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THE INNOCENCE REVOLUTION AND OUR “EVOLVING STANDARDS OF DECENCY” IN DEATH PENALTY JURISPRUDENCE

Mark A. Godsey and Thomas Pulley***

I. INTRODUCTION

The Supreme Court has reaffirmed on numerous occasions that the Eighth Amendment’s prohibition on “cruel and unusual punishments” must be understood in light of “the evolving standards of decency that mark the progress of a maturing society.”¹ At its core, this charge means that as we think about the constitutionality of the death penalty in the United States now and in the future, we must continually reassess how our societal views on the subject are changing and maturing. In addition, we must always consider any new information that comes to light about the fairness and accuracy of the capital punishment system in this country.

One cannot adequately consider whether the current administration of the death penalty in America measures up to modern notions of decency without doing so in light of the revolution that has occurred over the past decade in the American criminal justice system—the Innocence Revolution. Indeed, up through the early 1990s, we, as a society, believed our criminal justice system was highly accurate.² We believed that those caught and executed were guilty, and that the innocent were never executed or even charged, protected by a system that rarely, if ever, made mistakes.³

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¹ *Atkins v. Va.*, 536 U.S. 304, 311-12 (2002) (quoting *Trup v. Dulles*, 356 U.S. 86, 101 (1958) (plurality) (ruling that denationalization for treason was cruel and unusual under standards of the time)). E.g. *Harris v. Ala.*, 513 U.S. 504, 526 (1995) (Stevens dissent) (case that challenged Alabama’s capital sentencing structure requiring judge to “consider” jury’s recommendation rather than telling what specific weight to give to it); *Hudson v. McMillan*, 503 U.S. 1, 8 (1992) (beating of a prisoner was cruel and unusual even though there was no serious injury inflicted); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (examining inmate to quarters in numbers greater than designed under cruel and unusual punishment standard); *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976) (intentional denial of healthcare to inmate was deemed cruel and unusual).

² See Ken Armstrong & Steve Mills, “Until I Can Be Sure”: How the Threat of Executing the Innocent Has Transformed the Death Penalty Debate in *Beyond Repair: America’s Death Penalty* 94, 96-105 (Stephen P. Garvey ed., Duke U. Press 2003).

³ *Id.*

The recent advent of DNA testing and other advanced technologies, however, have demonstrated the fallacy and naiveté of these beliefs. DNA testing has offered us a crystal ball into the past like we had never seen before. It has allowed us to travel back in time and take a second look at certain old convictions—a look bolstered by the unprecedented clarity and accuracy of this new science. We have learned through DNA testing that in cases where we, as a society, were sure that we had found and convicted the actual perpetrators, we were wrong more often than we ever would have imagined. In these instances, we put an innocent person in jail, or worse, on death row.

In 1992, Barry Scheck and Peter Neufeld started the first Innocence Project at the Benjamin N. Cardozo School of Law in New York City. Since that time, Innocence Projects have sprung up in more than 25 states. The Innocence Project Network has freed more than 140 from prison by demonstrating through DNA testing or other conclusive new evidence that the system convicted the wrong person—an innocent person. Findings of innocence come from various avenues. A look at individuals sentenced to death alone creates a disturbing picture. For example, Florida has executed approximately 2.1 people per year since 1976,⁴ and has had prisoners on death row exonerated at a rate of approximately 0.8 people per year during that same time period.⁵ The Death Penalty Information Center Reports that 108 people have been freed from death row across the nation since 1973 because of innocence.⁶ This past year, 2003, broke the record for most death penalty exonerations with 10.⁷ A study released in 2000 by Columbia Law School examined error rates in capital cases from 1973-1995.⁸ The study reports 68% of death sentences imposed and reviewed by appellate courts were thrown out because of serious flaws.⁹

⁴ Florida Department of Corrections, *Death Row Fact Sheet*, <http://www.dc.state.fl.us/oth/deathrow/> (accessed Nov. 23, 2003).

⁵ Floridians for Alternatives to the Death Penalty, *Florida's Exonerated Death Row Inmates*, http://www.fadp.org/fl_exonerated.html (accessed Nov. 23, 2003).

⁶ Death Penalty Information Center, *Cases of Innocence 1973-Present*, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109> (last updated Mar. 1, 2004). The site lists 113 individuals, but points out that five of the cases were dropped from death row because of compromises when the person was convicted to lesser offense on retrial or the parole board became convinced of innocence, etc.

⁷ Illinois Coalition Against the Death Penalty, *2003 Is Record-Breaking Year For Death Row Exonerations*, <http://www.icadp.org/page223.html> (accessed Feb. 25, 2004). See also Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (accessed Feb. 25, 2004).

⁸ James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000) (available at <http://www2.law.columbia.edu/instructionalservices/liebman/> (accessed Nov. 23, 2003)).

⁹*Id.* at pt. II, (available at

The lessons of the Innocence Revolution begin with the realization that our system is not as accurate as we believed even 10 years ago. We have learned that eyewitness identification is much more problematic and inaccurate than we once thought; that science once believed to be reliable, such as microscopic hair comparisons and bite mark analysis, have led juries down the wrong paths time and time again; that innocent people have inexplicably confessed to crimes that they did not commit, and on and on. These are not problems for which DNA is the panacea, as DNA testing can only be done in the limited number of cases in which the appropriate biological material can be collected from the crime scene. In the remaining cases, we must move forward without the certainty of DNA, but with new knowledge that our system is not as reliable as we once believed.

In light of the lessons of the Innocence Revolution, we must face the reality that it is imminently possible in this country for an innocent person to be executed at the hands of the state.

It is our thesis in this Article that our society's evolving standards of decency in death penalty jurisprudence must be informed by the lessons taught by the Innocence Revolution. Any conception of our current or future "standards of decency" must include the understanding that some percentage of those executed in this country in the past were, and in the future will be—actually innocent. Part II briefly discusses the Innocence Revolution from its beginnings in the 1980s through the present. This Part attempts to shed some light on the number of wrongful convictions that occur on an ongoing basis in this country each year. This Part also briefly describes the leading causes of wrongful convictions, and explains how these problems persist today and into the future.

Part III then examines the impact the Innocence Revolution has had in our society. It looks at how people's attitudes and beliefs about the criminal justice system have changed. This Part also explores how some courts have dealt with this changing mood.

Part IV asks the questions: What should the implications of the Innocence Revolution be on our evolving standards of decency in death penalty jurisprudence? Is it morally decent and acceptable for our nation to maintain a capital punishment system where some of those to be executed are likely to be innocent? If so, what percentage of innocent people should be acceptable in our society under the circumstances?

It is the hope that this Article will ask more questions than it answers. Our goal is simply to raise the appropriate issues so that those pondering our society's evolving standards of decency will do so armed with the appropriate information about the Innocence Revolution, so that they may

decide these issues for themselves.

II. THE INNOCENCE REVOLUTION

A. *Examining for Innocence*

The inertia of a deeply-entrenched, omnipresent institution such as our criminal justice system makes change slow and difficult. Often, change requires concerted, steadfast efforts of a large or powerful group of individuals. Such efforts are underway in the realm of wrongful convictions. While the notion of working to free the innocent is by no means a new one,¹⁰ the momentum, coordination, and sheer number of people involved give force to the current Innocence Revolution.

In 1932, Professor Edwin Borchard wrote *Convicting the Innocent*.¹¹ In the book he outlines 65 cases where persons convicted of crimes were later released because of a showing of innocence.¹² In two of the capital cases, the individuals had actually gone to the gallows.¹³ One was given more time to have his innocence investigated after it was discovered that his death warrant had the wrong name.¹⁴ The other was saved when the knot of the noose unraveled rather than tightening when he was dropped from the gallows.¹⁵

In 1987, Hugo Adam Bedau and Michael L. Radelet published an

¹⁰ See Armstrong, *supra* n. 2, at 95-102.

¹¹ Edwin M. Borchard, *Convicting the Innocent: Errors in the Criminal Justice System* (Yale U. Press 1932).

