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THE SEDUCTION OF INNOCENCE: THE ATTRACTION AND LIMITATIONS OF THE FOCUS ON INNOCENCE IN CAPITAL PUNISHMENT LAW AND ADVOCACY

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INTRODUCTION

Over the past five years we have seen an unprecedented swell of debate at all levels of public life regarding the American death penalty. Much of the debate centers on the crisis of confidence engendered by the high-profile release of a significant number of wrongly convicted inmates from the nation's death rows. Advocates for reform or abolition of capital punishment have seized upon this issue to promote various public policy initiatives to address the crisis, including proposals for more complete DNA collection and testing, procedural reforms in capital cases, substantive limits on the use of capital punishment, suspension of executions, and outright abolition. Advocates for the retention and vigorous use of capital punishment have been sympathetic to some, but by no means all, of these proposals. Disagreement over the nature and scope of responses to the crisis has inevitably and quite properly led to debate about the significance of the wrongful conviction of the innocent in the administration of capital punishment.

This symposium presents two common criticisms of the current focus on innocence in the debate over the death penalty in America—one from an "agnostic" on the issue of capital punishment and one from a whole-hearted supporter. Professor Ron Allen, the self-described agnostic, along with his co-author Amy Shavell, makes the argument often made by supporters of capital punishment that there is nothing distinctive about the problem of wrongful death in the capital punishment context. Rather, the execution of

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some innocent people is simply the unavoidable cost of implementing capital punishment and thus is comparable to the foreseeable deaths that occur whenever the government undertakes an important social project, such as building a bridge or constructing a dam.[1] Joshua Marquis, a vocal and high-profile supporter of capital punishment, criticizes those who focus on the problem of innocence in the death penalty debate for overstating the problem by overestimating the actual number of completely innocent people convicted and sentenced to die. According to Marquis, the true number, while not zero, is low enough to constitute an acceptable cost of a valuable social policy.[2]

Although it is not our focus in this paper to refute them, we think that these common critiques of innocence are deeply flawed. Allen & Shavell's critique completely misses at least two distinctive harms that flow from executing the innocent. First, unlike the innocent victims of governmental bridge-building, those who are innocent and sentenced to death suffer the additional devastation of being blamed for a terrible crime; their names, families, and entire lives are forever tainted by such ignominy, quite apart from the death of their bodies. Moreover, when such errors are discovered, as some but by no means all of them eventually will be, they deeply undermine the legitimacy of the entire criminal justice system. This latter cost, though unquantifiable, is tremendously important. Public fear of unjust violence at the hands of the state, which has a monopoly on the legitimate use of force, is the hallmark of totalitarian regimes, one of the indices that most distinguish them from free and democratic societies. There is thus ample reason to weigh erroneous executions quite differently from unavoidable deaths in the regulatory context.

We are more sympathetic to Marquis's argument about exactly who should count as an "innocent" person, but we find the conclusion that he draws from his revised number equally flawed. Marquis claims that if we apply a more rigorous definition of innocence—such as "had no involvement in the [crime], wasn't there, didn't do it"[3]—the number of wrongly convicted and sentenced to die goes down to twenty-five or thirty, out of the 7000 murderers sentenced to death since 1976. Such a ratio, argues Marquis, represents an episodic rather than epidemic rate of error.

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[1] *See* Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005); *see also* Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 967 (1985); Stephen Markman & Paul Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 160 n.217 (1988) (endorsing and expanding upon van den Haag's argument).

[2] *See* Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501 (2005).

[3] *See id.* at 519.

The problem with Marquis' argument is that, even if we completely grant him his revised numerator, he is using the wrong denominator. It is simply not the case that all 7000 capital convictions have been subject to the same kind of scrutiny. The twenty-five or thirty exonerations (by Marquis's count) largely derive from a much smaller subset of cases in which there was significant postconviction scrutiny of the accuracy of the underlying conviction, such as cases involving preserved and testable DNA evidence. That such a significant fraction of *these* cases turned out to be erroneous suggests by extrapolation that the number of erroneous convictions in the entire set is much larger than Marquis allows and thus is not a number that we should accept with regretful equanimity.

Despite our profound disagreement with these two arguments against innocence, we have our own discomfort with the prominence of innocence in the current debate about capital punishment. In what follows, we articulate and develop a different set of concerns about the focus on innocence, concerns that derive from a perspective sympathetic to reform or abolition of the death penalty. Our discussion proceeds in three parts. In Part I, we offer an explanation for why innocence has become so prominent in the debate over the death penalty at this point in time (and why it played such a minor role in the earlier debate of the 1960s and '70s). In Part II, we question the normative distinctiveness of innocence as a problem in the administration of capital punishment in comparison with other, more endemic problems, such as disproportionate, arbitrary, or discriminatory imposition of capital punishment. In Part III, we question the strategic value of focusing on innocence in the effort to reform or abolish capital punishment. In what follows, we seek to question and at least qualify the apparently widespread assumption that the execution of the innocent is both the worst problem that the administration of capital punishment faces and the best strategic hope for reform or abolition of the death penalty in America.

I. MOMENTS OF REFORM IN THE MODERN ERA OF THE AMERICAN DEATH PENALTY

At the present time, the United States is fairly regarded as an outlier in its enthusiastic embrace of the death penalty.[4] Most Western countries have abolished the death penalty altogether and few of the retentionist countries around the world are active in carrying out executions. In light of this present moment, it is easy to overlook the more complicated story of the

[4] Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002).

American death penalty. In its early history, the United States was at the forefront of death penalty reform. Almost immediately after the Constitution was ratified, many states sought to limit the perceived excesses of capital punishment. By the early nineteenth century, states generally reduced the number of crimes punishable by death to a handful of crimes whereas England recognized over 200 capital offenses.[5] The reformist impulse was also manifest in states' efforts to limit the automatic application of the death penalty for murder. First, many states developed a hierarchy of murder, distinguishing between "degrees" of the crime such that only "first degree" murder could generate a capital sentence. Later, states gravitated toward discretionary sentencing even with respect to those defendants convicted of murder in the first degree. By the mid-twentieth century, virtually all American jurisdictions retaining the death penalty afforded jurors substantial discretion to withhold the punishment based on circumstances of the offense and offender.[6]

Notwithstanding these reforms, the death penalty has occupied an important practical and symbolic role in the American criminal justice system. Substantial numbers of executions have been carried out throughout our history, including a decade high of over 1500 during the 1930s.[7] The death penalty has also occupied a peculiar—and undoubtedly significant—role in American race relations and American politics more generally. The American death penalty has disproportionately targeted African-American offenders (both as a matter of law in the antebellum South and as matter of practice throughout our history[8]), and executions (including extralegal executions—lynchings) have been an important mechanism for subordinating African-Americans, particularly in the period between Reconstruction and the modern era. Perhaps because of its connection to race, the death penalty has received extraordinary attention in electoral politics at both the local and national levels, despite the absence of a significant federal death penalty. Overall, the broad history of the American death penalty reflects a deep ambivalence about the wisdom and role of the death penalty, and the two centuries separating early amelioration and modern robustness saw alternating waves of reform and retrenchment.

