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THE INNOCENCE REVOLUTION AND OUR "EVOLVING STANDARDS OF DEENCY" 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." 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. 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.

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1 Atkins v. Va., 536 U.S. 304, 311-12 (2002) (quoting Trop 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).


3 Id.
The recent advent of DNA testing and other advanced technologies, however, have demonstrated the fallacy and naivety 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, and has had prisoners on death row exonerated at a rate of approximately 0.8 people per year during that same time period. The Death Penalty Information Center Reports that 108 people have been freed from death row across the nation since 1973 because of innocence. This past year, 2003, broke the record for most death penalty exonerations with 10. A study released in 2000 by Columbia Law School examined error rates in capital cases from 1973-1995. The study reports 68% of death sentences imposed and reviewed by appellate courts were thrown out because of serious flaws.
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, 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.* In the book he outlines 65 cases where persons convicted of crimes were later released because of a showing of innocence. In two of the capital cases, the individuals had actually gone to the gallows. One was given more time to have his innocence investigated after it was discovered that his death warrant had the wrong name. The other was saved when the knot of the noose unraveled rather than tightening when he was dropped from the gallows.

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

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10 See Armstrong, supra n. 2, at 95-102.
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. In the article, the two presented the cases of 350 individuals they believed to be wrongfully convicted during the Twentieth Century. All these cases were considered potentially capital, but only 139 involved actual death sentences.

Around the same time, Jim McClosky began taking an active interest in prisoners wrongfully imprisoned for crimes they had not committed. His interest led to his creation of the New Jersey-based Centurion Ministries in 1983. The mission of the organization is to render assistance to those who are wrongfully imprisoned. The efforts of the organization have led to 32 inmates being freed as of this writing.

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. 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. 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. Eventually, in 1992, the two worked together to officially start the Innocence Project. They, along with Jim Dwyer, wrote Actual Innocence: Five Days to Execution, and Other Dispatches, which was released in 2000. The book documents several notable cases of wrongful convictions they had been involved with and gives recommendations for what can be done to decrease

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17 Id. at 23-24.
18 Id. at 31-32.
19 Id. at 38.
21 Id.
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.
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.
35 Id.
36 Id.
37 Id.
38 Id.
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
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. A study of wrongful convictions by Arye Rattner found 52.3% of cases she studied to involve mistaken eyewitness identifications. Looking at the Innocence Project website descriptions of the 138 Innocence Network exonerations, 31 wrongful convictions for murder have descriptions. Of the 31 exonerations listed on the Innocence Project website, eyewitness mistake was a major factor in five of the cases.

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. “[O]nly 16% of Bedau and Radelet’s cases of errors in potentially capital prosecutions” involved mistaken eyewitness testimony. Gross speculates that this phenomenon in murder cases is likely the result of the main witness being dead. 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. This creates less likelihood of error on their part in the first place. It should also be noted that a survey by Warden, 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.

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. She paid careful attention to her

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59 Arye Rattner, *Convicted but Innocent*, 12 L. & Hum. Behav. 283, 291 (1988). The next highest source of error accounted for only 11%. Id.
61 See id.
62 Gross, supra n. 58, at 413.
64 Id.
65 Id.
66 See id.
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.
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 Id.

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

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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.
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.

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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. Panic had overcome the area and police began to canvass the area, questioning 173 African American males. Twenty-three of the individuals questioned gave blood samples. Miller's blood type matched that of the attacker.

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. 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. The interrogation session was videotaped. It was described as "a numbing drone of hallucination, interrogation, exorcism, revival, and nonsense." Among the many bizarre interactions of the interrogation was the suspect trying to envision what happened in the murders.

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

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

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

112 Id. at 103.
113 Id.
114 Id.
115 Id.
116 Id. at 104.
117 Id.
118 Id.
119 Id.
120 Id. at 105-109.
121 Id. at 109-110.
122 Id. at 111.
123 Id. at 110.
124 Id. at 111.
125 Id.
126 Id. at 113.
127 Id.
128 Id.
involved and also disputed the results. By 1993, a second series of tests were done excluding Miller as the rapist. The prosecution relied heavily on the videotaped "confession" as solid evidence of his guilt. In 1995, the district attorney finally agreed Miller should get a new trial. In 1997, a hearing was held to decide if there was a basis to keep him for trial. The forensic evidence cleared Miller, and a jail house snitch had recanted and disappeared, so all that remained was the tape. The prosecution eventually dropped the charges and Miller was released in January of 1998.

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. 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. Only 1.6% of Rattner’s study contained forensic science errors. Of the 31 erroneous murder convictions listed on the Innocence Project website, at least 10 involved some sort of problematic scientific testimony.

