it about the death penalty that makes the inmate suffer more than if he had been sentenced instead to a long term of imprisonment? In many cases, the primary pain felt by men facing execution is seeing what their plight and their anticipated execution does to their families. Life in prison is a miserable life; the inmate knows that even if he were to leave death row via commutation of his sentence, he would be resentenced to life without possibility of parole and would die in prison. Given the widespread availability of life-without-parole sentences, almost all of those sentenced to death, absent the death penalty, will still die in prison. Being executed would end the pain of imprisonment sooner rather than later.

But the pain felt by the inmate anticipating execution is often overshadowed by the pain that innocent family members experience in anticipating the death of their loved one. Their pain arises out of their helplessness, the scorn directed at them, and what they endure immediately prior to, during, and after the execution itself.³⁴ Families of death row inmates are often indigent and almost always powerless to resist public and political outcries aimed at their incarcerated loved one. While the inmate's suffering is terminated at the instant of death, that of the family members goes on, from the moment they learn the death sentence has been carried out through the years of living with the memories and second-guesses. Arguably, the only thing worse than being executed is to see a member of your family executed.

Sentimental though this may seem to some, we make this point in the context of discussing the execution of the innocent for the following reason. Today, the main rationale generally given for retaining the death penalty is retri-

33. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1987-88).

34. See Michael L. Radelet et al., *Families, Prisons, and Men with Death Sentences: The Human Impact of Structured Uncertainty*, 4 J. FAM. ISSUES 593 (1983); Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 28, at 477.

bution.³⁵ Retribution gives us the simplest and most direct argument for the death penalty: Execute murderers because they deserve it. However, the death penalty inflicts its harm not with a laser but with a shotgun, injuring the guilty and the innocent alike. In ways very unlike prison sentences, the death penalty creates an ever-widening circle of victims. And many of those caught in the circle as it widens do not deserve it. Obviously, families of homicide victims do not deserve their pain either, but the discussion about the death penalty is foremost a discussion of how much misery society should deliberately inflict in the future, not about the misery that has already been inflicted in the past (and is therefore unretractable) by the offender.

III

HAVE INNOCENT DEFENDANTS REALLY BEEN EXECUTED?

In 1985, when we released the first draft of our research on erroneous convictions in capital cases,³⁶ the reaction by the Reagan Administration took us by surprise. Then-Attorney General Edwin Meese III, who in California in 1967 (with then-Governor Ronald Reagan) presided over the next to last pre-*Furman*³⁷ execution in America,³⁸ ordered the Justice Department to prepare an immediate response.³⁹ We had evidently hit a sore spot in the Administration's support of the death penalty; neither before nor since has the Attorney General's office taken such an interest in academic research on the death penalty.⁴⁰ The government's response was not, as one might naïvely have hoped, to

35. See Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19 (1994), reprinted in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 90, 95-98 (Hugo Adam Bedau ed., 1997).

36. See David Margolick, *25 Wrongfully Executed in U.S., Study Finds*, N.Y. TIMES, Nov. 14, 1985, at A19.

37. In the 1972 case of *Furman v. Georgia*, 408 U.S. 238, the Supreme Court (in effect) invalidated all existing death penalty statutes in the United States. Thereafter, states drew up new capital laws and procedures, making *Furman* the demarcation of the "modern" era of the death penalty in the United States.

38. See Carl J. Seneker, *Governor Reagan and Executive Clemency*, 55 CAL. L. REV. 412 (1967).

39. See Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); see also Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

40. Two other similar distortions of academic scholarship on the death penalty deserve mention. In 1975, when Solicitor General Robert Bork submitted an *amicus* brief in *Fowler v. North Carolina*, 428 U.S. 904 (1976), he asserted that all research that concluded the death penalty had no deterrent effect was severely flawed, and that the research of Isaac Ehrlich, which found that each execution deterred seven murders, provided "a reliable basis for judging whether the death penalty has a deterrent effect." David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975). The inadequacies and inconclusiveness of Ehrlich's research have been extensively demonstrated. See, e.g., William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 35, at 135, 141-43; 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*, *supra* note 28, at 157, 165-66. In 1972, Henry Peterson, an assistant attorney general in the Nixon Administration, testified before Congress to the effect that a "study" by the ABA showed that the death penalty was an effective deterrent.