The modern era has seen two significant reformist moments. The first began in the early 1960s as the number of executions drastically fell and advocates of reform and abolition looked to the federal courts—particularly

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[5] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 89-100 (2002).

[6] WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 8 (1974).

[7] *Id.* at 40.

[8] *See* BANNER, *supra* note 5, at 141 (discussing discriminatory statutes and practices).

the United States Supreme Court—to limit or abolish the death penalty.[9] In retrospect, the 1960s look like a "perfect storm" for restricting or abolishing the death penalty. The Civil Rights movement reached its peak in the early 1960s with the passage of the Civil Rights Act of 1964. Concerns about racial discrimination and the death penalty had pushed the NAACP Legal Defense Fund to the forefront of anti-death penalty efforts,[10] and the Southern face of the death penalty—executions were increasingly marginalized to southern and border states—naturally made capital punishment a target for groups concerned about racial justice. Given this context, it is not surprising that the United States Supreme Court's first significant gesture toward the constitutional regulation of the death penalty was the statement of three Justices that the Court should consider the constitutionality of the death penalty for the crime of rape.[11] All of the 455 executions for rape after 1930 in the United States occurred in southern states, border states, and the District of Columbia, and an overwhelming number of those executions involved African-American defendants and white victims.[12]

Popular support for the death penalty also dropped to an all-time low in the mid-1960s,[13] as the Vietnam War stirred an unprecedented skepticism about the capacity of governmental institutions to act in a humane and benign manner. As the general social upheaval reached its height in the late 1960s, and executions had ceased as a result of a de facto moratorium, the death penalty seemed high on the list of orthodoxies ripe for reconsideration.

On the legal front, the 1960s saw an explosion of decisions expanding the federal constitutional rights of state criminal defendants. Throughout the late 1950s and 1960s, the Warren Court recognized new procedural protections within the Bill of Rights and extended those protections to state trials that had previously been held only to a generalized guarantee of due process. Among the newly extended rights—and the most substantive in

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[9] *See* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973) (describing strategy of death penalty reformers during the 1960s).

[10] *See generally id.*

[11] *See* Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari).

[12] Marvin E. Wolfgang, *Race Discrimination in the Death Sentence for Rape,* in BOWERS, *supra* note 6, at 113.

[13] Carol Steiker & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,* 109 HARV. L. REV. 355, 410 (1995) ("[T]he 1966 Gallup poll turned out to be the *only* Gallup poll on the death penalty question out of 21 such polls conducted between 1936 and 1986 in which more people opposed than supported the death penalty for murder . . . .") (citation omitted).

nature—was the Eighth Amendment's prohibition of Cruel and Unusual Punishments, a guarantee that had not been applied to invalidate state laws or practices before 1962.[14]

In this context, the central critiques of the death penalty focused on its declining popular support and its arbitrary and inequitable distribution. The infrequency of executions suggested that the law on the books might not reflect genuine societal views. In light of the broad discretion afforded prosecutors and jurors, there was also the fear that the few offenders sentenced to death (or actually executed) were selected for arbitrary or perhaps discriminatory reasons.

When the Supreme Court struck down state death penalty statutes in *Furman v. Georgia*[15] in 1972, it focused precisely on these two concerns. All five of the Justices supporting the decision expressed concerns about arbitrariness, pointing to the absence of safeguards or procedures that would ensure the fair selection of the condemned. In this respect, the decision carried forward the Warren Court's faith that legal and social institutions could be improved with additional process. Notably, the opinions expressed less concern about those who had been selected for death than those who had been spared. Justice White expressed doubts about the capacity of the death penalty to achieve the social goals of deterrence or retribution given the paucity of executions,[16] and Justice Stewart alluded to the numerous offenders convicted of equally reprehensible rapes and murders who had not been death-sentenced.[17] Emphasizing the "'caste' aspect" of the American death penalty system,[18] Justice Douglas compared the treatment of wealthy defendants to the exemption of Brahmans under ancient Hindu law, almost lamenting "the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation."[19]

A clear though subordinate theme of the opinions was that the infrequency of executions cast doubt on America's genuine commitment to the death penalty. Justice Brennan made this argument explicitly, insisting that "[w]hen an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few

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[14] Robinson v. California, 370 U.S. 660 (1962) (invalidating California statute as applied criminalizing the status of being addicted to the use of narcotics).

[15] 408 U.S. 238 (1972).

[16] *Id.* at 313 (White, J., concurring) ("[T]he penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice . . . .").

[17] *Id.* at 309 (Stewart, J., concurring).

[18] *Id.* at 255 (Douglas, J., concurring).

[19] *Id.* at 256 (Douglas, J., concurring).

instances, the inference is compelling that there is a deep-seated reluctance to inflict it."[20] Justice Brennan would have constitutionally abolished the death penalty on this ground, with Justice Marshall agreeing that the death penalty was no longer consistent with public values. Even the Justices who held out the possibility of saving capital punishment with new procedural safeguards were careful to defend their decision against the counter-majoritarian critique by observing that the "legislative will is not frustrated if the penalty is never imposed."[21]

In this reformist moment spurred by declining executions, the Court paid virtually no attention to the risk of executing innocents as an argument against the death penalty. Although the five Justices in the majority wrote lengthy, wide-ranging opinions occupying almost 200 pages in the U.S. Reports, this concern is significantly raised only by Justice Marshall and then only as the last of numerous considerations that might turn informed public opinion against the death penalty.[22]

States responded quickly to *Furman* by amending their statutes to address the defects of unbridled discretion.[23] These newly-crafted statutes put to rest the claim that death penalty provisions had fallen into desuetude and reflected an outdated morality. In the decade after *Furman*, the Court's regulatory efforts focused primarily on the sort of guidance required in state schemes (through the enumeration of aggravating factors) as well as the competing interest in preserving sentencer discretion to consider and give effect to a defendant's mitigating evidence.[24]

Of course, to meet Justice White's concerns, it was not enough for jurors to be clearly informed of the characteristics of the "worst" murders; states had to generate significant numbers of death verdicts and executions so that it could truly be said that the death penalty was achieving social goals. Although the Court never explicitly insisted on increased production in this regard, the rapid growth of death row in the three decades post-*Furman*, as well as the willingness and ability of some death penalty states to carry out executions, undoubtedly has solidified the death penalty's constitutional status in the recent era.

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[20] *Id.* at 300 (Brennan, J., concurring).

