

Innocence and Its Impact on the Reassessment of the Utility of Capital Punishment: Has the Time Come to Abolish the Ultimate Sanction?

VINCENT R. JONES, J.D.*
DR. BRUCE WILSON**

Has the death penalty lost its appeal and usefulness? Historically, capital punishment held a clear mandate: to punish and deter. However, recent revelations regarding the shortcomings of evidence and the unreliability of both eyewitnesses and confessions have caused a questioning eye to review capital convictions. The result has been unsettling as inmates across the country are being exonerated, some within days of their scheduled executions. These troubling facts have caused several governors to reassess the utility of capital punishment in their states, and some have opted to repeal their death penalty statutes. Connecticut is the latest state to do so. Perhaps the time has come to completely abolish the death penalty in America.

I.	THE DEATH PENALTY IN AMERICA: A BRIEF HISTORY	460	R
	A. <i>The Pre-Modern Era</i>	460	R
	B. <i>The Modern Era</i>	462	R
	1. THE MENTALLY ILL ARE ROUTINELY EXECUTED IN THE UNITED STATES	462	R
	2. THE DEATH PENALTY IS UNFAIRLY APPLIED TO MINORITIES	463	R
	3. ARGUABLY, CAPITAL PUNISHMENT IS THE EMBODIMENT OF "CRUEL AND UNUSUAL PUNISHMENT"	464	R
II.	INNOCENCE AND ITS UNSETTLING EFFECT UPON THE ADMINISTRATION OF THE DEATH PENALTY	466	R
III.	INNOCENCE HAS USHERED IN A NEW ERA IN CAPITAL PUNISHMENT	468	R
IV.	WRONGFUL CONVICTIONS	471	R
	A. <i>Common Causes of Wrongful Convictions in Capital Cases</i>	472	R
	1. EYEWITNESS MISIDENTIFICATION	473	R
	2. FALSE CONFESSIONS	473	R
	i. Police Tactics	473	R

* Vincent R. Jones, J.D. has spent over fifteen years as a national trial lawyer focusing on criminal defense. He is currently an Assistant Professor of Criminal Justice at Governors State University, where he teaches courses on: The History of the Death Penalty, Constitutional Issues in Criminal Justice, and The Discovery of Innocence in the Criminal Justice System. He is co-author of *The Death Penalty in Focus: A Special Topics Anthology*. He is a graduate of Illinois State University with a B.S. in Political Science and a Juris Doctor from The John Marshall Law School in Chicago.

** Dr. Bruce Wilson is an Associate Professor of Criminal Justice at Governors State University.

ii. Informants	474	R
3. UNQUALIFIED DEFENSE LAWYERS	474	R
V. CONCLUSION	475	R

I. THE DEATH PENALTY IN AMERICA: A BRIEF HISTORY

A. The Pre-Modern Era

The first recorded legal execution occurred in 1608.¹ Captain George Kendall, a councilor for the Virginia colony, was executed for the crime of espionage after having been found guilty of spying for Spain.² Thus began the American relationship with capital punishment that continues to this day.³

The origins of capital punishment in this country lie with the early European settlers who brought the sanction with them to the “new world.”⁴ The experience of Captain Kendall was unique, both in the crime for which he was convicted and the method in which his execution was carried out.⁵ The executions that would follow Captain Kendall’s would take a much different path, and a decidedly different approach.⁶ Consider, for example, the fact that Kendall’s crime of espionage was a relatively unusual death-eligible offense for his era, and for ours.⁷ From the 1600s through the 1700s, death-eligible offenses were varied, often unusual, and very much representative of the puritanical views of the era.⁸ For example, some of the death-eligible offenses were participating in witchcraft and idolatry, bestiality, murder, manslaughter, man-stealing, stealing grapes, and trading with Native Americans.⁹ Also, the methods of carrying out the executions for these offenses were equally varied and unusual, and included hanging, shooting, drawing and quartering, burning at the stake, beheading, pressing to death, drowning, and breaking on the wheel.¹⁰ These early forms of execution had very clear objectives—to punish and deter. Little, if any, consideration was given to the issue of whether the methods were humane, whether the method-

1. VICTOR L. STREIB, DEATH PENALTY IN A NUTSHELL 4 (2003).
2. *Part I: History of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/part-i-history-death-penalty> (last visited Oct. 16, 2012).
3. Capital punishment is legal in thirty-three states and the Federal Government. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 8, 2012).
4. *Part I: History of the Death Penalty*, *supra* note 2.
5. ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 3 (Pamela Chester et al. eds., 4th ed. 2012) (footnote omitted).
6. *Id.*
7. *Id.*
8. *Id.* at 1.
9. *Id.*; *see also Part I: History of the Death Penalty*, *supra* note 2.
10. *See* BOHM, *supra* note 5 at 3, 125.