¹² *Id.* at xiii.

¹³ Armstrong, *supra* n. 2, at 99.

¹⁴ Borchard, *supra* n. 11, at 37. The jury foreman's name was on the warrant rather than the accused. *Id.* The prisoner's attorney petitioned the governor for a commutation to life imprisonment which was granted. *Id.* Eleven years later his co-defendant confessed to committing the crime alone. *Id.* at 37-38. The facts and new confession were reexamined and the state officials found it to be truthful. *Id.* at 38. He was released that year. *Id.*

¹⁵ *Id.* at 212-215. A doctor and a minister rallied the crowd against trying again. *Id.* at 213. The sheriff was urged to consult with an attorney before proceeding. *Id.* The attorney said the sentence should be carried out. *Id.* As preparations were made, the doctor threatened to rally 300 people to stop it. *Id.* The sheriff acquiesced and took the accused back to jail. *Id.* at 214. The question was taken up to the State Supreme Court and the sentence was affirmed. *Id.* The night before the scheduled execution, friends freed him from jail and hid him on a secluded farm. *Id.* When a candidate who favored commuting the sentence was elected governor, he turned himself in. *Id.* Two years later, the key witness recanted and he was pardoned. *Id.* at 214-215. About 20 years later, a corroborated confession was obtained from someone involved, but he died before he could testify against the real killer. *Id.* at 215-216.

article in the *Stanford Law Review* reporting a study similar to Borchard's undertaking.¹⁶ In the article, the two presented the cases of 350 individuals they believed to be wrongfully convicted during the Twentieth Century.¹⁷ All these cases were considered potentially capital,¹⁸ but only 139 involved actual death sentences.¹⁹

Around the same time, Jim McClosky began taking an active interest in prisoners wrongfully imprisoned for crimes they had not committed.²⁰ His interest led to his creation of the New Jersey-based Centurion Ministries in 1983.²¹ The mission of the organization is to render assistance to those who are wrongfully imprisoned.²² The efforts of the organization have led to 32 inmates being freed as of this writing.²³

The startup of the Innocence Project by Scheck and Neufeld in 1992 represents a significant progression in the Innocence Revolution. Scheck and Neufeld formed the group as a result of work they had previously done with the Bronx Legal Aid Society.²⁴ Both had left the group to pursue other endeavors, but in 1986 were asked to help on the case of Marion Coakley, who had been sentenced to fifteen years for rape.²⁵ The exoneration of Coakley, using DNA evidence, led to future endeavors with the assistance of the legal aid clinic Scheck ran at Cardozo Law School.²⁶ Eventually, in 1992, the two worked together to officially start the Innocence Project.²⁷ They, along with Jim Dwyer, wrote *Actual Innocence: Five Days to Execution, and Other Dispatches*, which was released in 2000.²⁸ The book documents several notable cases of wrongful convictions they had been involved with and gives recommendations for what can be done to decrease

¹⁶ Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21 (1987).

¹⁷ *Id.* at 23-24.

¹⁸ *Id.* at 31-32.

¹⁹ *Id.* at 38.

²⁰ Centurion Ministries, *About Us*, <http://www.centurionministries.org/aboutus.html> (accessed Nov. 23, 2003).

²¹ *Id.*

²² Centurion Ministries, *Mission*, <http://www.centurionministries.org/> (accessed Nov. 23, 2003).

²³ Centurion Ministries, *Cases*, <http://www.centurionministries.org/cases.html> (accessed Apr. 28, 2004).

²⁴ Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* 6 (Signet 2001).

²⁵ *Id.* at 10.

²⁶ *Id.* See also Innocence Project, *About this Innocence Project*, <http://www.innocenceproject.org/about/index.php> (accessed Nov. 23, 2003).

²⁷ *Id.*

²⁸ Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches* (Doubleday 2000).

errors.²⁹

Also around 1992, David Protess and Rob Warden, along with students in Northwestern's Medill School of Journalism, worked to secure the release of David Dowaliby who had been wrongfully imprisoned for allegedly killing his stepdaughter.³⁰ Protess and Warden published a book *Gone in the Night: The Dowaliby Family's Encounter with Murder and the Law*, which was later the basis for a 1996 CBS made for television movie.³¹ In 1996, the duo, with the help of several students, helped to vacate the convictions of the Ford Heights Four, who were convicted of two 1978 murders.³² This case was also turned into a book titled *A Promise of Justice: The Eighteen Year Fight to Save Four Innocent Men*.³³

In 1998, Northwestern School of Law held the National Conference on Wrongful Convictions and the Death Penalty.³⁴ The conference garnered a great deal of national attention, bringing to the mainstream the problem of wrongful convictions.³⁵ Just over two months after the conference, Northwestern law professor Lawrence Marshall, along with law clinic students, helped secure the release of Anthony Porter, an innocent man who at one point had come within 48 hours of execution.³⁶

In the fall of 1999, Northwestern University School of Law started the Center for Wrongful Convictions under their Bluhm Legal Clinic.³⁷ In total, activists associated with this program worked to release at least nine wrongfully convicted people from Illinois' death row.³⁸ By 2000, 13 men in total had been exonerated from death row in Illinois.³⁹ Since 1976, the state

²⁹ *Id.*

³⁰ Alicia C. Shepard, *Extra Credit*, 19 *Am. Journalism Rev.* 38, 40 (June 1997). Northwestern University, *Protess is Recipient of Justice Award*, <http://www.northwestern.edu/univ-relations/media/observer/1996-97observer/faculty-news/projust-facnews.html> (accessed Nov. 23, 2003).

³¹ Northwestern University Medill School of Journalism, *Inside Medill News, David Protess and Rob Warden*, <http://freexpression.northwestern.edu/inside/1999/protess.html> (last updated June 26, 2002).

³² *Id.* Northwestern University Medill School of Journalism, *Journalists, Legal System Failed Ford Heights Four*, <http://www.medill.nwu.edu/inside/1999/protess092898.html> (last updated Sept. 28, 1998).

³³ *Inside Medill News, David Protess and Rob Warden*, *supra* n. 31, at <http://freexpression.northwestern.edu/inside/1999/protess.html>. Jerry Bruckheimer Films at Touchstone optioned it for a feature film. *Id.*

³⁴ Center for Wrongful Convictions, *A Constituency for the Innocent*, <http://www.law.northwestern.edu/depts/clinic/wrongful/History.htm> (last modified Mar. 26, 2003).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Illinois Commission on Capital Punishment, *Report*, Ch. 1, 4 (Apr. 15, 2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_01.pdf (accessed Nov. 23,

had only executed 12.⁴⁰

In December of 2000, the Innocence Project at Cardozo and the Center for Wrongful Convictions teamed up to form the Innocence Network.⁴¹ The Innocence Network has grown to include organizations in at least 25 states.⁴² The Innocence Network has freed more than 140 wrongfully convicted prisoners to date.⁴³

These cases include dramatic stories of innocence when the entire country seemed convinced of guilt. One such example involves the story of the "Central Park Jogger." On April 19, 1989, a woman was brutally beaten and raped while jogging through the park.⁴⁴ The victim's condition left her unable to recall the attack.⁴⁵ The police investigated a group of Latino and African American teenagers who had been picked up for other alleged incidents within the park.⁴⁶ After "prolonged periods of police interrogation," five of the teenagers confessed to the crime.⁴⁷ The story quickly made national news, and the public seemed certain of the boys' guilt as fears of violence by youths were renewed.⁴⁸ In addition to the confessions, the prosecution introduced forensic evidence that a hair found on the victim's clothing perhaps came from one of the defendants.⁴⁹ Five of the boys were convicted for the attack.⁵⁰ A sixth boy, Steven Lopez, was believed to be involved but his charges relating to that case were dropped when witnesses refused to testify against him.⁵¹

In 2002, Matias Reyes confessed to actually having committed the attack on the Central Park Jogger.⁵² He had been convicted of a similar

2003).