[21] *Id.* at 311 (White, J., concurring) (describing legislative delegation of discretion to judges and jurors as sentencers such that the absence of death sentences is not contrary to legislative policy); *id.* at 309 (Stewart, J., concurring) (quoting Justice White).

[22] *Id.* at 366-67 (Marshall, J., concurring).

[23] *See* Steiker & Steiker, *supra* note 13, at 410.

[24] *Id.* at 371-403.

When *Furman* addressed the constitutionality of capital punishment in 1972, the national death row numbered in the 600s,[25] and states conducted twenty-one executions during the period 1965-1983.[26] Thirty years after *Furman*, the national death row had climbed over 3500, with California's death row (613) about as large as the nation's death row at the time *Furman* was decided.[27] Executions reached a post-*Furman* yearly peak in 1999 (ninety-eight)[28] and there have been 933 executions nationwide over the past two decades (1984-2004).[29]

We are now in the midst of the second reformist moment in the modern era in which the death penalty itself seems ripe for significant reform, if not wholesale reconsideration. The driving concern is the risk of death-sentencing and executing innocents. This issue emerged as lawyers and journalists brought to light numerous instances of innocents erroneously sentenced to death.[30] In Illinois, one inmate, Anthony Porter, had come perilously close to execution before journalism students discovered the actual perpetrator of his crime.[31] The circumstances of his case and the investigation made clear that it was entirely a matter of fortuity that Porter had not been executed before his innocence was established. Ultimately, the Chicago Tribune detailed systemic problems in the Illinois criminal justice system traceable in part to prosecutorial misconduct.[32] Following the publicity in Porter's case, the discovery of other innocents on Illinois's death row, and the journalistic account of rampant prosecutorial misconduct, Republican Governor George Ryan declared a moratorium on executions.

At the same time, new developments in DNA technology made it possible to reevaluate evidence in dormant cases—particularly sex offenses—leading to the exoneration of both capital and non-capital

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[25] Death Penalty Info. Ctr. website, *at* http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#SuspendingtheDeathPenalty (last visited Jan. 30, 2005).

[26] *Id.* at http://www.deathpenaltyinfo.org/article.php?scid=8&did=146 (indicating eleven executions between 1976-1985 inclusive); *Bowers*, *supra* note 6, at 23 (indicating ten executions for the period 1965-1967); Death Penalty Info. Ctr. website, *at* http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#SuspendingtheDeathPenalty (describing ten year moratorium between 1967-1977).

[27] Death Penalty Info. Ctr. website, *at* http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#year.

[28] *Id.* at http://www.deathpenaltyinfo.org/article.php?scid=8&did=146.

[29] *Id.*

[30] Ronald Tabak, *Finality Without Fairness: Why We are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 739-41 (2001).

[31] *Id.* at 739.

[32] *Id.* at 740.

prisoners. The 2000 publication of *Actual Innocence,*[33] which recounted the efforts of Barry Scheck and Peter Neufeld, pioneers in the post-conviction use of DNA to uncover erroneous convictions, contributed to the mounting perception that our criminal justice system was fallible even in, and perhaps especially in, capital cases. Over the past five years, public and political attention to the American system of capital punishment has equaled and perhaps surpassed the scrutiny of the *Furman* era.

At first glance the emergent heightened concerns about the death penalty seem perfectly understandable in light of the discovery of wrongly convicted and in some cases death-sentenced inmates. On the other hand, it seems odd that this issue should have so much more traction today than in the past. The fear of executing innocents has surfaced numerous times in American history, and the argument about the fallibility of human judgment has always been present in the larger moral debate about the death penalty. Indeed, in the early 1990s, there was little public attention or outrage when the Supreme Court was faced with the provocative question whether the Constitution prohibited the execution of the actually innocent.[34] The "real" question of the case was a procedural one: whether states were required to afford death-sentenced inmates a vehicle for litigating newly-discovered evidence of innocence.[35] Perhaps because the inmate raising the question had not convincingly established his innocence, the case was greeted as a non-event. Indeed, Chief Justice Rehnquist, in announcing the judgment of the Court, was almost cavalier in rejecting the notion that courts—as opposed to executive officials exercising their clemency powers—had any obligation to correct convictions "merely" because the wrong person had been condemned in the absence of some separate constitutional violation.[36]

It is hard to imagine the same sort of opinion being written today, and the question we address in this paper is whether the changed climate reflects a new wisdom about the significance of the possibility of error in the death penalty debate. From a normative perspective, is the problem of wrongful convictions powerfully different from other sorts of challenges to the death penalty? In the second half of our piece, we address the practical and strategic issues—whether the focus on innocence is a prudent path toward reform or abolition of the death penalty, and whether such a focus

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[33] JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

[34] Herrera v. Collins, 506 U.S. 390 (1993).

[35] *See id.* at 420 (O'Connor, J., concurring) (describing issue as "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew").

[36] *Herrera*, 506 U.S. at 408-15 (detailing arguments against recognizing constitutional right to post-conviction forum in this context).

undermines or reinforces reform in the criminal justice system more generally. Here, though, we'd like to examine and question what appears to be a central premise of the "innocence movement"—that the possibility of executing innocents is of greater normative concern than other kinds of error in capital punishment and thus offers a comparatively stronger basis for abolition or reform of the death penalty.

II. THE APPEAL OF ACTUAL INNOCENCE

We all recoil at the prospect of executing "actual innocents." This reflexive revulsion is obviously justified, but it is nonetheless important and valuable to specify the nature and degree of harm associated with punishing innocents. After all, virtually every socially valuable endeavor carries with it the risk of harm, and it is fair to ask whether the risks (or ultimate harms) in the end are justified. Virtually all would agree that it is better that one guilty person go free (or be spared execution) to prevent the incarceration or execution of an innocent; but at some point the numbers matter.[37] The distinctive claim of the newly emerging "innocence movement" is that the harms associated with executing innocents are of such a different kind or degree that we should not risk these sorts of errors even as we must tolerate others.

There are six prominent arguments for the special wrongness of executing the innocent. First, such punishment generates an enormous retributive gap between the individual's culpability (none) and the punishment received (death). Second, the false conviction of an innocent leaves unpunished the true offender, creating an additional retributive gap and perhaps risking the safety of others if the real culprit remains free to re-offend. Third, the failure to punish the true offender, if known to the community, undermines general deterrence. Fourth, the punishment of the innocent coupled with the failure to punish the guilty causes a loss to the legitimacy of the criminal justice system—a loss that could have consequences not only for society's effort to prevent crime and achieve justice, but also for the capacity of government to be successful in other areas of social policy. Fifth, the punishment of innocents involves a special sort of cruelty because the innocent offender, as he awaits and receives his punishment, knows that the punishment is undeserved. Lastly, executing (as opposed to incarcerating) innocents includes the additional harm of irrevocability.