confirm or disconfirm our findings by throwing its resources behind a more comprehensive study of the problem. We carried out our initial research over four years on a budget of \$9,000; it is anyone's guess what could have been discovered if the vast resources of the Justice Department had been available for more extensive research into the 350 cases we studied, much less any of the thousands of cases still waiting to be reexamined. Instead, the Attorney General's Office designed its response solely to discredit our work and by implication to insulate the death penalty from the charge that even in our society, with all the legal protections afforded the accused or convicted or sentenced capital defendant, there is still an undeniable risk of executing the innocent. As events would prove, the government's hostile reaction to our work was far different from that of other informed observers.⁴¹

The Justice Department's response focused on ten of the twenty-three cases about which we declared our belief that the executed defendant was innocent. Our critics did little more than rehash the case for the prosecution, because they thought, or wanted their readers to believe, that we had denied or forgotten that these defendants had been found guilty in court "beyond a reasonable doubt." Our judgment to the contrary was explained as the result of our careless methodology and excessive anti-death penalty zeal. As recently as 1994, the conservative magazine *National Review* recycled the views of our critics.⁴²

Some of the nation's leading judges have given our work more positive attention. For example, Supreme Court Justice Harry Blackmun used our research to support (in part) his decision to abandon any further tinkering with "the machinery of death," as he called it, in the futile hope to make the administration of the death penalty in our society fair and efficient.⁴³ And, in 1998, the Chief Justice of the Florida Supreme Court, Gerald Kogan, pointed to our work as one reason why he had decided to urge Florida lawmakers to abandon the death penalty.⁴⁴

We should mention in passing that despite not having demonstrated any lack of integrity or reliability in our research, the Justice Department's critique of that work has been very effective. The critique is frequently cited by those who support executions, though they give no evidence of having actually read the critique, much less of having read our law review article, our reply to our critics, or our book. Perhaps this is another example of the complacency that surrounds the public's attitude toward the death penalty and issues of fact on which that attitude ought to depend.

No such ABA study existed. See Hugo Adam Bedau, *The Nixon Administration and the Deterrent Effect of the Death Penalty*, 34 U. PITT. L. REV. 557 (1973).

41. See, e.g., Wendy Kaminer, *The Wrong Men*, ATLANTIC, Dec. 1992, at 147; Lawrence C. Marshall, *Book Review*, 85 J. CRIM. L. & CRIMINOLOGY 261 (1994).

42. See Stephen J. Markman, *Innocents on Death Row?*, NAT'L REV., Sept. 12, 1994, at 72.

43. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of *certiorari* to *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993)).

44. See Jenny Staletovich, *Justice Raising Voice to Bury Death Penalty*, PALM BEACH POST, Jan. 19, 1998, at A1, A8. Kogan is the former chief of the capital crimes unit for the Dade County State Attorney's Office.

Again and again, our critics point out that no responsible official in any of the nation's capital jurisdictions has ever admitted to executing an innocent person in this century, a point we were the first to make on the basis of our extensive research into the question.⁴⁵ Obviously, the government's failure or refusal to acknowledge that an innocent defendant has been executed is hardly evidence that none has been executed.

Getting the state to concede that it has convicted (let alone executed) an innocent defendant is clearly no easy matter. Once an innocent person is convicted, it is almost impossible to get that conviction reversed on grounds of the accused's innocence.⁴⁶ Even when prisoners do get released, usually the prosecutor or some other state official will continue to insist publicly that they really are guilty. The Jacobs-Tafero case powerfully and painfully illustrates this point.

In May 1990, Jesse Tafero was executed in Florida. His case gained notoriety because the electric chair malfunctioned and his head caught on fire before he died.⁴⁷ Two years later, Jesse's co-defendant, Sonia Jacobs, who had been convicted and sentenced to death on exactly the same evidence that sent Tafero to his death, was released after a U.S. Court of Appeals concluded that her conviction was based on prosecutorial suppression of exculpatory evidence and perjury by a prosecution witness (who was the real killer).⁴⁸ Jacobs now lives in Los Angeles, and in early 1996, a television movie of her case was aired.⁴⁹ But Tafero is dead. Had he been alive, the evidence that led to Jacobs's release would have led to his release, too.