⁴⁰ Center for Wrongful Convictions, *Illinois Death Row Roster, 1977-2003*, <http://www.law.northwestern.edu/wrongfulconvictions/documents/DeathRowRoster3.pdf> (accessed Nov. 23, 2003).

⁴¹ *Id.*

⁴² Innocence Project, *Other Projects by State*, http://www.innocenceproject.org/about/other_projects.php (accessed Nov. 23, 2003).

⁴³ Innocence Project, *Innocence Project*, <http://www.innocenceproject.org> (accessed Apr. 28, 2004).

⁴⁴ Innocence Project, *Raymond Santana*, http://www.innocenceproject.org/case/display_profile.php?id=121 (accessed Nov. 23, 2003).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See e.g. James Kunen, *Madness in the Heart of the City; A Brave Young Woman Fights for Life After a Brutal Attack that Defies Understanding*, People 106 (May 22, 1989); Bruce Frankel, N.Y. Jogger left imprint on court; But confessions may have most effect, USA Today (July 18, 1990) (available on LexisNexis Academic Universe).

⁴⁹ Innocence Project, *supra* n. 42.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

attack in the area in 1989. DNA from the rape kit in the Central Park Jogger case matched Reyes's profile and DNA testing on the hair in question also matched to Reyes.⁵³ The five boys, Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise, had their convictions overturned at the district attorney's recommendation.⁵⁴

As of this writing, the Innocence Network has freed 143 innocent prisoners and Centurion Ministries 32.⁵⁵ In addition, many innocent persons have secured their freedom through the work of private attorneys not acting in conjunction with these groups. The Death Penalty Information Center reports that 106 people have either had their death sentence convictions overturned and subsequently freed or issued pardons upon evidence of innocence.⁵⁶ Five others were removed from death row via other negotiated arrangements when serious questions of innocence arose.⁵⁷

B. *How the Innocent Get Convicted*

The revelation that innocent persons are convicted necessitates analysis as to why these problems occur. The cases where wrongful convictions have been discovered reveal several flaws in the system, including unreliable eyewitness testimony, perjured testimony by jailhouse snitches, false confessions, junk science, state misconduct, and incompetent lawyers.

1. Eyewitness Testimony

An eyewitness to a crime can provide invaluable information to help catch the perpetrator. Often the eyewitness may be the only source available from which critical information can be attained. Unfortunately, the fallibility of the human memory can cause serious errors to be made. In situations where people have been wrongfully convicted, eyewitness identifications have been by far the most prevalent reason leading to these erroneous convictions. Scheck, Neufeld, and Dwyer report that mistaken identification played a substantial role in 60 of the first 74 DNA exonerations in which they were involved. Samuel Gross documents 136

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Innocence Project, *supra* n. 43. It should be noted that two of the Centurion Ministries cases were in Canadian jurisdictions. Centurion Ministries, *supra* n. 23.

⁵⁶ Death Penalty Information Center, *supra* n. 6.

⁵⁷ *Id.* Examples include people who are convicted of, or plead to, lesser offenses and given time served; convicted of lesser offenses and still imprisoned; and released by the parole board because they were believed to be innocent.

cases of mistaken identifications from 1900 to 1983, which led to 97 convictions.⁵⁸ A study of wrongful convictions by Arye Rattner found 52.3% of cases she studied to involve mistaken eyewitness identifications.⁵⁹ Looking at the Innocence Project website descriptions of the 138 Innocence Network exonerations, 31 wrongful convictions for murder have descriptions.⁶⁰ Of the 31 exonerations listed on the Innocence Project website, eyewitness mistake was a major factor in five of the cases.⁶¹

When looking specifically at capital cases, the number tends to be lower than in rape or other non-capital cases. Gross' sample contained only 24 homicide cases involving mistaken identifications, and most of those were in conjunction with another felony.⁶² "[O]nly 16% of Bedau and Radelet's cases of errors in potentially capital prosecutions" involved mistaken eyewitness testimony.⁶³ Gross speculates that this phenomenon in murder cases is likely the result of the main witness being dead.⁶⁴ He also points out that most murderers are likely to be known by the victim, and may include several witnesses, all of whom are familiar with the perpetrator.⁶⁵ This creates less likelihood of error on their part in the first place.⁶⁶ It should also be noted that a survey by Wardern, Armbrust, and Linzer at Northwestern found that 46 of 86 persons wrongfully sentenced to death involved incorrect eyewitness identifications, but this also included perjured rather than solely mistaken eyewitness testimony.⁶⁷

A prominent example of mistaken eyewitness identification is the case of Ronald Cotton. In 1984, Jennifer Thompson was attacked in her apartment and raped at knifepoint.⁶⁸ She paid careful attention to her

⁵⁸ Samuel Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. of Leg. Stud. 395, 413 (1987).

⁵⁹ Arye Rattner, *Convicted but Innocent*, 12 L. & Hum. Behav. 283, 291 (1988). The next highest source of error accounted for only 11%. *Id.*

⁶⁰ See Innocence Project, *Case Profiles, Search Profiles*, http://www.innocenceproject.org/case/search_profiles.php (accessed Nov. 23, 2003). The parameter of murder under conviction was selected to yield the results discussed.

⁶¹ *See id.*

⁶² Gross, *supra* n. 58, at 413.

⁶³ Samuel Gross, *Risks of Death*, 44 Buff. L. Rev. 469, 480 (1996).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ Rob Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row*, <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Research/eyewitnessstudy1.htm> (accessed Nov. 23, 2003).

⁶⁸ Jennifer Thompson, *I Was Certain, But I Was Wrong*, New York Times sec. 4 p. 15 (June 18, 2000).

assailant so she would be able to give a good description to the police and identify him.⁶⁹ She identified her neighbor, Ronald Cotton, from police photos.⁷⁰ After identifying him from a lineup, he stood trial. Ms. Thompson testified at the trial identifying Ronald Cotton as her assailant.⁷¹ She recounts that “I was sure. I knew it. I had picked the right guy, and he was going to jail.”⁷² In 1987, a retrial was granted.⁷³ She agreed to testify again.⁷⁴ During a pretrial conference, another suspect, Bobby Poole, was brought into court for her to examine.⁷⁵ She stated with confidence that she had “never seen him in [her] life.”⁷⁶ Cotton was again convicted and sentenced to life plus 54 years for his involvement in that and a very similar crime in close proximity to the first.⁷⁷ In 1995, DNA evidence exonerated Cotton and proved Poole’s guilt.⁷⁸

2. Lying Witnesses: Jailhouse Snitches, Cooperators, and Others

A related issue to unreliable eyewitness identification is witnesses who perjure themselves. Many of these witnesses have some sort of inducement from the state, such as lenient sentencing in connection with their own crimes if they testify against the accused at trial. Out of 74 wrongful convictions listed by Scheck, Neufeld and Dwyer, 15 involved false witness testimony, and 14 involved snitches or informants who received deals from the government for their cooperation.⁷⁹ This factor seems especially relevant because of its prevalence in erroneous murder convictions. Of the 31 murder cases from the Innocence Project, at least 15 were due in part (often in large part) to witnesses who perjured themselves.⁸⁰ In Gross’ examination of Bedau and Radelet’s description of wrongful convictions relating to potential capital cases, perjured testimony was a factor in 35% of the cases.⁸¹ In Rattner’s study of general wrongful

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Innocence Project, Ronald Cotton*, http://www.innocenceproject.org/case/display_profile.php?id=06 (accessed Nov. 23, 2003).

⁷⁸ Thompson, *supra* n. 68.

⁷⁹ Scheck, *supra* n. 24, at 361. It is unclear if any overlap.

⁸⁰ See Innocence Project, *supra* n. 60.

⁸¹ Gross, *supra* n. 63, at 483.

convictions, witness perjury (not including state officials) was a factor in 11% of the cases.⁸² Warden reports in examining 97 cases where innocent people were sent to death row, prosecutors used "incentivised witnesses" in 38 of the cases.⁸³

It is not difficult to grasp why this happens, especially in potential capital cases.⁸⁴ For one thing, the stakes become very high. The police and district attorneys want to solve an atrocious crime. The media reports as many details from a violent crime as they can access, giving criminals seeking a deal with prosecutors fertile ground to fabricate a story matching what they have learned through the media.