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[37] For a whimsical treatment of the appropriate denominator, see Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (detailing varying formulations of the Blackstonian declaration, "'Better that ten guilty persons escape, than that one innocent suffer'") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *352).

Each of these harms is undoubtedly significant and in some sense vindicates the intuitive horror of punishing (and especially executing) the innocent. We believe, though, that the case for the normative distinctiveness of this danger might be overstated. Other sorts of error in the criminal justice system, including arbitrary and unequal treatment of offenders as well as disproportionate punishment of the "guilty," generate similar harms. Moreover, even if the punishment or execution of the innocent can be said to cause harms of a different degree if not kind, we believe that the comparative prevalence of other injustices suggests that the risk of executing innocents might deserve less attention than other normative claims against the death penalty; in short, such errors might well be worse when they happen but collectively they are not necessarily the worst part of our capital punishment system. Lastly, we worry that the real attraction of the innocence critique of the death penalty (the fear of executing innocents) might be attributable less to a defensible normative position than to a familiar but nonetheless lamentable psychological dynamic: the harm of punishing innocents resonates with the public precisely because most Americans can empathize with the harms that they fear could happen to themselves, rather than those that happen only to "bad people." Lurking behind innocence's appeal, then, might be indifference if not hostility to other types of injustice.

We discuss the plausible candidates for the distinctive harm of executing innocents in turn.

A. RETRIBUTIVE GAP

The execution of the innocent obviously violates a basic principle of retributivism. Although retribution is often invoked as a justification for punishment,[38] it can also fairly be invoked as a limitation on punishment, requiring that punishment should correspond to (and not exceed) a defendant's blameworthiness. The problem of "excessive punishment" is ubiquitous in the contemporary American death penalty practice, and yet few of these cases involve the actually innocent.

It is important to clarify here that in contemporary discourse surrounding the risk of executing innocent persons, "innocent" typically refers to the completely blameless, as in the case of a defendant misidentified as the perpetrator who had no involvement whatsoever in the offense for which he was convicted and sentenced. Indeed, when defense lawyers, abolitionists, politicians, and the media refer to the "innocents"

[38] MICHAEL MOORE, LAW AND PSYCHIATRY 233 (1984) ("Retributivism . . . is the view that punishment is justified by the desert of the offender . . . .").

freed from death row, they often describe them as "the exonerated"—individuals wholly absolved of blame. Of course, those seeking significant reform or abolition of the death penalty on these grounds have an interest in upping the numbers to generate interest in the problem, and many accounts or lists of "the exonerated" include defendants who were not wholly blameless.[39] It is clear, though, that the sort of innocence that has captured popular and political attention is "pure" innocence, with DNA exonerations serving as the paradigm of "erroneous" convictions. The number of death-row inmates exonerated in the modern era who fit this definition is subject to dispute, but by any account this number appears to be larger than most casual observers of the criminal justice system would have expected. And this distance between expectation and reality seems directly responsible for the renewed interest in our system of capital punishment over the past half-decade.

But the problem of "retributive gap" is not limited to the wholly blameless. Capital trials are notoriously messy affairs,[40] and there are numerous categories of death-sentenced (and executed) defendants whose death sentences can fairly be characterized as "excessive" punishment. In cases involving multiple defendants, prosecutors—and jurors—often misidentify the most culpable offender. In many instances, the identification of the "triggerperson" is actually irrelevant to death-eligibility as a matter of state and federal law, because the Constitution does not forbid death sentences based on accomplice liability so long as the defendant was a significant participant in a dangerous felony.[41] Nonetheless, the fact that the death penalty is *authorized* in certain cases does not necessarily mean it is *deserved*, and prosecutors and jurors would

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[39] John McAdams, *It's Good and We're Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 819, 827 (2001) (claiming that "death penalty opponents have radically and systematically exaggerated the number" of death row inmates who have been "exonerated").

[40] Justice Marshall's concurring opinion in *Furman v. Georgia* insisted that the death penalty distorts the fair and orderly process of the criminal law. *See* 408 U.S. 238, 238 (1972):

> The deleterious effects of the death penalty are also felt otherwise at trial. For example, its very existence "inevitably sabotages a social or institutional program of reformation." In short "the presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform and of the treatment of crime and criminals."

Id. (citations omitted).

[41] Tison v. Arizona, 481 U.S. 137, 158 (1987) (death penalty is constitutionally proportionate as applied to major participants in dangerous felonies who exhibit reckless indifference to human life).

in many cases have exercised their discretion differently if the "true" facts of the crime had been known to them.

Other defendants have been convicted and sentenced to death contrary to emerging recognition that such punishment is excessive. Dozens of defendants with mental retardation were executed in the decades before the Supreme Court declared the practice "excessive" and contrary to evolving standards of decency,[42] and numerous juveniles were also executed[43] though the Court, following public trends, recently recognized this practice to be "excessive" as well.[44]

In many capital trials, inadequate representation causes jurors to sentence defendants to death whose mitigation, if properly investigated and presented, would have secured a different outcome. In such circumstances, the failure to account for the defendant's reduced moral culpability in light of his mitigating evidence renders his punishment excessive. This problem is commonplace, as capital trial lawyers (and appellate courts reviewing capital convictions) have only recently and still imperfectly come to recognize the awesome investigative responsibility entailed in death penalty defense.[45] In addition, many capital defendants whose attorneys *did* develop significant mitigation at trial were condemned under sentencing schemes that precluded jurors from considering and giving effect to such evidence.[46] Texas, the modern leader in executions,[47] did not change its quasi-mandatory statute until the early 1990s,[48] and many of the 300 or so inmates executed in Texas during the modern era were condemned by jurors who were never asked whether the death penalty was deserved. The

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[42] Death Penalty Info. Ctr. website, *supra* note 25, at http://www.deathpenaltyinfo.org/executions.php (noting thirty-four executed offenders with evidence of mental retardation).

[43] *Id.* at http://www.deathpenaltyinfo.org/executions.php (documenting twenty-two executed offenders who were juveniles at the time of their crimes).

[44] Roper v. Simmons, No. 03-633, 2005 WL 464890 (U.S. Mar. 1, 2005).

[45] *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003) (concluding that trial counsel's failure to investigate and develop significant mitigating evidence of abuse constituted deficient performance and that there was a reasonability probability that such evidence would have affected the outcome at sentencing).

[46] *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (*Penry I*) (holding that Texas special scheme, which asked jurors only whether the defendant's conduct was deliberate and whether the defendant would be dangerous in the future, was constitutionally inadequate where the defendant's mitigating evidence of mental retardation and abuse had relevance outside of those inquiries).

[47] Death Penalty Info. Ctr. website, *supra* note 25, at http://www.deathpenaltyinfo.org/executions.php (noting that Texas has carried out 339 out of the 945 executions in the modern era).