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ology was efficient, or whether the punishment was directed accurately at the proper offender.¹¹ Rather than focusing on these issues, early executions focused on saving the souls of the condemned, and thereby had a religious bent to the process, serving as a cautionary tale lest those who consider such actions suffer the same fate.¹²

In fact, the community religious leaders paid great attention to the event.¹³ Often, the occasion of an execution provided the opportunity for large crowds and great sermonizing with the dramatic conclusion being the “last words” of the condemned.¹⁴ The importance of these last words cannot be understated. In fact, the fervor and conviction of the “last words,” particularly as it related to expressions of remorse, often provided the offender with a final opportunity for a reprieve from his death sentence.¹⁵

This relatively narrow focus continued from the early 1700s until about the late 1800s.¹⁶ During this time, several abolitionist groups had already begun to question the use of the death penalty as a sanction.¹⁷ In fact, many abolitionist societies, mostly led by the Quakers, began to spring up along the Eastern seaboard, coupling the anti-capital-punishment movement with the anti-slavery and anti-saloon movements.¹⁸ These societies and movements focused on moral injustice and, for the first time, the capital punishment debate focused on the sanction as a whole. Still, these initial inquiries were directed more toward the methods used, and to some degree the morality of its use, rather than whether the sanction should be used at all.¹⁹ Therefore, the solution was not to outlaw capital punishment entirely but to improve upon the methods. The “evolving standards of decency,” later described by our Supreme

11. *Id.* at 125.

12. *Id.* at 2, 125.

13. *Id.* at 2–3.

14. *Id.*

15. *Id.* at 2. Vestiges of this process still remain today. While the religious aspect of executions and the events preceding them have long since been abandoned, the process of allowing the convicted to “speak or present any information to mitigate the sentence” before the sentence is imposed still exists in our modern judicial system. FED. R. CRIM. P. 32(i)(4)(A)(ii). Further, great value is still placed on expressions of remorse, and under the Federal Sentencing Guidelines individual defendants are allowed point deductions for “acceptance of responsibility.” U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011).

16. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 107–08 (2002).

17. See BOHM, *supra* note 5, at 5.

18. *Id.* at 7. Objections to the death penalty have always existed; however, the Quakers, particularly the Philadelphia Quakers, are generally regarded as the originators of the capital punishment abolitionist movement. See *id.* at 5–7.

19. BANNER, *supra* note 16, at 108–09.

Court,²⁰ gave a reprieve to “cruel and unusual punishment” arguments.²¹ As a result, most of the original methods were dispensed with, leading to what were considered more humane methods of execution: hanging, firing squad, electrocution, and, finally, lethal injection.²²

B. *The Modern Era*

Over approximately the next 150 years, challenges to the constitutionality of the death penalty abounded. The issues presented to the Supreme Court for clarity and distinction represented many troubling issues for the continued use of the sanction. Such questions included, May the death penalty be imposed on a person with a mental impairment or defect, regardless of the crime and subsequent verdict?²³ Does capital punishment discriminate against blacks and other minorities?²⁴ Does the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibit the carrying out of executions if the punishment cannot not be proven to fall within the constrictions of the Eighth Amendment?²⁵ May a jury verdict stand in a death penalty case when the composition of the jury is tainted?²⁶ May juveniles be executed?²⁷ Are hanging,²⁸ electrocution,²⁹ lethal gas,³⁰ or lethal injection,³¹ by their process or composition, cruel and unusual? And is administration of the death penalty arbitrary or capricious in its application?³² A brief examination of these issues is illustrative at this point.

1. THE MENTALLY ILL ARE ROUTINELY EXECUTED IN THE UNITED STATES

In her article *Beyond Reason: Executing Persons with Mental Retardation*, Jamie Fellner, an attorney for Human Rights Watch, argues

20. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Although the punishment considered in *Trop* was expatriation of a person after a military court martial of desertion, the term “evolving standards of decency” has since been used in the context of capital punishment as well. *See, e.g., Rudolph v. Alabama*, 375 U.S. 889, 890 (1963) (Goldberg, J., dissenting).

21. *See* BOHM, *supra* note 5, at 27–30.

22. *Id.* at 130.

23. *Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002).

24. *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987).

25. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

26. *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

27. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

28. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), *cert. denied*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting).

29. *Glass v. Louisiana*, 455 So. 2d 659 (La. 1984), *cert. denied*, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting).

30. *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237, 1240 (1983) (Marshall, J., dissenting).

31. *Baze v. Rees*, 553 U.S. 35, 41 (2008).

32. *See Furman v. Georgia*, 408 U.S. 238, 274–77 (1972).

that mentally retarded offenders are less culpable than those without mental defects, and that this “special vulnerability,” which makes it difficult for the mentally retarded to cope with life’s challenges in normal settings, “can be fatal when [the mentally retarded] are charged with capital crimes.”³³ Notwithstanding the general popular sentiment from both sides of the debate—that the mentally retarded should not be executed—Fellner noted that “the United States remains . . . the only democracy whose jurisprudence expressly permits the execution of mentally retarded defendants and in which such executions are carried out.”³⁴ The article was published in 2001, shortly before the Supreme Court ruled that the Eighth Amendment prohibits executing the mentally retarded.³⁵ Despite this ruling, those with mental defects continue to be executed in the United States due to the requirements some states have for proving mental disability.³⁶

2. THE DEATH PENALTY IS UNFAIRLY APPLIED TO MINORITIES

Is the death penalty unfairly applied to minorities? Opponents of capital punishment seem to think so and have long decried the application of capital punishment to blacks and other minorities.³⁷ The general argument is that first, prosecutors unfairly target minorities and the poor, and second, once targeted, members of these groups are least able to mount a substantive defense.³⁸ In the words of NAACP attorney Christina Swarns, this is a lethal “handicap” when it comes to capital punishment.³⁹ Prosecutors have virtually unfettered discretion when it comes to issues of prosecution, charges to be filed, selecting cases for death penalty prosecution, plea-bargaining, and jury selection.⁴⁰ This wide-ranging power of discretion inures unevenly against blacks and other minorities.⁴¹

33. Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, HUM. RTS., Summer 2011, at 9, 12.