Desperate prisoners often try to elicit confessions from fellow inmates so they can then use this information to cut a deal with prosecutors in their own cases. When a confession cannot be elicited, the temptation to fabricate a confession can be irresistible. When state officials need to rely upon snitches, it often means other evidence against the accused is lacking. Therefore, if the prisoner can corroborate sufficient facts, the testimony is considered.

The case of Ron Williamson provides a case in point. Ron Williamson was known around town for his offensive manner and short temper towards women.⁸⁵ When a 21 year-old young woman, Debra Carter, was murdered about a block from where Williamson lived with his parents, he became a suspect.⁸⁶ The police also became suspicious of Dennis Fritz, because he had been hanging around with Williamson before the murder occurred.⁸⁷ The police did not have enough evidence to prosecute either Williamson or Fritz for the murder.⁸⁸

The prosecution collected several hairs from the scene and semen from the victim.⁸⁹ Three years after the murder, a hair expert concluded that 13 of the hairs may have come from Fritz.⁹⁰ Another four hairs were said to be Williamson's.⁹¹ The semen indicated that the perpetrator(s) was a non-secretor, a status that applied to both Fritz and Williamson.⁹² This was still

⁸² Rattner, *supra* n. 59, at 291.

⁸³ Warden, *supra* n. 67.

⁸⁴ See Gross, *supra* n. 63, at 481-483.

⁸⁵ Scheck, *supra* n. 24, at 171.

⁸⁶ *Id.* at 172.

⁸⁷ *Id.* at 173.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Innocence Project, Dennis Fritz, http://www.innocenceproject.org/case/display_profile.php?id=60 (accessed Nov. 23 2003).

not enough to convict.⁹³

Then a woman named Terri Holland was caught as a repeat offender for writing bad checks.⁹⁴ After being arrested, she told police that a year earlier when she had been in the county jail, Ron Williamson, who was in jail at the time for writing bad checks, had confessed to her how he killed Debra Carter.⁹⁵ Her testimony, along with other political pressures, gave the prosecution the push it needed to go forward against both Williamson and Fritz.⁹⁶ Both were convicted, and were sentenced to death.

Later, DNA evidence showed neither Williamson nor Fritz to be involved in the crime.⁹⁷ The DNA showed that the perpetrator was actually one of the witnesses that the state had used against Williamson and Fritz.⁹⁸ At one point Williamson came within five days of execution.⁹⁹

3. False Confessions

Another prevalent factor in wrongful conviction is false confessions. In Scheck, Neufeld and Dwyer, 16 of the 74 cases analyzed involved false confessions.¹⁰⁰ False confessions accounted for 14% of Bedau and Radelet's potentially capital cases.¹⁰¹ They only accounted for 8% of Rattner's general wrongful convictions.¹⁰² Warden's analysis of 42 wrongful convictions in Illinois cases since 1970 found that 14 individuals wrongfully confessed and 14 were convicted because of a co-defendant's wrongful confession.¹⁰³ Three of those cases overlapped when both wrongfully confessed.¹⁰⁴ Of the 31 murder cases on the Innocence Project website, nine involved confessionary statements.¹⁰⁵

Leo identifies five types of false confessions to police.¹⁰⁶ The first is

⁹³ Scheck, *supra* n. 24, at 173.

⁹⁴ *Id.* at 174-175.

⁹⁵ *Id.* at 175.

⁹⁶ *Id.* at 176.

⁹⁷ *Id.* at 197.

⁹⁸ *Id.* at 182, 197.

⁹⁹ *Id.* at 189.

¹⁰⁰ *Id.* at 361.

¹⁰¹ Gross, *supra* n. 63, at 485.

¹⁰² Rattner, *supra* n. 59, at 291.

¹⁰³ Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970*, <http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions.htm> (revised May 12, 2003).

¹⁰⁴ *Id.*

¹⁰⁵ Innocence Project, *supra* n. 60.

¹⁰⁶ Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions in Wrongly*

the voluntary false confession.¹⁰⁷ This is offered by an individual when the police have exerted little or no pressure.¹⁰⁸ There can be various reasons why an individual would confess under such circumstances: “a morbid desire for notoriety, the need to expiate guilt about imagined as well as real acts, the need to receive attention or fame, the desire to protect or assist the real offender, an inability to distinguish between fantasy and reality, or a pathological need for acceptance or self-punishment.”¹⁰⁹

The second type is the stress-compliant false confession.¹¹⁰ Ofshe and Leo state that this occurs when the person believes the only way to escape the interrogation environment he feels so uncomfortable in is to confess.¹¹¹ The third type of false confession is the coerced-compliant false confession.¹¹² This is similar to the stress-compliant in that the individual wants to get out of the interrogation environment, but it is different in that it involves “coercive techniques” such as threats or promises.¹¹³ It is also different in that it is more of a conscious decision to get out of the situation by weighing perceived benefits.¹¹⁴

The coerced-persuaded false confession is the fourth type.¹¹⁵ This occurs when the interrogator is able to convince the suspect to doubt his or her own memory or lack of memory about a certain time period.¹¹⁶ The suspect then becomes convinced that he in fact may have done it.¹¹⁷

Non-coerced-persuaded false confessions compose the fifth type of false confession.¹¹⁸ They are similar to the fourth type except the coercive police tactics are omitted.¹¹⁹

Illustrative of this problem is the case of Robert Miller. Two elderly women had died when attacked and raped in an Oklahoma City neighborhood.¹²⁰ Three “Negroid” hairs were found on one of the victims

Convicted: Perspectives on Failed Justice 36, 42 (Saundra D. Westervelt & John A. Humphrey eds., Rutgers U. Press 2001).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citations omitted).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 43.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 43-44.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 44.

¹¹⁹ *Id.*

¹²⁰ Scheck, *supra* n. 24, at 102-103.

and semen left at the scene was that of an A positive secretor.¹²¹ Panic had overcome the area and police began to canvass the area, questioning 173 African American males.¹²² Twenty-three of the individuals questioned gave blood samples.¹²³ Miller's blood type matched that of the attacker.¹²⁴

Miller used drugs regularly and suspected that PCP had been mixed in with some of the drugs he had ingested on the night of his interrogation.¹²⁵ He wanted to help the police so he went to the station with them and offered to use his psychic powers to assist their search.¹²⁶ The interrogation session was videotaped. It was described as "a numbing drone of hallucination, interrogation, exorcism, revival, and nonsense."¹²⁷ Among the many bizarre interactions of the interrogation was the suspect trying to envision what happened in the murders.¹²⁸

Although never actually admitting guilt, the police felt that he gave enough inside facts to indicate he was the perpetrator.¹²⁹ These incriminating statements, along with the blood evidence and the hair found, were sufficient to get a capital conviction.¹³⁰

After the conviction, an appellate lawyer and an investigator began looking into the case.¹³¹ They discovered that there had been another suspect in the attacks.¹³² In fact, similar rapes continued to occur after Miller had been arrested.¹³³ The other suspect, Ronald Lott, was arrested for those subsequent rapes.¹³⁴ He pled guilty to those rapes.¹³⁵

DNA testing on the evidence in 1991 showed that Miller was not a match.¹³⁶ The evidence matched the DNA of Ronald Lott.¹³⁷ The prosecutor argued that it only showed that there was more than one person

¹²¹ *Id.* at 103.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 104.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 105-109.

¹³¹ *Id.* at 109-110.

¹³² *Id.* at 111.

¹³³ *Id.* at 110.

¹³⁴ *Id.* at 111.

¹³⁵ *Id.*

¹³⁶ *Id.* at 113.