Did Jacobs's vindication and release cause any Florida official to admit the error in convicting Tafero, much less to apologize on behalf of the state, or even to express second thoughts about Tafero's execution? No. To be sure, a few newspaper articles pointed out the error,⁵⁰ but no politician, prosecutor, judge, or ex-juror involved in the case has so far made any public comment on Tafero's fate in light of Jacobs's vindication. Tafero's mother, living impoverished in Pennsylvania, does not have the resources to mount a campaign to clear her son's name. His attorneys have long since moved on to other cases.

So, given that we cannot point to admission of erroneous executions by government officials involved in the cases we have studied, on what grounds can we confidently infer that innocent defendants have been executed? Apart

45. "[W]e have found no instance in which the government has officially acknowledged that an execution carried out under lawful authority was in error." Bedau & Radelet, *supra* note 4, at 25.

46. In an extremely important article, Professor Samuel Gross argued that both the probability of erroneous conviction and the odds of erroneous convictions being ignored by appellate courts and clemency officials are higher in capital than in noncapital cases. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

47. See Ellen McGarrah, *3 Jolts Used to Execute Killer*, MIAMI HERALD, May 5, 1990, at A1.

48. See *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992).

49. The made-for-television show was entitled *In the Blink of an Eye*, and aired in the spring of 1996.

50. See, e.g., Cynthia Barnett, *New Evidence Might Have Spared Killer*, GAINESVILLE SUN (Fla.), Nov. 21, 1992, at A1.

from rare cases like Tafero-Jacobs (where one codefendant is executed before the other codefendant is exonerated), there are at least three kinds of evidence that we believe ought to convince any reasonable person that innocent defendants have been executed: close calls, calculation of the odds, and the role of "Lady Luck."⁵¹

A. Close Calls

Between 1972 and the end of 1996, sixty-eight death row inmates in the nation were released because of doubts about their guilt.⁵² These releases do not prove that the system works, as some defenders of the death penalty would argue. Representative Bill McCollum, for example, one of our executioners' best friends in Congress, was "encouraged" by the findings, claiming that the sixty-eight errors in twenty-five years "shows that the system is working quite well."⁵³ Contrary to such political spin, however, our research indicates that if "the system worked," the defendants would be dead. In virtually all of these cases, the defendants were released only after an expensive and exhausting uphill struggle, unsupported by public funds or public officials, and almost always fiercely resisted by the prosecution and ignored by those with the power to commute a death sentence.

Some of these prisoners, now free, came within a few days of being executed. Randall Adams, sentenced to death in Texas in 1977 and exonerated in 1989, came to within one week of his execution.⁵⁴ Andrew Mitchell, sentenced to death in Texas in 1981, came within five days of death by lethal injection before being vindicated in 1993.⁵⁵ Two half-brothers in Florida, William Jent and Ernest Miller, came within sixteen hours of being executed before they were released from prison in 1988.⁵⁶ More such cases have been cited elsewhere.⁵⁷

Today, there are more than three thousand prisoners on America's death rows.⁵⁸ As things stand, it would be preposterous to believe that all the innocent death row defendants have been identified and exonerated. If the history of the last twenty years is any guide to the future, an average of three death row inmates per year will continue to be vindicated and released. How many

51. For an excellent discussion of why American criminal procedures do not protect the innocent from erroneous conviction, see Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1358-93 (1997).

52. Radelet et al., *Doubts*, *supra* note 4. A later report based on our research was issued by the Death Penalty Information Center. See DEATH PENALTY INFORMATION CENTER, INNOCENCE AND THE DEATH PENALTY: THE INCREASING DANGER OF EXECUTING THE INNOCENT (1997). This report received extensive national and international publicity. See, e.g., Terry Carter, *Numbers Tell the Story*, 83 A.B.A. J. 20 (Oct. 1997).

53. See Carter, *supra* note 52, at 20.

54. See RADELET ET AL., INNOCENCE, *supra* note 4, at 67-69.

55. See Radelet et al., *Doubts*, *supra* note 4, at 950-51.

56. See RADELET ET AL., INNOCENCE, *supra* note 4, at 318.

57. For two dozen cases in which innocent prisoners came to within 72 hours of executions, see *id.* at 276; Bedau & Radelet, *supra* note 4, at 72.

58. On July 1, 1998, the exact number of prisoners on America's death rows stood at 3,474. See NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW, U.S.A., Summer 1998, at 1.

equally innocent death row inmates will be unsuccessful in obtaining relief is impossible to know, but the number most certainly is not zero.