[48] *See* Steiker & Steiker, *supra* note 13, at 393-96 (describing litigation surrounding old Texas statute based on inability of jurors to give effect to mitigating evidence).

Supreme Court's recent highly-publicized efforts[49] to extend relief to Texas defendants sentenced under such circumstances should not obscure the fact that many more defendants from that period were executed and might well not have deserved to die.

Thus, the problem of "retributive gap" is not unique to "pure" innocents but an endemic problem in the American death penalty. And it is striking that comparatively little attention is paid to those defendants who, though guilty of a crime (perhaps manslaughter, or non-capital murder, or capital murder accompanied by powerful mitigation), are punished excessively.

B. FAILURE TO PUNISH AND INCAPACITATE THE "TRUE" OFFENDER

Apart from the obvious costs to the wrongly punished, misidentification of the perpetrators of crime prevents or delays the truly guilty from receiving deserved punishment and fails to incapacitate dangerous offenders. Indeed, after Anthony Porter's innocence was established in Illinois, police came to suspect that the true culprit committed another murder during the interval between Porter's arrest and exoneration.[50] The failure to identify, apprehend, and punish the guilty is of course a serious problem in the criminal law generally. "Underinclusion" seems to be of special concern in the death penalty context, and, as noted above,[51] several of the opinions in *Furman* regarded the failure to punish deserving (or at least equally deserving) offenders with the death penalty as constitutionally problematic.

The difficulty with this argument is that the erroneous punishment of the actually innocent accounts for an extremely small part of the underinclusion problem. Many offenders are not apprehended or punished simply because their crimes go unsolved, not because an innocent person has been wrongly charged or convicted. More significantly, the very protections our system adopts to prevent the conviction and punishment of

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[49] *See* Penry v. Johnson, 532 U.S. 782 (2001) (*Penry II*) (rejecting "nullification" question as adequate vehicle for mitigating evidence unrelated to the dangerousness and deliberateness questions answered by the jury); Tennard v. Dretke, 124 S. Ct. 2562 (2004) (rejecting Fifth Circuit's policy of applying *Penry I* only to cases involving mitigating evidence amounting to a uniquely severe condition with a nexus to the crime); Smith v. Texas, 125 S. Ct. 400 (2004) (summarily reversing Texas Court of Criminal Appeals's decision which had purported to distinguish the nullification charge from the one given in *Penry II* and which had found the defendant's mitigating evidence addressable via the special issues under *Penry I*).

[50] James S. Liebman, *The New Death Penalty Debate: What's DNA Got To Do With It?*, 33 COLUM. HUM. RTS. L. REV. 527, 539 (2002).

[51] *See supra* text accompanying notes 16-19.

the innocent obviously also protect the guilty. Our demand of proof beyond a reasonable doubt guarantees that some, perhaps many, guilty offenders will escape punishment. The problem of "false negatives"—offenders escaping punishment—is less the result of "false positives" than of our efforts to *avoid* "false positives." In short, we could hardly improve, much less solve, the problem of underinclusion by increasing safeguards against erroneous convictions.

Moreover, to the extent pervasive underinclusion has been uncovered in the death penalty context, it regrettably has been linked to racial discrimination. It is familiar history that African-American defendants were uncommonly likely to be punished with death from the founding until the modern era, and much of modern constitutional criminal procedure is traceable to concerns about sham trials—such as in the Scottsboro cases–resulting in African-Americans being sentenced to death.[52] In the present era, though, race appears to surface less as an aggravating factor in cases involving minority defendants than as a mitigating factor in cases involving minority victims. Indeed, the famous Baldus study litigated in *McCleskey v. Kemp*[53] strikingly revealed that killers of blacks (who themselves tend to be black) were more than four times less likely to receive the death penalty than killers of whites.[54] This fact, of course, made *McCleskey* a difficult case, because it is not obvious that this sort of race-of-the-victim discrimination should be addressed by sparing killers of whites rather than ensuring vindication of minority victims.[55] In any case, the harm of underinclusion is not particular to the problem of punishing innocents, and contemporary empirical evidence such as the Baldus study suggests that systemic underinclusion is attributable to other, more troublesome, causes.

C. UNDERMINING DETERRENCE

The argument here is quite similar. The failure to punish true offenders undermines general deterrence because the true offender escapes punishment (and society presumably eventually learns of that fact). Again, this harm is certainly real, but the harm is not particular to inaccurate convictions, and inaccurate convictions are not a particularly significant

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[52] *See* Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (discussing role of Scottsboro cases and others in the development of modern constitutional criminal procedure).

[53] 481 U.S. 279 (1987).

[54] *Id.* at 287 (noting that under Baldus study, "even after taking account of thirty-nine nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks").

[55] *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 340-45 (1997) (discussing problems of remedy).

source of the problem of sub-optimal deterrence. Ironically, inaccurate convictions might actually serve deterrence purposes if their error goes undetected. Clearly one of the central dynamics leading to inaccurate convictions is the pressure law enforcement officials feel to clear cases. This pressure stems in part from society's desire to communicate clearly the "crime-does-not-pay" message. It is actually a contested empirical matter whether the erroneous convictions secured under such circumstances contribute to or detract from deterrence. We would have to know (as we do not) what percentage of inaccurate convictions are discovered; we would also need more information regarding how communities (particularly would-be criminals) receive the respective "messages" of, first, the quick apprehension of the "perpetrator" and, second, the belated discovery that the true perpetrator went unpunished. Indeed, one of the challenges to purely utilitarian theories of punishment is the possibility that society could achieve a net benefit by punishing innocents to deter crime if the innocence of those punished could remain undetected (or at least undiscovered for an extended time).[56]

D. LOST LEGITIMACY

The execution of innocent offenders undoubtedly would exact a steep price in terms of governmental legitimacy. It is a matter of common understanding that greater resources are devoted to capital cases, and a substantial error rate in such cases would certainly prompt serious doubts about the accuracy of the criminal justice system more generally. A crisis of confidence might extend beyond the criminal justice system as well. It is a familiar critique of the death penalty that if we cannot trust our government on small matters and regularly find fault in the ordinary operation of governmental bureaucracies, we should not entrust the state with the enormity of the death penalty. But in fact, the better argument might run the other way: if the government cannot get it right when a person's life is at stake, when everyone appreciates the stakes and substantial resources are mobilized to prevent error, how can we have confidence in the state's decision-making in less scrutinized areas?