¹³⁷ *Id.*

involved and also disputed the results.¹³⁸ By 1993, a second series of tests were done excluding Miller as the rapist.¹³⁹ The prosecution relied heavily on the videotaped “confession” as solid evidence of his guilt.¹⁴⁰ In 1995, the district attorney finally agreed Miller should get a new trial.¹⁴¹ In 1997, a hearing was held to decide if there was a basis to keep him for trial.¹⁴² The forensic evidence cleared Miller, and a jail house snitch had recanted and disappeared, so all that remained was the tape.¹⁴³ The prosecution eventually dropped the charges and Miller was released in January of 1998.¹⁴⁴

4. Junk Science

A fourth factor leading to false convictions is unreliable “scientific” testimony of state “experts.” This category includes such things as microscopic hair analysis, fiber analysis, and bite mark analysis.¹⁴⁵ Other techniques are reliable but are not particularly probative, such as traditional serology techniques. Yet other times the prosecution experts are sloppy, incompetent, or deceptive in rendering results that are useless but highly persuasive to lay jurors.

Scheck, Neufeld, and Dwyer indicate from the 74 cases they examined, 26 involved microscopic hair comparisons, 38 involved serology inclusions, 25 included defective or fraudulent science, and five contained other faulty forensic inclusions.¹⁴⁶ Only 1.6% of Rattner’s study contained forensic science errors.¹⁴⁷ Of the 31 erroneous murder convictions listed on the Innocence Project website, at least 10 involved some sort of problematic scientific testimony.¹⁴⁸

A relevant case to consider on this point is that of Ray Krone. Police suspected Krone of killing a waitress at a bar he frequented.¹⁴⁹ They found

¹³⁸ *Id.* at 113-114.

¹³⁹ *Id.* at 121.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 132.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 137.

¹⁴⁵ *Id.* at 208-213. See generally, Michael J. Saks, *Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science*, 49 *Hastings L.J.* 1069, 1094-1127 (1998).

¹⁴⁶ Scheck, *supra* n. 24, at 361.

¹⁴⁷ Rattner, *supra* n. 59, at 291.

¹⁴⁸ Innocence Project, *supra* n. 60.

¹⁴⁹ Innocence Project, Ray Krone, http://www.innocenceproject.org/case/display_profile.php?id=105 (accessed Nov. 23, 2003).

no fingerprints at the scene, although they did find the victim's blood and a bite mark on the victim with saliva. The saliva belonged to someone with the most common blood type. Officers made Krone give a dental impression on Styrofoam. A so-called expert said that Krone's impression matched the bite mark on the victim.¹⁵⁰ Despite his claims of innocence, he was sentenced to death and 21 years for murder and kidnapping in 1992.¹⁵¹ In 1996, he won an appeal for a new trial.¹⁵² He was again convicted on the bite mark testimony, but this time the judge only gave a life sentence because of doubts the judge had about Ray's guilt.¹⁵³

In 2002, the saliva and blood were submitted for DNA testing.¹⁵⁴ The results excluded Krone and indicated that the perpetrator was Kenneth Phillips, who was serving time for an unrelated sex crime.¹⁵⁵ The district attorney dismissed the charges and pursued a murder conviction against Phillips.¹⁵⁶ Krone was released in April of that year.¹⁵⁷

5. State Misconduct

Misconduct by various state representatives can also lead to erroneous convictions. This includes police misconduct at many stages in the investigation, prosecutorial misconduct in various ways such as not disclosing exculpatory evidence, or even state employed forensic workers fabricating or misrepresenting evidence.

Scheck, Neufeld, and Dwyer state that of the 74 exonerations they investigated, 33 involved prosecutorial misconduct and 37 involved police misconduct.¹⁵⁸ Either prosecutorial misconduct, police misconduct or both was a factor in 64% of exonerations studied by them.¹⁵⁹ Armstrong found that "since 1963, at least 381 murder convictions across the nation have been reversed because of police or prosecutorial misconduct."¹⁶⁰ State misconduct was a factor in at least 6.8% of the cases examined by

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Scheck, *supra* n. 24, at 361.

¹⁵⁹ *Id.* at 225.

¹⁶⁰ *Id.* at 226.

Rattner.¹⁶¹ Of the 31 murder cases described on the Innocence Project website, at least 12 involved some sort of state misconduct.¹⁶²

It is also necessary to examine a Columbia Law School study, *A Broken System: Error Rates in Capital Cases, 1973-1995*.¹⁶³ As mentioned earlier, the study found that 68% of all capital sentences from 1973-1995 were thrown out because of serious errors.¹⁶⁴ While this does not indicate intentional misconduct, it does represent that procedural errors seriously plague capital punishment implementation.

The problems of state misconduct are illustrated in the case of Rolondo Cruz. After a disturbing abduction, rape, and murder of a 10 year-old girl, police desperately needed answers.¹⁶⁵ Alejandro Hernandez, known as Crazy Alex, began providing all sorts of names and stories after hearing about the reward.¹⁶⁶ Hernandez pointed the finger at Cruz, who was well-known in the area for committing petty offenses.¹⁶⁷

Cruz was then interrogated by the police, and began giving information too.¹⁶⁸ He claimed that he had heard where the murder had been committed.¹⁶⁹ Cruz and Hernandez kept talking and eventually became suspects because of their incessant stories.¹⁷⁰ On the eve of the Republican Primary in the county, the prosecutor secured indictments.¹⁷¹

The day before the trial began, and with a weak case, the prosecutor announced he had just learned that Cruz had purportedly told two detectives about a dream he had about the girl's murder.¹⁷² In his description of the dream, Cruz had provided specific details about the crime that had not been released to the public.¹⁷³ There was no record of this conversation ever having taken place, but it became one of the key pieces of evidence.¹⁷⁴

Six months after the state obtained convictions against Cruz and Hernandez, a "pedophile and murderer named Brian Dugan had been

¹⁶¹ Rattner, *supra* n. 59, at 291.

¹⁶² *Innocence Project*, *supra* n. 60.

¹⁶³ Liebman, *supra* n. 8.

¹⁶⁴ *Id.*

¹⁶⁵ Scheck, *supra* n. 24, at 226-227.

¹⁶⁶ *Id.* at 227.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

arrested in other sexual assault cases, not far from the scene of [the victim's] murder."¹⁷⁵ Trying to curry favor to avoid death, he told prosecutors that he had murdered three other people including the victim in the Cruz case.¹⁷⁶ He said he had committed it alone and that Cruz and Hernandez were not involved.¹⁷⁷ DNA evidence confirmed his story.¹⁷⁸

Cruz appealed his conviction.¹⁷⁹ The prosecutor's office maintained that Cruz was guilty.¹⁸⁰ Two officers and an attorney in the prosecutor's office quit in protest.¹⁸¹ The conviction was overturned on procedural errors on appeal and the prosecution set to try him again.¹⁸²

At the new trial, the defense called the dream testimony into question because there had been no record of the conversation.¹⁸³ The officers offered as corroboration that they had contacted their supervisor and told him of the dream conversation and asked for advice.¹⁸⁴ When the supervisor was questioned during trial preparation, he said that he had been called and remembered talking to them.¹⁸⁵ The prosecution was planning to call him as a witness but the night before the situation suddenly changed.¹⁸⁶ The supervisor came to the prosecutor's office and told them he must have been mistaken because he realized he had been in Florida on vacation during the time the conversation supposedly occurred.¹⁸⁷ The judge at the bench trial heard this testimony and declared Cruz not guilty.¹⁸⁸ The county later agreed to pay \$3.5 million to settle civil rights claims brought by Cruz and his co-defendants.¹⁸⁹

¹⁷⁵ *Id.* at 230.

¹⁷⁶ *Id.* at 227.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 229-230.

¹⁷⁹ *Id.* at 230.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 230-231.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 231.

¹⁸⁷ *Id.*

¹⁸⁸ Center for Wrongful Convictions, *Police Perjury and Jailhouse Snitch Testimony put Rolando Cruz on Death Row*, <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/cruz.htm> (last modified, Jan. 21, 2003).