34. *Id.* at 13.

35. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

36. *Mental Retardation*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/category/categories/issues/mental-retardation> (last visited October 19, 2012).

37. See, e.g., Attorneys for the NAACP Legal Defense and Educational Fund, *A Cruel and Unusual Punishment (1971)*, in VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975 264, 284-85 (Philip English Mackey ed., 1976).

38. Christina Swarns, *The Uneven Scales of Capital Justice: How Race and Class Affect Who Ends Up on Death Row*, AM. PROSPECT, July 2004, at A14, available at <http://prospect.org/article/uneven-scales-capital-justice>.

39. *Id.* Swarns argues that blacks are more likely to be executed than whites, that whites are more often able to avoid death sentences through plea bargains, and that prosecutors unfairly target blacks. *Id.* She goes on to argue that the administration of capital punishment discriminates against the black victim, the black juror, and ultimately the black defendant. *Id.*

40. *Id.*

41. *Id.*

3. ARGUABLY, CAPITAL PUNISHMENT IS THE EMBODIMENT OF “CRUEL AND UNUSUAL PUNISHMENT”

Does the death penalty violate the Eighth Amendment’s cruel and unusual punishment prohibition? Since its inception, there has been a scientific approach to improving the methods of execution employed in this country.⁴² For example, over time the United States has moved from what now seem to be barbaric methods of execution, such as drawing and quartering, pressing, and burning at the stake, to less dramatic and presumably less intrusive methods of execution.⁴³ The premise is that by creating a more efficient, less outwardly horrific means of extinguishing life, we can carry out death sentences that arguably do not run afoul of the Eighth Amendment’s prohibition against cruel and unusual punishment: “The idea that capital punishment is not torture is based on the historical assumption that there are humane ways of executing people.”⁴⁴ However, Professor Vittorio Bufacchi and Laura Fairrie, in their article *Execution as Torture*, quote a former death row prisoner, Don Cabana, who stated that “[n]o matter how ‘humane’ an execution we devise, it is still a violation of human dignity.”⁴⁵

Over the last seventy-five years, the United States has employed various means of execution, each based upon the very assumption that there is a humane way to execute individuals consistent with “evolving standards of decency,” as outlined by our Supreme Court in *Gregg v. Georgia*.⁴⁶ To rebut the presumption that executions can somehow be humane, however, one need look no further than the history of botched executions to be convinced of the contrary.⁴⁷

From the 1946 excruciatingly painful and horrific attempt at elec-

42. See Craig Haney & Richard L. Wiener, *Death is Different: An Editorial Introduction to the Theme Issue*, 10 PSYCHOL. PUB. POL’Y & L. 373, 374 (2004).

43. See BOHM, *supra* note 5, at 125–26.

44. Vittorio Bufacchi & Laura Fairrie, *Execution as Torture*, 13 PEACE REV. 511, 511 (2001).

45. *Id.* at 516. Professor Bufacchi teaches Philosophy at University College in Cork, Ireland. Laura Fairrie is a producer and director of documentary films.

46. 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles* 356 U.S. 86, 101 (1958)). In addition to carving out the “evolving standards of decency,” which presumably permits “humane” execution and does not violate the Eighth Amendment, *Gregg* also provided a new procedure for bifurcated trials to allow evidence of mitigation during the penalty phase of capital cases. See *id.* at 190–92. The irony is that while *Gregg* made this provision for other death-eligible defendants, defendant Gregg, through his court-appointed attorney, presented no evidence, other than Gregg’s own testimony, of mitigation. *Id.* at 160. During a four-day trial, the jury heard absolutely nothing about Gregg’s background or character, and there was no independent opinion as to why the death penalty should not be applied in his case. *Id.*; see also Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 835–36 (2008).

47. See Robert Wilbur, *Lethal Injection the Latest Chapter in America’s History of Botched Executions*, TRUTHOUT (May 27, 2012, 8:00 AM), <http://truth-out.org/news/item/8683-lethal-injection-the-latest-chapter-in-americas-history-of-botched-executions>.

trocution of seventeen-year-old Willie Francis in Louisiana⁴⁸ to the 1990 electrocution of Jesse Tafero in Florida, who was still breathing after receiving two jolts of electricity and having his entire head catch fire,⁴⁹ it is clear that, after almost fifty years, “humane” progress has not been made when it comes to death by electrocution.⁵⁰

Lethal injection was supposed to be the cure-all—the most humane method of execution.⁵¹ The three-drug elixir is designed to first induce unconsciousness using sodium thiopental, then produce paralysis and stop respiration using pancuronium bromide, and, finally, create a fatal cardiac arrest using potassium chloride.⁵² This method of execution gives the appearance of being clinical and scientific, rather than brutal and barbaric. In fact, the entire setting has the appearance of a medical procedure being performed, as opposed to a state-sanctioned execution.⁵³ Upon closer examination, however, much is still awry: “The inventor of the lethal injection machine, Fred Leuchter, admitted that ‘about [eighty percent] of these [Texas] executions have had one problem or another. In the final analysis, it looks disgusting.’ The prisoners routinely choke, cough, spasm, and writhe as they die.”⁵⁴

The appearance of medical professionalism is also misleading. In fact, the American Medical Association has stated that it is a violation of medical ethics for a physician to participate in an execution.⁵⁵ Thus, the

48. *Louisiana ex rel. Francis v Resweber*, 329 U.S. 459, 460 (1947). The Supreme Court allowed a second (successful) attempt at executing Willie Francis despite his attorney’s appeal that it would constitute both torture and degradation of a human being and thereby violate the Eighth Amendment’s prohibition against cruel and unusual punishment. *See id.* at 464. Justice Burton in his dissent called it “death by installments.” *Id.* at 474 (Burton, J., dissenting). *See also* Gilbert King, Op-Ed., *Cruel and Unusual History*, N.Y. TIMES, Apr. 23, 2008, http://www.nytimes.com/2008/04/23/opinion/23king.html?_r=0.