It is a slightly different and more difficult question whether the discovery of erroneously death-*sentenced* individuals undermines governmental legitimacy. Supporters of the death penalty have pointed to the same evidence trumpeted by reformers and abolitionists—the discovery

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[56] *See* MOORE, *supra* note 38, at 238 (describing case in which significant social benefits could be achieved by punishing an innocent person and concluding that "there is no a priori reason that the net social gain in such a case might not outweigh the harm that is achieved by punishing an innocent person").

of numerous death-sentenced innocents during the appellate and post-conviction process—as proof of the system's corrective potential.[57] Developments over the past five years seem to have generated serious concern about the accuracy of the American death penalty system. It remains difficult, though, to assess how the public would react today to the execution of an innocent given the absence of an undisputed, unequivocal case involving the execution of a blameless person in the modern era.

It is also fair to ask whether the loss of legitimacy caused by the execution of the innocent might be offset by the legitimacy gains realized by the execution of the guilty. Austin Sarat, reflecting on the continued presence of the death penalty in a country that regards itself as "the most democratic of democratic nations"[58] suggests that the death penalty might serve an important role in confirming the strength and authority of our leaders.[59] Democracies, he argues, in which the locus of power is in the "people," need dramatic symbols to confirm their precarious sovereignty, and "[i]f the sovereignty of the people is to be genuine, it has to mimic the sovereign power and prerogatives of the monarchical forms it displaced and about whose sovereignty there could be few doubts."[60] The recent experiences in American presidential elections support this notion, as both President George W. Bush and particularly President Bill Clinton sought to establish their leadership credentials by demonstrating their (regal) willingness to preside over executions.[61]

In evaluating the potential harm of lost legitimacy, we should recognize that other aspects of our death penalty system undermine legitimacy as well. Arbitrary or discriminatory use of the death penalty can affect public confidence even if the public harbors no doubts about the guilt of each executed defendant. As our introduction suggests, "legitimacy" depends critically on context, and in times of declining executions, the public might be more alarmed by the inequitable or arbitrary distribution of the death penalty than by the more remote risk of executing innocents. Conversely, as executions rise, and less popular (and perhaps less executive and judicial) attention is paid to the circumstances of each case,

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[57] McAdams, *supra* note 39, at 834 ("[N]o proof of an innocent executed in the U.S. in the last generation . . . suggests that the system works . . . .").

[58] AUSTIN SARAT, THE KILLING STATE 5 (1999).

[59] *Id.*

[60] *Id.*

[61] Richard Brooks & Steven Raphael, *Criminal Law: Life Terms of Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 639 (2002) (discussing political costs of opposing capital punishment).

"legitimacy" might require assurance that innocents are not regularly being caught in the machinery of death.

E. SPECIAL CRUELTY OF ENDURING UNDESERVED PUNISHMENT

The horror of executing innocents might ultimately turn on our revulsion at the prospect of someone being forced to walk to his death knowing his punishment to be undeserved. This harm strikes a more visceral chord than harms associated with underinclusion (knowing that one deserves death but that some equally deserving offender has been spared) or procedural irregularity (the evidence of one's guilt was obtained through questionable means). The harm is likely compounded by the stigma heaped upon both the condemned and his family. In children we see a disbelieving and painful anger when punishment is undeserved, and our intuitions recognize as more painful the wrongful and inescapable infliction of pain.

Here, too, we acknowledge the horror and harm but doubt its distinctiveness. As an initial matter, this argument about the distinctive cruelty surrounding the punishment of innocents raises profound questions. Many offenders, though in fact guilty, manage to persuade themselves of their own innocence. Is their punishment less cruel because their "honest" belief in victimization is objectively unreasonable? In terms of magnitude, the group of self-assessed martyrs is likely to greatly outnumber the truly innocent.

A separate claim relating to cruelty at the moment of execution based on psychological factors concerns the execution of the incompetent. Although the Supreme Court has concluded that the Constitution forbids the execution of persons incompetent at the time of execution,[62] few protections in American death penalty law have been enforced less vigorously. The Supreme Court has not crafted a general standard for assessing competency, and many jurisdictions apply an extremely thin version of what it means to be "sane" at the time of execution. As a result, state and lower federal courts routinely sustain competency findings in the face of substantial evidence of impaired or even delusional thought on the part of the defendant. In an infamous Arkansas case during Bill Clinton's first presidential campaign, the inmate's execution was allowed to go forward despite the inmate's apparent belief that he could eat his dessert after the execution.[63] And in a case involving a Texas inmate, the federal courts authorized the execution of an inmate notwithstanding the inmate's

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[62] Ford v. Wainwright, 477 U.S. 399 (1986).

[63] *See, e.g.*, Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283 (1996) (exploring the political dimensions underlying the denial of clemency in Ricky Rector's case).

delusional belief that his "dead aunt [would] protect him from the effects of the sedative and toxic agents used."[64] In cases of acknowledged psychosis, some states have sought to forcibly medicate inmates with approaching execution dates to render them competent for execution, and the federal constitutional status of such a practice remains open to debate.

If the paradigm, then, of a "non-cruel" execution is one in which the condemned acknowledges or at least understands his responsibility for his crime and rationally connects his impending punishment to his own culpable actions, executions are cruelly administered on a regular basis in the United States. The harm associated with the execution of innocents cannot fairly be characterized as distinctive in this regard.[65]

F. IRREVOCABILITY

Thus far we have argued that many of the harms associated with punishing the innocent can be found in cases involving those guilty of wrongdoing. A more tailored claim might assert the distinctiveness of *executing* as opposed to incarcerating inmates. On this view, we should be especially concerned about punishing innocents in the capital context because death is irrevocable: it is a common and thoroughly respectable concern about the death penalty that executions cannot be undone. This harm, like some of those discussed above, has both an individual and societal dimension: wrongful executions are terrible for the innocent condemned because their lives are unrecoverable and terrible for society because such errors are beyond repair. But we doubt that the death penalty is truly distinctive in this respect. Innocents who are convicted and incarcerated can be freed from prison, but their time spent in prison is likewise unrecoverable. In this respect, the argument of irrevocability is truly an argument about severity; it is impossible to turn back the clock on any punishment that has been endured, and the irretrievable loss in the death penalty context exceeds the loss of wrongful imprisonment.

Moreover, errors are less likely to be uncovered and corrected in the non-capital context. As a procedural matter, non-capital inmates have fewer avenues and resources for vindicating their claims of innocence.

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[64] Garrett v. Collins, 951 F.2d 57, 58 (5th Cir. 1992).

[65] Some might argue that wrongful *execution* (as opposed to incarceration) of the innocent is especially cruel, but we have our doubts. Undeserved punishment carries this cost in both capital and non-capital cases. Wrongful incarceration is endured one day at a time, and the structural deafness of our criminal justice system to non-capital claims of actual innocence undoubtedly compounds the frustration of involuntary restraint. Again, the collective magnitude of the error in the non-capital context dwarfs the corresponding harm in our administration of the death penalty.