¹⁸⁹ *Id.*

6. Bad lawyers

Another factor causing erroneous convictions is bad defense lawyering. In order for the adversarial system to function properly, both sides must have competent representation. The Innocence Project found 32% of the cases they examined involved "subpar or outright incompetent legal help."¹⁹⁰

Wrongful convictions have occurred when defense counsel have fallen asleep during the trial, shown up intoxicated, and failed to spend adequate time researching the case or examining witnesses.¹⁹¹ The problem is not always due to the failures of the lawyer, as sometimes the problems are systemic. For instance, a public defender carrying an unmanageable load of clients will not be able to represent them to the best of his or her abilities.¹⁹²

Also problematic is that many states are simply not willing to pay adequate money for indigent defense. Scheck, Neufeld and Dwyer report that in Mississippi, the maximum fee for non-death penalty cases is \$1,000 plus minimal overhead allowance.¹⁹³ In portions of Texas, the limit is \$800. Virginia caps felony defense at \$305 when the punishment is less than 20 years.¹⁹⁴

One example of this can be seen in the case of the Ford Heights Four. One of the men, Dennis Williams, an African American, was represented by a lawyer named Archie Weston.¹⁹⁵ Mr. Weston made no objections as the prosecution systematically excluded African-Americans from the jury.¹⁹⁶ He never called into question an important discrepancy in timing that should have been evident in one of the prosecution's key witness's story.¹⁹⁷ Weston also never talked to any of the forensic experts who testified about hairs found in Williams' car seat.¹⁹⁸ It was later discovered that these hairs did not match the victims' as the prosecution claimed.¹⁹⁹ Williams was found guilty and sentenced to death.²⁰⁰ Upon review, the

¹⁹⁰ Scheck, *supra* n. 24, at 242.

¹⁹¹ *See id.* at 243-244.

¹⁹² *See Douglas Vick, Pothouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *Buff. L. Rev.* 329 (1995).

¹⁹³ Scheck, *supra* n. 24, at 244.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 238.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 239.

Illinois Supreme Court said Williams was only “entitled to competent, not perfect, representation.”²⁰¹

Several weeks after the Illinois Supreme Court heard the case, one of the justices recognized Weston’s name among disciplinary cases against lawyers in the state.²⁰² Weston was in trouble for seriously mishandling an estate.²⁰³ A \$23,000 judgment was rendered against him in the case and his house was seized when he did not pay.²⁰⁴ Disbarment procedures had commenced when he failed to respond to a subpoena.²⁰⁵ When he came to defend his license before the State Supreme Court they inquired why he failed to respond to the subpoena.²⁰⁶ He said that he was under extreme stress and “had not been thinking straight.”²⁰⁷ The justices compared the timelines and saw that this period of time coincided with the Williams’ trial.²⁰⁸ The Court ultimately granted Williams a new trial.²⁰⁹ He and his co-defendants were eventually proven innocent.²¹⁰

III. THE IMPACT OF THE INNOCENCE REVOLUTION

A. *Impact on Individuals*

The Innocence Revolution has undoubtedly left its impact on the public at large. One primary impact has been waning public support for the death penalty. A Gallup Poll released in May 2003 indicated that “73% of Americans believe an innocent person has been executed under the death penalty in the last five years.”²¹¹ According to the report, about 12% of Americans believe more than 20% of executions involve innocent people.²¹² Yet 74% still expressed support for the death penalty.²¹³ This

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 240.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 241.

²¹⁰ *Id.*

²¹¹ Jeffrey Jones, *Support for the Death Penalty Remains High at 74%*, Gallup Poll News Serv. (May 19, 2003).

²¹² *Id.*

²¹³ *Id.*

number falls to 53% when asked if they preferred the death penalty to life in prison without parole.²¹⁴ This number can be compared to 61% who still preferred the death penalty to life in prison without parole in 1997.²¹⁵ It is also noteworthy to point out that in 1991, 11% of people who indicated they were against the death penalty said that the risk of executing an innocent person was the primary reason.²¹⁶ In 2003, that number has jumped to 25%.²¹⁷

The view of the public is also reflected in the actions of public servants in legislative and executive realms of power. A sample of various states provides some insight. For instance, in January of 2000 George Ryan, then Governor of Illinois, implemented a moratorium on executions in the State, due largely to concerns that innocent people were being executed.²¹⁸ Other states have considered proposals for similar moratoriums. Nebraska's legislature passed a moratorium bill so that a comprehensive study of the death penalty could be undertaken.²¹⁹ The governor vetoed the measure, but the study went forward nonetheless.²²⁰

The Governor of Maryland also required a comprehensive study of capital punishment within its state.²²¹ In 2001, the state's House of Delegates passed a moratorium until the study could be completed and reviewed.²²² The bill was blocked in the State Senate.²²³ However, the Maryland Supreme Court responded by imposing a moratorium of its own.²²⁴ Results of the study have shown racial and geographical biases in the implementation of the system.²²⁵ On May 9, 2002, Governor Parris Glending imposed a moratorium on executions.²²⁶ In the election later that

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Jeffrey Jones, *Understanding Americans' Support for the Death Penalty, Gallup Poll Tuesday Briefing, 3*, <http://www.gallup.com/poll/tb/religValue/20030603c.asp?Version=p> (last updated June 3, 2003).

²¹⁷ *Id.*

²¹⁸ *E.g.* Armstrong, *supra* n. 2, at 95.

²¹⁹ James S. Liebman et al., *A Broken System, Part II: Why Is There So Much Error in Capital Cases, and What Can Be Done About It, Pt. 1*, <http://www2.law.columbia.edu/brokensystem2/sectionI.html> (accessed Nov. 23, 2003).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *See* Editorial, *Maryland's Execution Pause*, Wash. Post B6 (Apr. 15, 2001) (stating "The Maryland Court of Appeals on Thursday accomplished what the state's legislature failed to do a few days earlier -- put a temporary halt on executions in the state").

²²⁵ American Bar Association, *Latest Developments/Trends*, <http://www.abanet.org/moratorium/latesttrend.html> (last updated Nov. 6, 2003).

²²⁶ *E.g.* Dennis O'Brien and David Nitkin, *Glending Halts Executions*, Balt. Sun Telegraph, Pg 1A

year, Glending was defeated by Robert Erlich who stated he would lift the moratorium.²²⁷ He followed through within two weeks of his inauguration.²²⁸ The State Supreme Court has recently ruled and removed all obstacles from the resumption of executions.²²⁹

Nevada's Senate also passed a bill that placed a moratorium on executions.²³⁰ The Assembly passed a bill that modified the approach, requiring a study to be completed rather than an outright moratorium.²³¹ As a result of the study, the State implemented several changes to the operation of the system.²³²

In May of 2003, the Texas Senate passed Senate Bill 1045.²³³ The Bill would create an Innocence Commission to study cases of wrongful conviction and to suggest remedies to prevent further occurrences.²³⁴ The State enacted legislation to provide for better indigent counsel.²³⁵ Texas has also joined several other states in providing inmates access to DNA testing under certain circumstances.²³⁶ More recently, Travis County became the first in the state of Texas to pass a resolution in support of a moratorium.²³⁷

In North Carolina, the State Senate passed Senate Bill 972 calling for a two-year moratorium on executions while a study of the State's system could be performed.²³⁸ The bill went to House but floundered in Committee.²³⁹ Members in the House are trying to garner further support for the proposal.²⁴⁰

(May 10, 2002).

²²⁷ *Maryland Execution Moratorium Ends*, Associated Press Online (Jan. 22, 2003) (from LexisNexis Academic).

²²⁸ *Id.*

²²⁹ Susan Levine and Lori Montgomery, *Ruling Allows Executions to Resume in Maryland*, Wash. Post B1 (Nov. 18, 2003); *see also Oken v. State*, 2003 Md. LEXIS 750 (November 17, 2003).

²³⁰ Liebman et al, *supra* n. 219.

²³¹ *Id.*

²³² *See* American Bar Association, *supra* n. 225 (indicating changes include requiring a team of attorneys to work a capital case and raising the amount paid for court appointed attorneys.)