49. Michael L. Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last updated Oct. 1, 2010).

50. Willie Francis was able to describe his ordeal: “[T]he experience was in all ‘plumb miserable,’ His mouth tasted ‘like cold peanut butter,’ and he saw ‘little blue and pink and green speckles.’ Added Francis ‘I felt a burning in my head and my left leg and I jumped against the straps.’” BOHM, *supra* note 5, at 27.

51. *See Baze v. Rees*, 553 U.S. 35, 62 (2008) (noting that Kentucky and thirty-five other states have adopted the lethal injection as the most humane method of execution available, and that “if administered as intended, [lethal injection] will result in a painless death.”).

52. *See id.* at 44 (citations omitted).

53. For example, Kentucky’s lethal injection protocol requires that “qualified personnel having at least one year of professional experience” insert the IV, “a certified phlebotomist” and EMT perform the venipunctures, “[a] physician is present to assist in any effort to revive the prisoner in the event of a last-minute stay of execution,” and there is an EKG to “verif[y] the death of the prisoner.” *Id.* at 45–46.

54. Bufacchi & Fairrie, *supra* note 44, at 516.

55. *AMA Code of Medical Ethics Opinion 2.06: Capital Punishment*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page#> (last updated June 2000).

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entire lethal injection process is, by appearance, a medical procedure and yet is performed without a doctor. Yet notwithstanding the foregoing evidence, lethal injections continue to persist.⁵⁶

What should be obvious is the overriding fact that the death penalty “machine” has successfully thwarted each and every one of the foregoing challenges. According to a recent Gallup Poll, sixty-one percent of Americans still favor capital punishment for the crime of murder.⁵⁷ In the authors’ view, the dispositive factor is this: At its core, the convicted has been accused and has been found guilty of committing a *great wrong*. As a society, we need this great offense to be assuaged. Despite professions to the contrary, it would appear that we as a society, continue to be foremost and primarily, punitive.

This sixty-one percent level of support, however, is the lowest level of support in thirty-nine years, basically since *Furman v. Georgia*,⁵⁸ and represents a downward trend.⁵⁹ There have been many suggestions to explain this descent, and each of them holds a degree of merit. One explanation, however, seems to rise above the others and that is that the American public is troubled by the many instances of individuals being wrongfully convicted and sentenced to death.

II. INNOCENCE AND ITS UNSETTLING EFFECT UPON THE ADMINISTRATION OF THE DEATH PENALTY

Starting in the mid-1980s, crime science began in earnest to use the newly discovered tool of DNA testing.⁶⁰ With the use of DNA testing, it has been discovered that many individuals who had previously been found guilty of various serious crimes, ranging from rape to murder, were in fact innocent.⁶¹ These individuals were not merely adjudged “not guilty,” which often relies on legal technicalities and the prosecution’s inability to carry its burden of proof; they were determined to be “factually innocent.” As a result of DNA testing, many people across the nation have been released, exonerated, or given new trials.⁶² Many pend-

56. See *Execution List 2012*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2012> (last visited Oct. 23, 2012).

57. Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP POL. (Oct. 13, 2011), <http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx>.

58. 408 U.S. 238 (1972).

59. Newport, *supra* note 57.

60. Randy James, *A Brief History of DNA Testing*, TIME (June 19, 2009), <http://www.time.com/time/nation/article/0,8599,1905706,00.html>.

61. See generally BENJAMIN N. CARDOZO SCHOOL OF LAW, 250 EXONERATED, TOO MANY WRONGFULLY CONVICTED, available at http://www.innocenceproject.org/docs/InnocenceProject_250.pdf.

62. See *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php# (last visited

ing cases were given new consideration, old cases were revived, and former residents of death row were released.⁶³

The shocking revelations from case after case of factually innocent people being saved from death sentences began to reverberate throughout the criminal justice system. Innocence has become the new “clarion call” and is completely changing the death penalty debate.⁶⁴ The possibility of post-conviction factual innocence has dramatically interrupted the heretofore placid landscape of capital punishment.⁶⁵ Whether or not we as a nation should have a death penalty is no longer a simple philosophical argument couched in the language of “crime and punishment.” It is no longer a complex conundrum that can be unraveled only by constitutional law experts and Supreme Court Justices. The issue is brilliant in its simplicity, capable of being fully grasped from the halls of the U.S. Supreme Court to the walls of the community corner barbershop. The death penalty issue’s answer is simply this: Innocent people should not be executed.