B. Calculation of the Odds

Assume we execute two death row inmates, each of whom we believe is guilty “beyond a reasonable doubt” on the evidence. Let belief in guilt “beyond a reasonable doubt” mean that we are ninety percent confident of guilt, and that our belief in both these cases is correct. Nevertheless we are not (and rarely could be) 100% certain, and so, on these assumptions, we are implicitly accepting a ten percent error rate even when we are ninety percent confident. However, because the odds of error are multiplicative, the probability that any two death row prisoners chosen at random are guilty is not ninety percent (0.9), but only eighty-one percent (0.9×0.9). Thus, the probability that all 3,000 death row inmates today are guilty, even if we are ninety percent confident of guilt in each case, is minuscule.

To put this another way, if we executed 100 inmates and we were ninety-five percent certain of guilt in each case, we would be implicitly accepting a five percent error rate; in being willing to execute all 100, we are in effect willing to execute five out of the hundred who might be innocent (even though, of course, we do not know which five are innocent, or whether more or any are). If our perceptions on the odds of error are accurate reflections of the real occurrences of error, the number of innocent persons legally executed is quite high—and much higher than our admittedly selective and incomplete research into identifiable cases suggests.

C. The Role of “Lady Luck”

In the heat of their attack on our claim that some two dozen of the several hundred cases we studied involved the execution of the innocent, the Justice Department simply ignored the vast majority of cases where we claim an innocent person was convicted of a capital offense but was not executed.⁵⁹ In effect, their silence tacitly concedes that our judgment is correct in more than ninety percent of all the cases and wrong in fewer than ten percent. Why these critics think that small percent matters they have yet to explain. What they conveniently overlook are scores of cases in which they do not—and could not reasonably—dispute our claims, namely, that innocent persons have been convicted and sentenced to death, and that innocent prisoners who were not executed would have been, or might have been, executed except for extraordinary good fortune.

Consider some of the ways good fortune smiled on the innocent death row prisoner. Some of the cases we cite involve a defendant whose release was owing to the timely discovery of a hitherto unknown eyewitness (for example,

59. *See generally* Markman & Cassell, *supra* note 39.

the case of Jerry Banks⁶⁰). What if that witness had not stepped forward? In other cases we cite, the true culprit confessed in time to save the innocent prisoner (for example, the case of James Foster⁶¹). What if the true culprit had kept silent about his involvement? In still other cases, vindication depended on a dedicated journalist who took up the cause and established that the convicted defendant is really innocent (for example, the case of Freddie Pitts and Wilbert Lee⁶²). What if no journalist had developed a timely interest in the case? In 1993, Kirk Bloodsworth was freed from death row in Maryland when technology not widely available at the time of his trial (DNA testing) proved his innocence.⁶³ What if this technology had not been developed for another decade, or semen on the body of the victim had not been preserved, or the victim had not been raped as well as murdered? Under any of these conditions, Bloodsworth would not have been exonerated.

In one way or another, virtually every case in which death row inmates are able to prove their innocence is a story of exceptional luck. Only when we realize how lucky the exonerated death row defendants have been can we realize how easy it is for fatal mistakes to go undetected. The more such cases are discovered the greater the likelihood there are other cases so far undetected—and that some of these cases involve the execution of the innocent. Just because boats filled with illegal drugs are regularly intercepted by the police near our shores, it does not follow that all boats carrying such drugs have been intercepted.

IV

ACTUAL AND POSSIBLE REMEDIES

The fact that innocent persons (in one or another sense of “innocence”) are executed seems to have had little if any real impact on opinion toward the death penalty. Four deaf audiences can be identified: the appellate courts, clemency boards, legislatures, and the general public.

A. Appellate Courts

The Supreme Court has in effect said that appellate courts need not listen to postconviction evidence of a defendant’s innocence, unless the circumstances are truly exceptional, as when the inmate has a videotape supporting his alibi that he was not at the scene of the murder. The Court issued a ruling of this very sort in 1995 in the case of Lloyd Schlup.⁶⁴ While incarcerated at the Missouri State Penitentiary, Schlup was accused of, and eventually sentenced to death for, the murder of a fellow inmate. Scheduled to be executed in 1993, he came to within nine hours of his death before Governor Mel Carnahan granted