²³³ Death Penalty Information Center, *Changes in Death Penalty Laws Around the U.S. - 2000-2003*, <http://www.deathpenaltyinfo.org/article.php?did=236&scid=40> (accessed Nov. 23, 2003); *see* Tex. Sen. 1045, 78th Leg. Sess. (Mar. 7, 2003).

²³⁴ *Id.*

²³⁵ Death Penalty Information Center, *supra* n. 233; *see* 2001 Tex. Gen. Laws 906. The act provided for minimum standards for counsel, fair assignment, counsel must be provided within five days of arrest, and research assistance provided for cases involving serious felonies or capital cases. *Id.* It also provided \$20 million to help finance the indigent defense. *Id.*

²³⁶ Liebman et al, *supra* n. 219.

²³⁷ Death Penalty Information Center, *supra* n. 233.

²³⁸ N.C. Sen. 972, 2003 Sess. (Apr. 2, 2003).

²³⁹ Mark Toscak, *Event Works to Suspend Executions*, Greensboro News and Rec. B1 (Nov. 9, 2003).

²⁴⁰ *Id.*

To date, more than 3,300 organizations, groups, and local governments have passed resolutions in support of a moratorium.²⁴¹ A prominent defender of the death penalty has described “a true crisis of confidence in the death penalty in the United States.”²⁴² He points out that while there is still strong support, the trend has begun against it.²⁴³ He notes that a significant reason for this trend is increased attention on the risk of possibly executing an innocent person.²⁴⁴ The shaken confidence created by the Innocence Revolution has likely played a role in the declining numbers of people sentenced to death. In 1994 and 1995, 327 people in the United States were sentenced to death. In 2002, the number had dropped to 159.²⁴⁵

Thirty-eight jurisdictions have passed statutes allowing post-conviction DNA testing.²⁴⁶ Similar legislation has been proposed in many of the other jurisdictions.²⁴⁷ All of these facts indicate that the Innocence Revolution is spurring a desire for change within our criminal justice system.

²⁴¹ Quixote Center/Equal Justice, USA, *National Talley*, <http://www.quixote.org/ej/> (accessed Nov. 23, 2003).

²⁴² Joseph Hoffmann, *Violence and the Truth*, 76 Ind. L.J. 939, 940 (2001).

²⁴³ *Id.*

²⁴⁴ *Id.* at 941.

²⁴⁵ Thomas P. Bonczar & Tracy L. Snell; *Capital Punishment, 2002*, U.S. Dept of Justice, Bureau of Justice Statistics, Bulletin 8 (Nov. 2003) (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf> (accessed Nov. 23, 2003)).

²⁴⁶ See Arizona (Ariz. Rev. Stat. §13-4240 (2003)); Arkansas (Ark. Code Ann. §16-112-207(b)(1) (2003)); California (Cal. Penal Code § 1405 (LEXIS current through the 2004 supplement)); Colorado (Colo. Rev. Stat. §§ 18-1-411--416 (2003)); Connecticut (2003 Conn. Pub. Act 242); Delaware (Del. Code Ann. tit. 11 §4504 (2003)); District of Columbia (D.C. Code § 22-4133 (2003)); Florida (Fla. Stat. Ch. 925.11 (2003)); Georgia (Ga. Code Ann. §5-5-41(c) (2003)); Idaho (Idaho Code §19-4902 (b) (2003)); Illinois (725 Ill. Comp. Stat. 5/116-3 (2003)); Indiana (Ind. Code §§ 35-38-7-1-19 (LEXIS current through 2003 regular session)); Kansas (Kan. Stat. Ann. § 21-2512 (2002)); Kentucky (Ky. Rev. Stat. Ann. § 422.285 (2002)) (capital cases only); Louisiana (La. Code of Crim. Proc. art 926.1 (2003)); Maine (15 Me. Rev. Stat. Ann. §§ 2136-2138 (2003)); Maryland (Md. Crim. Proc. Code Ann. §8-201 (2002)); Michigan (Mich. Comp. Laws §770.16 (2003)); Minnesota (Minn. Stat. §§ 590.01-.06 (2002)); Missouri (Mo. Rev. Stat. §547.035 (2003)); Montana (Mont. Code Ann. § 46-21-110 (2003)); Nebraska (Neb. Rev. Stat. §§ 29-4120--4125 (2003)); Nevada (2003 Nev. Stat. 335); New Jersey (N.J. Stat. Ann. § 2A:84A-32a (2003)); New Mexico (N.M. Stat. Ann. §31-1A-2 (2003)); New York (N.Y. Crim. Proc. Law § 440.30 (Consol. 2003)); North Carolina (N.C. Gen. Stat. §15A-269 (2003)); Ohio (2003 Ohio Laws 23); Oklahoma (Okla. Stat. tit. 22, §§1371.1--2 (2003)); Oregon (2001 Or. Laws 697 (2001)); Pennsylvania (42 Pa. Consol. Stat. Ann. § 9543.1 (2003)); Rhode Island (R.I. Gen. Laws §§ 10-9.1-10--12 (2003)); Tennessee (Tenn. Code Ann. §§ 40-30-301--313 (2003)); Texas (Tex. Crim. Proc. Code Ann. §§ 64.01--.05 (2003)); Utah (Utah Code Ann. §§ 78-35a-301-- 304 (2003)); Virginia (Va. Code Ann. § 19.2-327.1 (2003)); Washington (Wash. Rev. Code § 10.73.170 (2003)); Wisconsin (Wisconsin Stat. § 974.07(2002)). See *Jenner v. Dooley*, 590 N.W.2d 463, 471-472 (S.D. 1999) (stating that South Dakota allows post-conviction DNA testing).

²⁴⁷ Federal (H.R. 3214, 108th Cong. (Oct. 1, 2003)); Massachusetts (Mass. Sen. 178, 183d Gen. Ct. Reg. Sess. (Jan. 9, 2003)); Mississippi (Miss. H. 169, 2003 Reg. Sess. (Dec. 13, 2002) (failed)); New Hampshire (N.H. H. 640, 158th Gen. Ct., Reg. Sess. (Jan. 9, 2003) (failed)); South Carolina (S.C. H. 4068, 115th Gen. Assembly, Reg. Sess. (Apr. 24, 2003)); West Virginia (W.Va. H. 3098, 78th Leg., Reg. Sess. (Feb. 21, 2003)).

B. *Impact on the Judicial System*

The Supreme Court in *Atkins v. Virginia*²⁴⁸ ruled that the execution of mentally handicapped individuals was cruel and unusual.²⁴⁹ This decision represents the Supreme Court's latest affirmation of the doctrine that the standard of Eighth Amendment cruel and unusual punishment should be measured in light of an "evolving standard of decency"²⁵⁰ or our "contemporary standard of decency."²⁵¹ In making this determination, the Court deemed that the current societal values mandated a re-evaluation of the practice.²⁵² Reaching the decision therefore required the Court to assess current societal values.²⁵³

Noteworthy to the discussion at hand was footnote 25 of the decision where the court talks about aspects of the person's ability to defend.²⁵⁴ The court notes, "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. [T]hese exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit."²⁵⁵

A Federal District Court in Massachusetts dealt with the issue of possibly executing an innocent person directly in *United States v. Sampson*.²⁵⁶ The challenge alleged that the Federal Death Penalty Act was unconstitutionally cruel and unusual because of the risk of executing an innocent person.²⁵⁷ The argument stated that the "evolving standard of decency" did not allow executions to occur in a system fraught with error such that an innocent person may be executed.²⁵⁸

The court drew from *Atkins v. Virginia* in evaluating the contention.²⁵⁹ It focused on "objective indicia of contemporary attitudes."²⁶⁰ Several sources were utilized in assessing the public climate on the issue including

²⁴⁸ 536 U.S. 304.

²⁴⁹ *Id.* at 321.

²⁵⁰ *Id.* at 312 (quoting *Trop*, 356 U.S. at 101.) See *supra* note 1 and accompanying text.

²⁵¹ *Hudson*, 503 U.S. 1 at 8 (quoting *Estelle*, 429 U.S. 97 at 103).