Consider the effect that innocence presents. Innocence trumps all other challenges. No right-thinking person, whether in favor or against the use of capital punishment, can in good conscience be in favor of the execution of an innocent person. Innocence moves the debate from legal, procedural, and constitutional challenges, which tend to be applied on an individual, case-by-case basis, to a comprehensive evaluation of the quality of the system as a whole. In this manner, innocence changes the issue from one of the defense of a single accused defendant to an indictment of the system—regardless of the individual accused.

Consider, if you will, how formidable prior arguments become when coupled with a claim of innocence:

- a. Racial bias and innocence;
- b. Improper jury composition and innocence;
- c. Mental competency and innocence; and
- d. Cruel and unusual punishment and innocence.

The force of these and other arguments now becomes patently tenable simply by adding the possibility of factual innocence. The simple fact is that few on either side of the debate are comfortable with the notion of

Oct. 23, 2012); *see also* Justice for All Act of 2004, 18 U.S.C. § 3600(g)(1) (2006) (“[I]f DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, the applicant may file a motion for a new trial or resentencing, as appropriate.”).

63. Rockne Harmon, *Foreword* to EDWARD CONNORS ET AL., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL*, at xix (1996).

64. *See* Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 50 (2000).

65. *Id.*

executing a factually innocent defendant no matter what their individual stance on capital punishment might be.

III. INNOCENCE HAS USHERED IN A NEW ERA IN CAPITAL PUNISHMENT

By the late 1990s a subtle shift in the landscape of capital punishment had begun. This shifting of the landscape encompassed calls for a moratorium on executions, even in the face of continued public support for the death penalty.⁶⁶ The State of Illinois, through the inquiry initiated by then-Governor George Ryan, took a leading role in the call for a moratorium after revelations of innocence in the cases of Rolando Cruz, Alejandro Hernandez, and a group of four men called the “Ford Heights Four.”⁶⁷ All of these men were rescued from death row or life without the possibility of parole after spending several years incarcerated.⁶⁸ In the case of the Ford Heights Four, the period of time spent in prison was just short of twenty years.⁶⁹

In November 1998, Northwestern University hosted the first National Conference on Wrongful Convictions and the Death Penalty.⁷⁰ The highlight of this conference was the compelling testimony of thirty-five former death row inmates who had been spared from execution based upon the revelation of their wrongful convictions.⁷¹

Perhaps the most important moment was ushered in by the incredible case of Anthony Porter. In 1998, Anthony Porter, an Illinois convicted murderer, came within fifty hours of being executed.⁷² A legal team including Lawrence Marshall and students at the Northwestern School of Journalism won a reprieve for Mr. Porter from the Illinois Supreme Court.⁷³ This made it possible for Northwestern journalism Professor David Protes to take a new look at Mr. Porter’s case.⁷⁴ Due to the reinvestigation of Anthony Porter’s conviction, which included obtaining a videotaped confession from the actual murderer, Anthony

66. See BOHM, *supra* note 5, at 249–50. It should be noted that Gallup polls consistently demonstrate that the majority of the population favors the use of capital punishment. Newport, *supra* note 57.

67. BOHM, *supra* note 5, at 250. The Ford Heights Four consisted of Kenneth Adams, Dennis Williams, Willie Rainge and Verneal Jimerson. After their release, and after spending eighteen years in prison, the four were successful in suing Cook County, Illinois and were awarded compensation in the amount of \$36 million. *Id.* at 200.

68. *Id.*

69. *Id.*

70. *Id.* at 250.

71. *Id.*

72. Anthony Porter, Center on Wrongful Convictions, NW. LAW BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/CWC/exonerations/ilPorterSummary.html> (last visited Oct. 24, 2012).

73. *Id.*

74. *Id.*

Porter became Illinois' tenth exonerated death row prisoner and the seventy-eighth nationally.⁷⁵ There can be no understating the impact of these cases, not just on the exonerees but also on the criminal justice system. The public, heretofore disinterested in the outcome of such cases generally, now took a new interest in the machinations of the death penalty as a form of justice. Governors and legislators also began to question this sanction, and it was not long before their concerns evolved into action.⁷⁶ Consider for example, the action taken by these governors:

On April 25, 2012, Governor Dan Malloy of Connecticut signed a bill that repealed the death penalty in the state of Connecticut.⁷⁷ In doing so he said: “[i]t is a moment for sober reflection, not celebration.”⁷⁸

On December 17, 2007, Governor John Corzine signed into legislation a bill repealing the death penalty in the state of New Jersey.⁷⁹ In doing so he expressed: “Today, New Jersey is truly evolving . . . I believe society must first determine if its endorsement of violence begets violence—and—if violence undermines our commitment to the sanctity of life. To these questions, I answer ‘Yes,’”⁸⁰

When Governor Bill Richardson of New Mexico signed legislation halting capital punishment in 2009, he said: “Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime.”⁸¹ He went on to note that over 130 death row inmates had been exonerated in the past ten years.⁸²

But perhaps the most compelling comments were made by Illinois Governor George Ryan. On January 31, 2000, under Governor George Ryan, Illinois became the first state to declare a moratorium on all executions.⁸³ In doing so, Governor Ryan released this statement: “How do you prevent another Anthony Porter—another innocent man or woman from paying the ultimate penalty for a crime he or she did not

75. FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 66 (2008).

76. *Id.* at 71.

77. Bernie Davidow, *Without Fanfare, Malloy Signs Bill Abolishing Death Penalty*, HARTFORD COURANT, Apr. 25, 2012, <http://courantblogs.com/capitol-watch/without-fanfare-malloy-signs-bill-abolishing-death-penalty/>.