States generally provide post-conviction counsel as a matter of right to indigent death-sentenced inmates, but not to others, and Congress likewise funds indigent representation in federal habeas only in capital cases. Media attention is also likely to be directed toward capital cases, in part because of society's fascination with death and in part because of the presence of an advocate for the inmate. The recent burgeoning of "innocence projects" will help vindicate some claims of non-capital inmates, particularly in cases involving DNA, but the resources presently available to non-capital inmates are plainly insufficient to assure meaningful investigation in the vast majority of cases. Given a national prison population hovering over 2,000,000, even an optimistic error rate of one percent would translate into more than 20,000 wrongfully incarcerated inmates. The irreparable loss for those individuals represents an undoubtedly significant harm, and in practical terms amounts to many more ruined lives than could be attributed to the American death penalty over its whole history much less in the modern era.

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We thus conclude that the conviction and execution of the innocent entails harms that are ubiquitously present in the capital punishment system. Perhaps more significantly, other sorts of injustices, including the arbitrary or discriminatory administration of the death penalty and the execution of guilty but undeserving or impaired offenders, actually present these risks in greater magnitudes.

What, then, accounts for the apparent appeal of the innocence argument and the comparative devaluation of other errors and injustices in our criminal justice system? We fear that the power of innocence claims derives in large part from a type of cognitive bias. Individuals tend to overestimate risks of harm that they believe themselves to face and to underestimate risks they view as attaching only to others. Even with our extraordinary incarceration rates, most Americans do not view themselves as potential criminals, and thus most Americans are unlikely to view themselves as subject to the many risks of harm we detailed above. On the other hand, we suspect that many Americans, whether offender or non-offender, can imagine getting erroneously caught in the web of the criminal justice system, even if, as a practical matter, the overall risk is small and overwhelmingly distributed to actual offenders (the usual suspects). This process of identification is fueled by dramatic media accounts of the wrongfully accused and convicted and the comparative lack of public interest in the harms inflicted upon the guilty. Hence, though we obviously acknowledge the devastating costs of punishing and executing the innocent,

we are not persuaded, as a normative matter, that such costs necessarily deserve priority in critiquing the American capital justice system.

III. INNOCENCE AS STRATEGY

Those who work as litigators to free the innocent from death row, or those who work as reformers to prevent or reduce the incidence of such miscarriages of justice, are by no means necessarily insensitive to the less dramatic, but more endemic, injustices in the administration of capital punishment that we have described above. Rather, it is commonly, indeed virtually universally, believed that emphasis on the possible execution of the innocent is the best strategy to broadly reform or even to abolish the death penalty. Hence, death penalty reformers and abolitionists might respond to our arguments questioning the distinctiveness of innocence as a normative matter by asserting the power of innocence as a reforming or abolitionist strategy. Who cares, they might say or think, whether innocence is special in some abstract sense, when it is so clearly special in the concrete political sense as a lever by which to move public opinion and public policy?

The argument for the strategic distinctiveness of innocence is as powerful, perhaps even more so, than the argument for its normative distinctiveness. Some of those closest to the action have begun to use the term "innocence revolution" to describe the past five years of renewed skepticism, debate, and public policy initiatives at all levels of government regarding the administration of the death penalty.[66] Rob Warden's paper in this symposium is a riveting account of the most dramatic chapter thus far in the story of the "innocence revolution"—the experience of the state of Illinois, in which a spate of high-profile exonerations of death row inmates galvanized a Republican governor to declare a moratorium on executions and then to offer mass clemency to the entire death row population.[67] Warden also describes the somewhat less dramatic movement of the reluctant Illinois legislature toward a reform "package" that attempts to respond to some of the most egregious problems in the administration of capital punishment that were brought to light by the post-exoneration investigations into the failure of the Illinois criminal justice system.[68] The

[66] Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265 (2004); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004).

[67] Rob Warden, *Illinois Death Penalty Reform: How it Happened, What it Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381 (2005).

[68] *Id.* at 387-88.

Illinois experience, while unusually dramatic, illustrates well the attraction of focusing on innocence as a strategy for both abolitionists and reformers. From the abolitionist perspective, Governor Ryan's complete conversion from supporter of capital punishment to abolitionist holds out the hope that mounting concerns about executing the innocent may shake the solid foundation of public support for capital punishment that has existed since the 1970s.[69] From the reformist perspective, the work of the Illinois legislature suggests that concerns about innocence can lead to widespread systemic reform—not only greater DNA collection and testing, but also reforms designed to improve police investigative procedures, to prevent prosecutorial misconduct, and to provide better funding and higher standards for capital defense, among other things. The power of the "innocence movement" to promote reform derives in large part from the fact that DNA exonerations offer what Richard Rosen has called a "random audit" of convictions, thus providing a window into the mistakes of the criminal justice system and generating a list of particular failures that need to be corrected.[70] Barry Scheck and Peter Neufeld, the leaders of the DNA exoneration movement and co-founders of The Innocence Project at the Cardozo School of Law, have repeatedly urged that the false convictions they have uncovered require not only more "innocence projects" and DNA reforms, but also broader systemic reforms of the criminal justice system.[71]

Thus, it is not surprising that abolitionists and reformers alike, appalled and galvanized by the discovery of innocent convicts on death row, have treated the problem of innocence as something of a strategic gift. History may prove them right; it may turn out that current concerns about executing the innocent will provide a crucial push toward ultimate abolition of the death penalty in the United States, or that important reforms in capital punishment or criminal justice generally will be instituted in response to those concerns. There are reasons, however, to look the proverbial gift horse in the mouth. One of the privileges and duties of the legal academy is to question conventional orthodoxies, and we seek here to question and perhaps to qualify the current consensus that focus on the problem of innocence is the best strategy for promoting change regarding the administration of capital punishment. What follows are three sets of

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[69] Gallup polling data, asking the same abstract question, "Do you favor the death penalty for those convicted of murder?," has reported substantial majorities in favor of the death penalty from the early 1970s on, though the numbers have dropped from high of 80% in favor in 1994 to a recent low of 66% in the October, 2004 poll. *See* Press Release, Joseph Carroll, Assistant Editor, The Gallup Organization, Who Supports the Death Penalty? (Nov. 16, 2004), *at* http://www.deathpenaltyinfo.org/article.php?scid= 23&did=1266.

[70] Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 69 (2003).

[71] *See generally* DWYER ET AL., *supra* note 33.

concerns about the current unquestioning focus on innocence. Even if these concerns are not sufficient to offset the benefits of focusing on innocence—and, frankly, we are not certain that they are—they at least illuminate some possible pitfalls that may lie along this strategic path.