²⁵² *Atkins*, 536 U.S. at 312-313.

²⁵³ *Id.*

²⁵⁴ *Id.* at 320, n. 25.

²⁵⁵ *Id.*

²⁵⁶ 275 F. Supp. 2d 49 (D. Mass. 2003).

²⁵⁷ *Id.* at 54.

²⁵⁸ *Id.* at 58.

²⁵⁹ *Id.* at 55.

²⁶⁰ *Id.*

enacted legislation, jury decisions, and public opinion polls.²⁶¹

The public opinion polls revealed strong support for capital punishment despite beliefs that innocent persons have been executed.²⁶² Jury decisions weighed against capital punishment as only one jury of the previous seventeen federal death penalty cases rendered the death penalty.²⁶³ The legislation weighed in favor of continued executions because no new states had repealed their capital punishment statutes and only one continued the moratorium.²⁶⁴ The conclusion of the court was that although the mood of the country may be slowly shifting, it has not yet reached a point where the threat of executing an innocent person went beyond the current standard of decency.²⁶⁵

IV. THE IMPACT OF CONVICTING INNOCENTS ON OUR EVOLVING STANDARDS OF DECENCY

What effect should the Innocence Revolution have on our evolving standards of decency in death penalty jurisprudence? If we accept the fact that innocent people inevitably slip through the fallible criminal justice system, where does that leave capital punishment?

Perhaps one could argue that executing a few innocent people is acceptable for the net gain of protection to society that the death penalty offers. After all, governments have to make decisions that can take innocent lives on a regular basis. Consider, for example, the decision to send troops into combat. About 81,700 United States troops died in combat in wars or major conflict from 1950 to 2000, while many others have died in peacekeeping missions.²⁶⁶

Consider the number of innocent lives lost on our nation's highways due to increases in the speed limit. For instance, when the government raised the speed limit on interstate highways, the National Highway Traffic Safety Administration ("NHTSA") found that 350 more people died on interstates than would otherwise have been predicted had the increase not

²⁶¹ *Id.*

²⁶² *Id.* at 58. See *supra* notes 211-217 and accompanying text.

²⁶³ *Sampson*, 275 F. Supp. 2d at 58-59.

²⁶⁴ *Id.* at 59. It points out that the Illinois legislature had not taken the further step of a repeal. *Id.* It does note that twelve jurisdictions had introduced repeal legislation, so it was important to keep an eye on this aspect. *Id.*

²⁶⁵ *Id.* at 86.

²⁶⁶ The United States Civil War Center, *Statistical Summary: America's Major Wars*, <http://www.cwc.lsu.edu/cwc/other/stats/warcost.htm> (last modified June 13, 2001).

occurred.²⁶⁷ The Insurance Institute for Highway Safety reports a 15 percent increase in fatalities on interstates and freeways as a result of increased speed limits.²⁶⁸

Capital punishment, however, can be distinguished from these examples and governmental decisions similar to them. In the examples above, there is some element of choice made by the innocent individuals who ultimately lose their lives.²⁶⁹ Individuals who enlist in the military do so with the understanding that the risk of death is involved. Likewise, people understand that driving can be a dangerous endeavor. In 2000, about 42,000 people died in automobile accidents in the United States.²⁷⁰ The situation; therefore, generally includes some assumption of risk by the individual. However, the case is very different for a person wrongfully convicted. The person does not make a choice to be considered for execution or assume any sort of risk.

Another distinguishing factor between these examples and that of capital punishment is the availability of practical and functionally equivalent safer alternatives. Most would agree that it is simply not practical for our country to go forward with no armed forces, and thus no risk of losing innocent lives in combat. Similarly, in order to lower the death rate on highways to near zero, the speed limit would have to be reduced to a near crawl, which would suffocate our economy. In the death penalty scenario, however, the state could utilize life without the possibility of parole to achieve the same incapacitating role and would run no risk of executing an innocent person. This is not to say that imprisoning an innocent person to life imprisonment is by any means desirable, but it is at least reversible if the truth is later found.

In addition, in the areas of combat and highway safety, our society continually takes steps to reduce the chances of innocent lives being lost. In contrast, the criminal justice system has done very little to correct the errors in the system that the Innocence Revolution has brought to light. There are various ways of working to decrease the risk of error within the system. One step that can and is being taken in many areas is to videotape interrogations and confessions.²⁷¹ This provides a record of what transpired

²⁶⁷ NHTSA, *The Effect of Increased Speed Limits in the Post-NMSL Era*, <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/1998/Speedlim.pdf> (accessed Nov. 23, 2003).

²⁶⁸ Ohio Insurance Institute, *Ohio Insurance Facts 2001*, ch. 6, http://www.ohioinsurance.org/factbook2001/chapter6/chapter_6f.htm (accessed Nov. 23, 2003).

²⁶⁹ An obvious exception to this would be instances of conscription.

²⁷⁰ U.S. Census Bureau, *Statistical Abstracts of the United States: The National Data Book 2002*, pg. 80, chart 101 (2002 online ed. - online edition 2003) (available at <http://www.census.gov/prod/2003pubs/02statab/vitstat.pdf> (accessed Nov. 23, 2003)).

²⁷¹ Leo, *supra* n. 106, at 49.

during questioning that juries and others can review.²⁷² Such a record allows for people to see when coercive techniques are utilized and creates a deterrent for officers to coerce false confessions from innocent suspects.²⁷³ It also serves to prevent false claims of abuse, thus protecting the police.

Another step that can be taken is to change the way identification lineups are conducted. First, lineups should be conducted using the "double-blind" method, where the officer who implements the lineup should not know which person is the suspect in order to prevent nonverbal cues to the witness as to which photograph the witness should select.²⁷⁴ Second, the witness should be told that the suspect may not be in the lineup and the person does not have to make a selection.²⁷⁵ Third, the suspect should not stand out from those whom he is being lined up amongst.²⁷⁶ Fourth, the eyewitness should indicate how confident he or she is at the time of the identification.²⁷⁷ Fifth, the photographs or individuals should be shown to the witness in sequential order, one at a time, rather than in a group. Studies show that these methods drastically reduce the chances that the witness will select the wrong person, while remaining equally as effective in finding the true perpetrator.²⁷⁸

Also, further steps should be taken to ensure adequate counsel for all. This should include increasing the amount paid to those who take indigent cases.²⁷⁹ Included in this should be making sure public defenders are paid at a competitive rate.²⁸⁰ Public defender workloads should be kept at manageable levels by having the staff necessary to deal with the normal case load.²⁸¹

Informants and snitches should be used sparingly.²⁸² Courts and juries should be extremely skeptical of their testimony, and jury instructions should be designed to incorporate the problems with informants that the Innocence Revolution has unveiled.²⁸³ In fact, informants should only be utilized to the extent that other facts or information independently

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Gary L. Wells et al., *Eye Witness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Hum. Behav. 603, 627 (1998).

²⁷⁵ *Id.* at 629.

²⁷⁶ *Id.* at 630.

²⁷⁷ *Id.* at 635.

²⁷⁸ *See id.* at 627-641.

²⁷⁹ Scheck, *supra* n. 24 at 355.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 352.

²⁸³ *Id.* at 352-353.

corroborates the bulk of their testimony.²⁸⁴

But even if we implement these changes and more, and provide access to DNA testing for all individuals accused of crimes, we will still not have a perfect system. In the end, human fallibility always seeps through. DNA testing is available only in the limited number of cases where appropriate biological material is left at the scene of the crime. Barring some miraculous omniscience, the risk of convicting an innocent person will remain.

V. CONCLUSION

The Innocence Revolution confirms that the criminal justice system does convict innocent people. This new understanding requires reassessment of society's standard of decency. In imposing the ultimate irreversible punishment, we need to carefully evaluate our willingness to possibly end an innocent person's life. This evaluation needs to be informed by the risks, viable alternatives, and the extent that further safeguards could assist if utilized.

²⁸⁴ *Id.*