78. *Id.*

79. Jon S. Corzine, Governor, N.J., Remarks on Eliminating Death Penalty in New Jersey (Dec. 17, 2007) (transcript available at <http://www.deathpenaltyinfo.org/node/2236>).

80. *Id.*

81. Press Release, Governor Bill Richardson, Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009), available at <http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf>.

82. *Id.*

83. See BAUMGARTNER ET AL., *supra* note 75, at 71.

commit? . . . Today, I cannot answer that question.’”⁸⁴ As if to answer his own question, Governor Ryan went on to say: “Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing lethal injection, no one will meet that fate[.]”⁸⁵

For death penalty abolitionists, the Illinois moratorium was a huge step in the right direction. In effect, death sentences could still be issued, but the gubernatorial moratorium blocked the execution of the order. Clearly, Governor Ryan was seriously troubled by the notion of innocent people on death row. Not satisfied with just declaring a moratorium, Governor Ryan also announced that he would create a commission to study the administration of capital punishment in the state of Illinois and went on to appoint members to the Governor’s Commission on Capital Punishment on March 9, 2000.⁸⁶ This Commission was composed of some of the best and brightest attorneys and judges in Illinois, including Judge Frank McGarr, a former federal prosecutor and former Chief Judge of the Federal District Court for the Northern District of Illinois; the late former Senator and activist Paul Simon; Thomas Sullivan, renowned Super Lawyer and a former U.S. Attorney; Scott Turow, an attorney and bestselling author; the late, great defense attorney Donald Hubert; and eleven others of equally impressive notoriety and stature.⁸⁷ Their findings were a predictable indictment of the current system of capital punishment in Illinois. Their corresponding eighty-five point recommendation in effect called for a complete overhaul of the system.⁸⁸

When Governor Pat Quinn succeeded Governor George Ryan in 2009, he continued the moratorium in full force and effect, and on March 9, 2011, Governor Quinn signed Senate Bill 3539, repealing the death penalty in Illinois.⁸⁹ This act made Illinois the sixteenth state to

84. Press Release, Ill. Gov’t News Network, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=359>.

85. *Id.*

86. See GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (2002), available at <http://www.olympiafor.org/Illinois%20Moratorium%20Commission’s%20complete%20report%20.pdf>.

87. *Id.* at v–vii. The complete list included: Judge Frank McGarr, Chairman; Senator Paul Simon, Co-Chair; Thomas P. Sullivan, Co-Chair; Deputy Governor Matthew R. Bettenhausen, Member and Executive Director; Kathryn Dobrinic, Member; Rita Fry, Member; Theodore Gottfried, Member; Donald Hubert, Member; William J. Martin, Member; Thomas Needham, Member; Roberto Ramirez, Member; Scott Turow, Member; Mike Waller, Member; Andrea Zopp, Member; Judge William H. Webster, Special Advisor to the Commission; and Jean Templeton, Research Director. *Id.*

88. See generally *id.* at 20–191, 207.

89. Press Release, Ill. Gov’t News Network, Statement from Governor Pat Quinn on Senate Bill 3539 (Mar. 9, 2011), available at <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>.

repeal the death penalty⁹⁰ and the fourth within the preceding four years.⁹¹ Not long after Illinois' repeal, the state of Connecticut became the seventeenth state to abolish the death penalty on April 25, 2012.⁹²

Meanwhile, more and more death row inmates are being released as innocence projects spring up across the country.⁹³ As a result of the Porter case and the notoriety of others like Porter, many states have begun to question the reliability, if not the utility, of capital punishment. This punitive instrument of the state, which possesses so much potential for making grave and uncorrectable errors, is seemingly for the first time being looked at for its inability to punish accurately. States including Illinois, New Jersey, New York, New Mexico, and Connecticut have all repealed their death penalty statutes within the last five years.⁹⁴

IV. WRONGFUL CONVICTIONS

In several of the foregoing states, the governors and/or courts initiated an investigation into the administration of capital punishment within their own states.⁹⁵ Their investigations revealed that wrongful convictions did in fact occur and in much too significant numbers for comfort. Their investigations also revealed that several factors contribute to wrongful convictions and that these wrongful convictions far too often eventuate with innocent individuals being placed on death row.⁹⁶

There is great room for debate on whether the death penalty should continue to exist or whether it should permanently be abolished. In our

90. Ariane De Vogue, *Illinois Abolishes Death Penalty; 16th State to End Executions*, ABC NEWS (Mar. 9, 2011), <http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912#.UH3hvBw1Dat>.

91. DEATH PENALTY INFORMATION CTR., *THE DEATH PENALTY IN 2011: YEAR END REPORT 2* (2011), available at http://www.deathpenaltyinfo.org/documents/2011__Year__End.pdf.

92. See *Connecticut*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/connecticut-1> (last visited Oct. 24, 2012). The seventeen states are: Michigan (1846), Wisconsin (1853), Maine (1887), Minnesota (1911) Hawaii (1957) Alaska (1957) Vermont (1964) Iowa (1965), West Virginia (1965) North Dakota (1973) Massachusetts (1984), Rhode Island (1984), New York (2007), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012). *States With and Without the Death Penalty*, *supra* note 3. The District of Columbia also abolished the death penalty in 1981. *Id.*

93. BAUMGARTNER ET AL., *supra* note 75, at 62–64.

94. *States with and Without the Death Penalty*, *supra* note 3.