60. See RADELET ET AL., INNOCENCE, *supra* note 4, at 176-88.

61. See *id.* at 23-39.

62. See *id.* at 326.

63. See Radelet et al., *Doubts*, *supra* note 4, at 926-27.

64. See *Schlup v. Delo*, 513 U.S. 298 (1995).

a stay and appointed a panel to reinvestigate the case.⁶⁵ In addition to the videotape, Schlup had affidavits from twenty other prisoners and a former guard stating that he was not the killer.⁶⁶ Schlup's demand for a full hearing on his innocence prevailed in the Supreme Court by the narrowest of margins—one vote.⁶⁷ In this case, the Court continued its unremitting effort to reduce access to appellate review via federal habeas corpus by raising the threshold for relief. It ruled that before an inmate could present evidence of his innocence in federal courts in search of a hearing to reopen the case, he must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent."⁶⁸ By "probably," the Court seems to have meant "more likely than not." Prior to *Schlup*, the defendant seeking habeas corpus relief in federal courts had to show by "clear and convincing evidence" that "no reasonable juror would have found him guilty except for a constitutional error at his trial." Although this was a victory for Schlup (a victory that, thanks to Congress, other inmates will not be able to secure; see our discussion below), it demonstrates how reluctant the appellate courts are to hear evidence of innocence. Had there been no videotapes to present to the courts, Schlup would have been executed.

B. Clemency Boards

Government officials with the power to commute death sentences to terms of imprisonment have not been receptive to arguments of the condemned defendant's innocence.⁶⁹ In the twenty year period from 1973 to 1992, only twenty-nine death sentences were commuted to prison terms for humanitarian reasons by executive clemency;⁷⁰ doubt about the defendant's guilt was a factor in nine of these cases.⁷¹ Only one of these commutations came from Texas or California, states with the largest death row populations; in Florida, the only other state with more than three hundred prisoners on death row, there has not

65. See *id.* at 313 n.27.

66. See Don Terry, *Despite New Evidence, A Prisoner Faces Death*, N.Y. TIMES, Nov. 15, 1993, at A12.

67. See *Schlup*, 513 U.S. at 298.

68. *Id.*

69. For a recent discussion of executive clemency in capital cases, see Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 28, at 531.

70. See Radelet & Zsembik, *supra* note 12, at 297-99; cf. Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 263 (1990-91). These two sources cite different commutation totals for the years in question because Bedau relied upon adjusted Bureau of Justice Statistics (which include some appellate court-ordered resentencing), whereas Radelet and Zsembik's more accurate figures were derived from examining records of all death sentences imposed in the United States since 1972 (primarily in the files of the NAACP Legal Defense Fund).

71. See Radelet & Zsembik, *supra* note 12, at 300. Since this research was published, four more death row inmates have had their sentences commuted to life imprisonment because of doubts about guilt: Earl Washington, Jr. (Virginia, Jan. 15, 1994), Don Paradis (Idaho, May 24, 1996), Joseph Payne (Virginia, Nov. 7, 1996), and Henry Lee Lucas (Texas, June 26, 1998).

been a commutation of a death sentence in more than a dozen years.⁷² A defendant's possible innocence has begun to seem almost like an argument against clemency: No one, least of all members of clemency boards, wants to embarrass the state officials who worked to get the prisoner convicted, sentenced, and executed.

C. Legislatures

Worry that the innocent might be executed has not persuaded state legislatures to create tighter standards for death sentencing, much less to repeal the death penalty. In 1994, Kansas reenacted the death penalty;⁷³ New York's legislature did so in 1995,⁷⁴ and Massachusetts came within one vote of following suit in 1997,⁷⁵ despite evidence of wrongful capital convictions in each of these states,⁷⁶ evidence virtually placed in the hands of every member of these state legislatures prior to their votes. In New York, extensive protections demanded by concerned legislators were built into the new death penalty law,⁷⁷ with what effect remains to be seen. But the history of wrongful convictions in capital cases did not in the end persuade the majority to vote against reenacting the death penalty. Nor is there any reason to believe that if Governor Pataki in New York (elected in part for his vigorous pro-death penalty stance⁷⁸) were confronted with a plea for clemency from a death row prisoner, he would follow the lead of his predecessors, Alfred E. Smith (1923-28) and Herbert H. Lehman (1933-42). When Smith and Lehman served as New York's governors, death sentences were routinely commuted every time one or more Court of Appeals judges dissented from a ruling that affirmed a conviction.⁷⁹

In recent years, Congress, like the courts, has made it easier to execute the innocent. In 1995, federal funding for attorneys serving indigent death row inmates was severely cut, resulting in the closure of "Resource Centers" in twenty states that provided legal services for condemned inmates.⁸⁰ Congress has also restricted the ability of federal courts to hear claims of innocence. Several new barriers to obtaining habeas corpus relief are contained in the

72. See *id.* at 313.

73. See John Dvorak, *Kansas Approves Death Penalty After 22 Years; Governor Says She Won't Fight Law*, TIMES-PICAYUNE (New Orleans), April 9, 1994, at A15.