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. They found

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138 Id. at 113-114.
139 Id. at 121.
140 Id.
141 Id. at 132.
142 Id.
143 Id.
144 Id. at 137.
146 Scheck, supra n. 24, at 361.
147 Rattner, supra n. 59, at 291.
148 Innocence Project, supra n. 60.
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.\textsuperscript{150} Despite his claims of innocence, he was sentenced to death and 21 years for murder and kidnapping in 1992.\textsuperscript{151} In 1996, he won an appeal for a new trial.\textsuperscript{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.\textsuperscript{153}

In 2002, the saliva and blood were submitted for DNA testing.\textsuperscript{154} The results excluded Krone and indicated that the perpetrator was Kenneth Phillips, who was serving time for an unrelated sex crime.\textsuperscript{155} The district attorney dismissed the charges and pursued a murder conviction against Phillips.\textsuperscript{156} Krone was released in April of that year.\textsuperscript{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.\textsuperscript{158} Either prosecutorial misconduct, police misconduct or both was a factor in 64\% of exonerations studied by them.\textsuperscript{159} Armstrong found that “since 1963, at least 381 murder convictions across the nation have been reversed because of police or prosecutorial misconduct.”\textsuperscript{160} State misconduct was a factor in at least 6.8\% of the cases examined by

\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Scheck, supra n. 24, at 361.
\textsuperscript{159} Id. at 225.
\textsuperscript{160} Id. at 226.
Rattner.\textsuperscript{161} Of the 31 murder cases described on the Innocence Project website, at least 12 involved some sort of state misconduct.\textsuperscript{162}

It is also necessary to examine a Columbia Law School study, \textit{A Broken System: Error Rates in Capital Cases, 1973-1995}.\textsuperscript{163} As mentioned earlier, the study found that 68% of all capital sentences from 1973-1995 were thrown out because of serious errors.\textsuperscript{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.\textsuperscript{165} Alejandro Hernandez, known as Crazy Alex, began providing all sorts of names and stories after hearing about the reward.\textsuperscript{166} Hernandez pointed the finger at Cruz, who was well-known in the area for committing petty offenses.\textsuperscript{167}

Cruz was then interrogated by the police, and began giving information too.\textsuperscript{168} He claimed that he had heard where the murder had been committed.\textsuperscript{169} Cruz and Hernandez kept talking and eventually became suspects because of their incessant stories.\textsuperscript{170} On the eve of the Republican Primary in the county, the prosecutor secured indictments.\textsuperscript{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.\textsuperscript{172} In his description of the dream, Cruz had provided specific details about the crime that had not been released to the public.\textsuperscript{173} There was no record of this conversation ever having taken place, but it became one of the key pieces of evidence.\textsuperscript{174}

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

\textsuperscript{161}Rattner, supra n. 59, at 291.
\textsuperscript{162}Innocence Project, supra n. 60.
\textsuperscript{163}Liebman, supra n. 8.
\textsuperscript{164}Id.
\textsuperscript{165}Scheck, supra n. 24, at 226-227.
\textsuperscript{166}Id. at 227.
\textsuperscript{167}Id.
\textsuperscript{168}Id.
\textsuperscript{169}Id.
\textsuperscript{170}Id.
\textsuperscript{171}Id.
\textsuperscript{172}Id.
\textsuperscript{173}Id.
\textsuperscript{174}Id.
arrested in other sexual assault cases, not far from the scene of [the victim’s] murder.\textsuperscript{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.\textsuperscript{176} He said he had committed it alone and that Cruz and Hernandez were not involved.\textsuperscript{177} DNA evidence confirmed his story.\textsuperscript{178}

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

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

\textsuperscript{175} Id. at 230.
\textsuperscript{176} Id. at 227.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 229-230.
\textsuperscript{179} Id. at 230.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 230-231.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 231.
\textsuperscript{187} Id.
\textsuperscript{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/exoneration/cruz.htm (last modified, Jan. 21, 2003).
\textsuperscript{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.
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.
217 Id.
218 E.g. Armstrong, supra n. 2, at 95.
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”).
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.  

(May 10, 2002).


228 Id.


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.)


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.


240 Id.
To date, more than 3,300 organizations, groups, and local governments have passed resolutions in support of a moratorium. A prominent defender of the death penalty has described "a true crisis of confidence in the death penalty in the United States." He points out that while there is still strong support, the trend has begun against it. He notes that a significant reason for this trend is increased attention on the risk of possibly executing an innocent person. 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.

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

243 Id.
244 Id. at 941.
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.
\(^{257}\) Id. at 54.
\(^{258}\) Id. at 58.
\(^{259}\) Id. at 55.
\(^{260}\) Id.
enacted legislation, jury decisions, and public opinion polls.\textsuperscript{261}

The public opinion polls revealed strong support for capital punishment despite beliefs that innocent persons have been executed.\textsuperscript{262} Jury decisions weighed against capital punishment as only one jury of the previous seventeen federal death penalty cases rendered the death penalty.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{261} Id.

\textsuperscript{262} Id. at 58. See supra notes 211-217 and accompanying text.

\textsuperscript{263} Sampson, 275 F. Supp. 2d at 58-59.

\textsuperscript{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.

\textsuperscript{265} Id. at 86.

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

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. 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. 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. This provides a record of what transpired.

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269 An obvious exception to this would be instances of conscription.
271 Leo, supra n. 106, at 49.
during questioning that juries and others can review. 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. 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. 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. Third, the suspect should not stand out from those whom he is being lined up amongst. Fourth, the eyewitness should indicate how confident he or she is at the time of the identification. 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.

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. Included in this should be making sure public defenders are paid at a competitive rate. Public defender workloads should be kept at manageable levels by having the staff necessary to deal with the normal case load.

Informants and snitches should be used sparingly. 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. In fact, informants should only be utilized to the extent that other facts or information independently

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272 Id.
273 Id.
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.