95. See GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 86; N.J. DEATH PENALTY STUDY COMM'N, *NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 3–4* (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf; N.Y. STATE ASSEMBLY, *THE DEATH PENALTY IN NEW YORK 2* (2005), available at <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>; STATE OF CONN. COMM'N ON THE DEATH PENALTY, *STUDY PURSUANT TO PUBLIC ACT NO. 01-141 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT 1* (2003), available at <http://deathpenalty.procon.org/sourcefiles/Connecticut%20Death%20Penalty%20Commission%20Final%20Report.pdf>.

96. See generally *id.*

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view, no cogent argument can be made for the continued use of the death penalty as a viable sanction. Our admitted bias with regard to this issue is intentional and unwavering. There is no room for the continued use of the death penalty as a form of punishment, particularly in the United States, where we have positioned ourselves as leaders in the forefront of human rights issues. Victor Streib, Dean of Ohio Northern University's law school, said, "[The death penalty] puts the U.S. in an embarrassing international position on human rights."⁹⁷

However, whether one is a supporter of the sanction, indifferent to it, or in opposition, we all should agree on one basic principle: The innocent should not be convicted and should never be executed.⁹⁸ The fact that these two events arguably have happened and continue to occur is an immutable stain on our criminal justice system, and no right-thinking individual that adheres to the principles of fair and impartial justice should ever rest until this stain is permanently removed. In order to move toward this goal, we must identify what the causes of wrongful convictions are.

A. *Common Causes of Wrongful Convictions in Capital Cases*

There are many factors that have historically contributed to wrongful convictions and/or executions.⁹⁹ Research reveals that generally these factors fall into the following categories:

1. Eyewitness misidentification;
2. False confessions;
3. Unqualified defense counsel;
4. Prosecutorial misconduct;
5. Judicial error or misconduct; and
6. Police misconduct or shoddy investigation¹⁰⁰.

For purposes of this article, we have limited our focus to the three main factors: eyewitness misidentification, false confessions, and unqualified defense lawyers.

97. Jeff Glasser, *Death Be Not Proud*, U.S. NEWS & WORLD REP., Jan. 9, 2000, http://www.usnews.com/usnews/news/articles/000117/archive_033872.htm.

98. See Ken Armstrong & Steve Mills, *Part 1: Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, <http://www.chicagotribune.com/news/watchdog/chi991114deathillinois1,0,4002543.story?page=3>.

99. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (1987). Professors Hugo Bedau and Michael Radelet have jointly conducted ambitious research to document miscarriages of justice in capital cases; much of the information relied upon for article is based upon their research.

100. See *id.*; *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Oct. 26, 2012).

1. EYEWITNESS MISIDENTIFICATION

The largest cause of wrongful convictions can be directly attributed to eyewitness misidentifications. According to the Innocence Project, nearly seventy-five percent of wrongful convictions were a result of mistaken identification by the witness or the victim.¹⁰¹

Years of research has shown that eyewitnesses are simply not very good at identifying criminal defendants.¹⁰² This is particularly true when eyewitnesses are under stress or attempting to identify offenders of a different race.¹⁰³ Once other factors are added, such as distance of observation, vantage point, vision of the observer, time of day, and length of period of observation, the reliability of eyewitness identification is markedly reduced.¹⁰⁴ Yet notwithstanding these shortcomings, there can hardly be an apparently more credible witness for the prosecution than the purported eyewitness.¹⁰⁵ The impact of an “eyewitness” cannot be overstated when it comes to prosecuting a criminal defendant. Because of the weight of evidence an eyewitness creates, it is imperative that this type of witness be not only credible to the jury, but also accurate.

2. FALSE CONFESSIONS

Why would anyone confess in a capital case if he or she were innocent of the charge? This is a reasonable question to pose. The reality is, however, that it is not that uncommon.¹⁰⁶ There are several factors that may contribute to false confessions. Two of the leading factors are police tactics and jailhouse informants¹⁰⁷ (commonly referred to as “jailhouse snitches”).

i. Police Tactics

The police have powerful tools at their disposal for extracting confessions. While interrogating, they often confuse and disorient the suspect. They often lie about the existence of physical evidence, the existence of witnesses, and statements that have purportedly been given.

101. *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Oct. 26, 2012).

102. THE JUSTICE PROJECT, *EYEWITNESS IDENTIFICATION: A POLICY REVIEW 4*, available at http://www.psychology.iastate.edu/~glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf.

103. See Heather D. Flowe et al., *The Role of Eyewitness Identification Evidence in Felony Case Dispositions*, 17 *PSYCHOL. PUB. POL'Y & L.* 140, 141–142 (2011).

104. See *Eyewitness Misidentification*, *supra* note 101.

105. Gabriel W. Gorenstein & Phoebe C. Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 *J. APPLIED PSYCHOL.* 616, 616 (1980).

106. BOHM, *supra* note 5, at 224 (explaining that false confessions are the third most common source of error in capital cases).