74. See James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1.

75. See Adrian Walker & Doris Sue Wong, *No Death Penalty, by One Vote*, BOSTON GLOBE, Nov. 7, 1997, at 1.

76. See generally RADELET ET AL., INNOCENCE, *supra* note 4, at 282-358; Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807 (1990-91).

77. See N.Y. CORRECT. LAW §§ 650-662 (McKinney Supp. 1997).

78. See Ian Fisher, *The 1994 Campaign: Clamor over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at A45.

79. See Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 170 (1964).

80. See Lis Wiehl, *A Program for Death-Row Appeals Is Facing Elimination*, N.Y. TIMES, Aug. 11, 1995, at B16.

Anti-Terrorism and Death Penalty Act signed into law on April 24, 1996.⁸¹ For example, the Act includes a provision that requires “clear and convincing” evidence of innocence rather than simply evidence of “probable” innocence.⁸² This supersedes the broader standard articulated by the Supreme Court in the *Schlup* case discussed above. Under the provisions of this legislation, even with his videotapes, Schlup would have been executed.

D. General Public

The risk of executing the innocent has turned out to be a rather weak anti-death penalty card in the current public debates over the death penalty. In a 1985 Gallup Poll, fifteen percent of those who opposed the death penalty justified their position by saying “persons may be wrongly convicted.”⁸³ By 1991, this figure had fallen to eleven percent.⁸⁴ Further, the public is increasingly turning a deaf ear to cases in which death row convicts have made a plea of innocence.⁸⁵ Apparently so many inmates and their supporters have claimed innocence, legitimately or not, that officials and the general public dismiss such claims, including the valid ones, with the cynical reply that abolitionists claim innocence “all the time.” Thus, it has become clear that abolitionists gain nothing from inflated claims of innocence; here as elsewhere, crying “Wolf!” distorts the true situation. There are dozens of cases in which it can be said the defendant might be innocent, and death penalty opponents are absolutely right to point that out and stress the risk involved, but journalists and their audiences appear to tire quickly, signing off on the issue with an attitude that amounts to a “Ho hum, another ‘innocent’ death row inmate.”

In the end, arguing that the death penalty should be abolished because it will eventually kill the innocent is not the best kind of argument to make, just as it is not the best argument against torture to point out that some false confessions will result. Protesting the execution of the innocent does not make one a death penalty abolitionist; the true test is whether one opposes it for the

81. Pub. L. No. 104-132, §§ 101-08, 110 Stat. 1214, 1217-26 (codified at 28 U.S.C. §§ 2244-2266 (Supp. II 1996)).

82. See Marcia Coyle, *Law: Innocent Dead Men Walking?*, NAT'L L.J., May 20, 1996, at 1; Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477 (1996); Ronald J. Tabak, *Panel Discussion: Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 538 n.119 (1996); Panel Discussion, *Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163 (1997) (remarks of Ronald J. Tabak, moderator).

83. Alex Gallup & Frank Newport, *Death Penalty Support Remains Strong*, 309 GALLUP POLL MONTHLY 40, 42 (June 1991).

84. See *id.*

85. Among those executed in recent years despite doubts about their guilt are James Adams (Florida, May 10, 1984), Edward Earl Johnson (Mississippi, May 20, 1987), Jimmy Wingo (Louisiana, June 16, 1987), Willie Darden (Florida, Mar. 15, 1988), Roger Keith Coleman (Virginia, May 20, 1992), Leonel Herrera (Texas, May 12, 1993), Jesse DeWayne Jacobs (Texas, Jan. 4, 1995), and David Wayne Spence (Texas, Apr. 3, 1997).

guilty. The innocence argument is important because it undermines the justification of capital punishment on the ground of retributive justice.

As things stand now, we have little or no knowledge about the effect of information about wrongful convictions of capital defendants on the public's support for the death penalty. Here as elsewhere, the Marshall hypothesis (that the public is ignorant of the basic facts about the death penalty but that if it were informed, there would be a tendency to oppose the death penalty)⁸⁶ remains untested in recent years.⁸⁷ In the decade since our research on miscarriages of justice in capital cases was first published, we have some vivid anecdotal evidence from various conversations and courtroom testimony showing that jurors in capital trials who learn about our work find themselves rethinking their support for the death penalty.⁸⁸ However, more systematic research is needed before we can gauge the effect of such knowledge on various constituencies.

It is here that the ABA's call for a moratorium on death sentencing might have its strongest impact.⁸⁹ The ABA's call has now been joined by a similar call by the Pennsylvania Bar Association and the Philadelphia Bar Association,⁹⁰ and it is likely that other professional associations in the legal profession will follow suit. There are also signs that the religious community is increasingly taking a stand against the death penalty; in October 1997, for example, the twenty-one Catholic Bishops in Texas issued a plea for an end to the death penalty.⁹¹ While such declarations might not turn many of those who strongly support the death penalty into abolitionists, the call for a moratorium can increase the public's ambivalence on the topic.⁹² This, in turn, promises to lower the volume on calls for vengeance and to make opposition to the death penalty in general (by the public) or in a specific case (by a troubled juror) more tolerable, leading to fewer death sentences.

86. See *Furman v. Georgia*, 408 U.S. 238, 360-63 (1972) (Marshall, J., concurring).

87. But see Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 28, at 25, 31-41; Robert M. Bohm et al., *Knowledge and Death Penalty Opinion: A Test of the Marshall Hypothesis*, 28 J. RES. CRIME & DELINQ. 360 (1991); Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171.

88. See Michael L. Radelet, *Sociologists as Expert Witnesses in Capital Cases: A Case Study*, in EXPERT WITNESSES: CRIMINOLOGISTS IN THE COURTROOM 119, 127-31 (Patrick R. Anderson & L. Thomas Winfree, Jr., eds., 1987).

89. See generally American Bar Ass'n, *supra* note 2.

90. See Michael A. Riccardi, *Philadelphia Bar Calls for Execution Moratorium*, LEGAL INTELLIGENCER, Dec. 1, 1997, at 1. The motion was passed after strong support from Clifford E. Haines, the former Chief of the Homicide Unit for the Philadelphia prosecutor's office. See *id.* Haines told the Board of Governors about a case in which he had asked for three death sentences, one of which was ultimately imposed. See *id.* He later regretted his action because shortly after the death sentence was imposed, the defense attorney in the case lost his license to practice law because of a drug conviction. See *id.*

91. See Cecile S. Holmes, *Texas Catholic Bishops Urge End to Death Penalty*, HOUS. CHRON., Oct. 21, 1997, at A17.

92. For a discussion of America's ambivalence about the death penalty, see Franklin E. Zimring, *Ambivalence in State Capital Punishment Policy: An Empirical Sounding*, 18 N.Y.U. REV. L. & SOC. CHANGE 729 (1990-91).

Nonetheless, for the immediate future it appears that most Americans will either ignore the risk of executing the innocent or simply accept its inevitability. A recent letter to the *Houston Post* by Rex L. Carter is all too typical.⁹³ In November 1994, we wrote to the newspaper, pointing out the inevitability of executing the innocent and mentioning the case of Gary Graham.⁹⁴ Graham had admitted to a string of armed robberies but denied he was guilty of the murder that sent him to Texas's death row. And, indeed, much of the evidence of his guilt of that crime was suspect.⁹⁵ Here is Mr. Carter's response:

Hugo Bedau had best come in out of the heat. As a defender of the death penalty, I have no problem in admitting innocent people can be executed and couldn't care less what happens to Gary Graham. He should have been executed for what he confessed to. There is a war going on in our own country—against crime and thugs like Graham. It is sad that innocent people get killed in war, but that is the way it is. Ask any wartime veteran. Try 'em, give 'em 90 days for appeal and then hang 'em slowly at noon on the courthouse lawn. Just maybe killers-to-be will get the message, just as Japan did when we dropped the A-bomb.⁹⁶

Mr. Carter's rhetorical flourishes get in the way of his logic, but we have no doubt his sentiments coincide with the feelings of many citizens.