107. See *id.* at 224–225, 241–55.

Many are skilled at playing on a suspect's biases, fears, loyalties, and lack of knowledge.¹⁰⁸ Even more, some have been known to use violence and torture to induce confessions.¹⁰⁹ While we must recognize the need of law enforcement personnel to use every legal means at their disposal to convict the guilty, we must also recognize that these same tools may be used to convict the innocent as well.

ii. Informants

More often than most would care to acknowledge, perjured testimony is used when a jailhouse informant comes forward to reveal the confession of a cellmate.¹¹⁰ It is incredible the number of times that a circumstantial case is sealed by the so-called "confession" of the defendant to his cellmate, the informant.¹¹¹ It is almost laughable how alleged offenders will often recite the same basic story of innocence for years, but after only a few days of sharing a cell, the same offenders change their stories to what amount to full confessions. The fact that the informant often seeks a reduced sentence or some other significant benefit is routinely overlooked.¹¹²

3. UNQUALIFIED DEFENSE LAWYERS

There are many intelligent, talented, and highly skilled attorneys who work tirelessly for the accused on death row. When the attorney for the accused, however, is unqualified, disinterested, or unskilled, the results can be disastrous for the accused. Nothing guarantees a wrongful conviction faster than a bad defense lawyer.¹¹³

For example, consider the results of a study conducted by the *National Law Journal*, which only serve to illustrate the dangers involved when unqualified counsel represent defendants in capital cases.¹¹⁴

108. *Id.* at 224.

109. *Id.*

110. See Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413, 1419–20 (2007).

111. See, e.g., *Know the Cases: Browse the Profiles: Steven Barnes*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Steven_Barnes.php (last visited Oct. 21, 2012); see also *Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Nov. 2, 2012) ("In more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial.").

112. See *Informants*, *supra* note 111.

113. See Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, *WALL ST. J.*, Sept. 7, 1994, at A1.

114. See generally Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, *NAT'L L.J.*, June 11, 1990, at 30 (conducting a six-month survey of capital murder suspects

Nine years after John Young was condemned to death in Georgia, his disbarred attorney, Charles Marchman, admitted his addiction to drugs.¹¹⁵ Additionally, he admitted that the breakup of his marriage and the discovery of his homosexuality prevented him from defending Mr. Young adequately.¹¹⁶ He admitted to being unprepared and was disbarred because of a drug conviction just days after the trial.¹¹⁷ Even worse, he presented no mitigating evidence on behalf of his teenage client.¹¹⁸ Notwithstanding this compelling evidence of ineffective assistance of counsel, John Young was executed in 1985.¹¹⁹

James Copeland, on death row in Louisiana for a murder conviction, was granted re-trial by the Louisiana Supreme Court for judicial misconduct.¹²⁰ In re-trial, Mr. Copeland was convicted again. After re-trial, his attorney confessed to never reading the first trial's transcript and not investigating evidence that would support a life sentence rather than execution.¹²¹

Texas lawyer Jon Wood, in his losing defense of Jesus Romero, used only twenty-five words in his entire closing argument designed to appeal for his client's life: "You're an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say."¹²² Jesus Romero was executed in 1992.¹²³

Finally, seventy-two-year-old Houston lawyer John Benn, in defense of his client George McFarland, did not call a single witness and fell asleep over and over again during the trial.¹²⁴ When asked by the judge why he was sleeping through the proceedings, Mr. Benn's response was "it's boring."¹²⁵

V. CONCLUSION

In each of the foregoing cases, the convictions withstood challenge and appeal. If we are to limit senseless wrongful convictions, each and

in six southern states and finding that the trials failed to meet the standards set forth by the U.S. Supreme Court and that the outcomes were often determined by the skill of defense attorneys).

115. See BOHM, *supra* note 5, at 230.

116. *Id.*

117. John Coursey, *A New Step Forward: U.S. Supreme Court Decision on Incompetent Attorneys*, THE NEW ABOLITIONIST, Sept. 2003, available at http://www.nodeathpenalty.org/new_abolitionist/september-2003-issue-29/new-step-forward.

118. *Id.*

119. *Id.*

120. Rosalynn Carter, Carter Center Symposium on the Death Penalty: Introductory Remarks (July 24, 1997) in 14 GA. ST. U. L. REV. 329 (1998).

121. *Id.* at 381; see also BOHM, *supra* note 5, at 230.

122. Coursey, *supra* note 117.

123. *Id.*

124. BOHM, *supra* note 5, at 230.

125. *Id.*

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every attorney that defends a capital defendant must be held to the highest legal standard possible. Simultaneously, the standard for demonstrating ineffective assistance of counsel must be significantly lowered to ensure the “due process” guaranteed by our Constitution.

While no system of justice is ever perfect, there are a number of safeguards that can be implemented to reduce the likelihood of wrongful convictions. Below are suggestions designed to address the problem:

1. Judicially qualify eyewitness identifications, and exclude testimony that is more prejudicial than probative.
2. Improve the quality of lawyers involved in capital cases. No lawyer should be allowed to handle a capital case without the requisite experience and funding to properly represent a death-eligible client.
3. Severely punish the misconduct of perjured testimony and restrict the use of jailhouse confessions.
4. Require specially qualified judges for all capital cases.
5. Eliminate all barriers to claims of actual or factual innocence (such as statutes of limitations).
6. Require scientific testing paid for by the state.
7. Punish prosecutorial misconduct, and judicially disqualify defense counsel that is not performing at an acceptable standard in all capital cases.

However, even if we improve upon our current system of capital punishment, and even if we are able to dramatically reduce the odds of a wrongful conviction, the fact is that no system of justice can ever be perfect. Because of this admitted imperfection, it is clear that the time has come to abolish capital punishment in the United States—as has been done throughout Europe and most of all of the Western countries. The time has come to abolish the death penalty in the United States.