Dale Volker, the state senator from New York whose ten-year quest to reinstate the death penalty in the Empire State finally succeeded in 1995, had this to say about executing the innocent: "I would never think it's impossible. You would hope that it would never happen, but the mere fact that you might fail does not argue that you shouldn't do it."⁹⁷

Or consider the comments of Paul D. Kamenar, executive director of the Washington Legal Foundation, who early in 1995 was quoted in *The New York Times* saying, "I would gladly give them a couple of questionable cases that they are harping about in return for their agreeing to recognize that in the vast majority of cases, there is no question of the guilt of those being executed."⁹⁸ This trade we would happily accept; few abolitionists would deny that most of those now on death row are guilty. We doubt, however, that most retentionists would be willing to agree that the vast majority of murderers on death row are not genocidal maniacs, psychopathic serial or multiple murderers, recidivist

93. See Rex L. Carter, *Letter to the Editor*, HOUSTON POST, Nov. 13, 1994, at C2.

94. See *Ex parte* Gary Graham, 853 S.W.2d 565 (Tex. Crim. App. 1993).

95. See Susan Blaustein, *The Executioner's Wrong: Texas Will Execute Gary Graham for a Murder He Almost Certainly Didn't Commit*, WASH. POST, Aug. 1, 1993, at C1.

96. Carter, *supra* note 93.

97. We are reminded of the scene in *Dr. Strangelove*, in which Joint Chief of Staff Chairman General Buck Turgidson (played by George C. Scott) tells the President (Peter Sellers) that a 40-megaton nuclear bomb is about to be dropped in error on a target in Russia:

The President: General Turgidson, when you instituted the human reliability tests you assured me there was no possibility of such a thing ever occurring.

General Turgidson: Well, ahh, I don't think it's quite fair to condemn the whole program because of a single slipup.

Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb (Columbia 1964).

98. See Sam Howe Verhovek, *When Justice Shows Its Darker Side*, N.Y. TIMES, Jan. 8, 1995, at D6.

killers, and thus that they are not the worst among the bad and so do not belong there.

Finally, consider the comments of Florida State University criminologist Larry Wollan. Although a supporter of the death penalty, Wollan realizes that the risk of executing the innocent is undeniable, and he phrases the argument in a responsible way: "Innocent people have been executed," he concedes, but "[t]he value of the death penalty is its rightness *vis-à-vis* the wrongness of the crime, and that is so valuable that the possibility of the conviction of the innocent, though rare, has to be accepted."⁹⁹ Elsewhere, Ernest van den Haag made the same point when he says that our documentation of twenty-three erroneous executions in this century in America "[does] not tell us anything unexpected,"¹⁰⁰ and this liability to grave error does not outweigh the deterrent and moral benefits of the death penalty. Since, in our judgment, those benefits are entirely illusory¹⁰¹—we gain nothing in public safety or moral rectitude by the practice of the death penalty—the constant and unavoidable risk of executing the innocent cannot be so complacently tolerated.

V

CONCLUSION

We close on an ironic note. One of the amazing things that has happened in the decade since our research was first released to the public is that those who defend the death penalty now concede the inevitability of executing the innocent, even though they challenge individual cases that we and others have identified as probably involving the execution of an innocent person. It is a major concession. We know of no defender of the death penalty who, prior to 1985, was willing to make such a public concession. Moreover, this concession has the effect of forcing responsible defenders of capital punishment to rethink their argument in two important respects. First, as retributivists, they must acknowledge that convicting and executing the innocent—those who do not deserve to die—is a terrible wrong, and avoiding it is no less important on retributive grounds than convicting and punishing the guilty. Second, they must explain in convincing detail how a cost/benefit argument, on which they rely, shows that the benefits from the death penalty outweigh the admitted cost of executing the innocent. Elsewhere, we have shown why we believe these arguments must fail.¹⁰²

We are left to ponder how future generations, when they look back, will evaluate America's current love for the executioner.

99. *See id.*

100. Ernest van den Haag, *Why Capital Punishment?*, 54 ALBANY L. REV. 501, 512 (1990).

101. *See generally* THE DEATH PENALTY IN AMERICA, *supra* note 35, at 95-98; BEDAU, *supra* note 28.

102. *See* Radelet et al., *Doubts*, *supra* note 4, at 271-81.