A. THE OTHER INNOCENCE REVOLUTION: TRUTH-SEEKING AS A LIMIT ON LITIGATION OF CONSTITUTIONAL CLAIMS

It should be with some sense of irony that advocates hail the "innocence revolution" in the debate about capital punishment, because not very long ago there was an "innocence revolution" of a different sort in criminal procedure that has had a huge impact on the litigation of constitutional claims by capital defendants. In response to the Warren Court's incorporation of the criminal procedure provisions of the Bill of Rights, its expansive reading of those provisions, and its liberal approach toward the availability of federal review of state court convictions, the Burger and Rehnquist Courts moved in the 1970s and 1980s to craft rules of constitutional adjudication in the criminal process to focus on truth-seeking rather than vindication of constitutional rights *per se*. This reorientation had a substantial impact on the constitutional standards regarding ineffective assistance of counsel and prosecutorial duties to disclose exculpatory evidence—the two constitutional issues most important to capital defendants. At the same time, the Court substantially narrowed the availability of federal habeas corpus review, crafting exceptions for claims of "actual innocence." Congress then adopted and strengthened these limitations on habeas review, codifying some of the "innocence" exceptions, while at the same time narrowing them. Many of those who now hail the new "innocence revolution" and its potential to reform or abolish capital punishment railed against these earlier judicial and legislative innovations. We fear that unreflective embrace of "innocence" as strategy by reformers and abolitionists may undermine the efforts and credibility of the criminal and capital defense bar in its attempt to formulate and litigate alternatives to this earlier "innocence revolution."

Consider first the striking reorientation of federal habeas review around the issue of actual innocence. Judge Henry Friendly's hugely influential 1970 speech and article, *Is Innocence Irrelevant?*,[72] repudiated the Warren Court's expansive treatment of collateral federal review of state court convictions as a vehicle for the consideration of all federal constitutional claims in a federal forum. Rather, argued Friendly, federal

[72] Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970).

habeas review of constitutional issues should be restricted, with rare exception, to the much smaller subset of such issues that are accompanied by a colorable claim of actual innocence. Friendly's exhortation fell on receptive ears on the Court, and the resulting judicial reorientation of federal habeas law is well-known—and frequently lamented by critics of capital punishment. While the Court did not directly embrace potential innocence as a precondition for federal habeas relief, it instead repeatedly tightened procedural requirements for federal habeas petitions,[73] allowing only few and narrow exceptions for the many petitioners who failed to meet them—with innocence paramount among the exceptions.[74] Moreover, the Court also limited the substantive scope of federal habeas review in two different ways, both of which reflected its emphasis on innocence as a limiting criterion. First, the Court's preclusion of Fourth Amendment claims from re-litigation in a federal forum was based on Justice Powell's recognition, citing Friendly, that such claims always impede rather than promote the accuracy of criminal verdicts.[75] Second, the Court's preclusion of "new" constitutional claims on federal habeas, like its tightened procedural rules, allowed only narrow exceptions, the most significant of which concerned issues related to verdict accuracy.[76] Finally, for the increasingly few habeas claims that both meet the Court's heightened procedural requirements and fall within its narrowed scope of review, the Court has relaxed the standard for deeming constitutional errors harmless on habeas review, once again on grounds that only truly grievous constitutional wrongs—conviction of the innocent being the paramount case—should be corrected on habeas.[77]

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[73] *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (excuse for petitioner's failure to comply with state procedural rule must meet "cause and prejudice" standard rather than "deliberate bypass" standard of Fay v. Noia, 372 U.S. 391 (1963)); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (applying "cause and prejudice" standard to failure to develop the facts underlying claim) (overruling Townsend v. Sain, 372 U.S. 293 (1963)); McCleskey v. Zant, 499 U.S. 467 (1991) (applying "cause and prejudice" standard to new claims not presented in previous petition); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (applying "cause and prejudice" standard to successive claims raising grounds identical to grounds heard and decided on the merits in a previous petition).

[74] The Court crafted a narrow "miscarriage of justice" exception to the "cause and prejudice" requirement, allowing petitioners to raise successive claims, repetitive new claims, or defaulted claims if they made a colorable showing of actual innocence of the underlying crime. *See* McCleskey v. Zant, 499 U.S. 467 (1991) (repetitive new claims); Murray v. Carrier, 477 U.S. 478 (1986) (defaulted claims); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (successive claims); *see also* Sawyer v. Whitley, 505 U.S. 333 (1992) (crafting an even narrower "innocent of the death penalty" miscarriage-of-justice exception).

[75] *See* Stone v. Powell, 428 U.S. 465 (1976).

[76] *See* Teague v. Lane, 489 U.S. 288 (1989).

[77] *See* Brecht v. Abrahamson, 507 U.S. 619 (1993).

This judicial "innocence revolution" had already been fully accomplished when Congress joined the fray, amending the federal habeas statute in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[78] Congress, like the Court, did not make innocence a threshold requirement for habeas review. Moreover, Congress made many restrictive changes to habeas law either unrelated to or at odds with innocence as a central focus.[79] Nonetheless, in several key ways, the 1996 amendments borrowed from and exaggerated the Court's use of innocence as a gateway to habeas relief. In banning consideration of new claims raised in a second or successive habeas petition, Congress, like the Court, crafted an "innocence" exception[80]—but limited it to claims of factual innocence of the underlying offense (rather than ineligibility for the death penalty, as the Court permitted),[81] and required that the petitioner prove such factual innocence by "clear and convincing evidence"[82] (rather than the Court's less demanding "more likely than not"[83] standard).[84] Similarly, in restricting the availability of evidentiary hearings on habeas review, Congress crafted an "innocence" exception that resembled the one adopted by the Court,[85] but with the same exaggerations found in its successive petition provisions.[86]

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[78] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

[79] For example, AEDPA's "opt-in" provisions, providing a shorter statute of limitations in capital cases for states who meet certain standards for provision of capital representation services, have no direct relationship to innocence; arguably, AEDPA's creation of a statute of limitations with no explicit innocence exception is at odds with concerns about innocence preservation.

[80] *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (2000).

[81] *See* Sawyer v. Whitley, 505 U.S. 333 (1992).

[82] 28 U.S.C. § 2244(b)(2)(B)(ii).

[83] *See* Murray v. Carrier, 477 U.S. 478, 496 (1986). The Court imposed a "clear and convincing" standard of proof only on defendants seeking to show that they were ineligible for the death penalty, rather than innocent of the underlying offense. *See Sawyer*, 505 U.S. at 336.

[84] Moreover, the statute provides that the innocence showing is a necessary but not sufficient condition for the consideration of a new claim in a second or successive habeas petition; the petitioner must additionally show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence . . . ." 28 U.S.C. § 2244(b)(2)(B)(i). In contrast, the Court had ruled that a colorable innocence claim was a sufficient condition for an exception to its limitations on successive petitions—an alternative to a showing of "cause" for failure to have raised the issue in previous submissions, rather than an additional requirement. *See Murray*, 477 U.S. at 496.

[85] *See* 28 U.S.C. § 2254(e)(2)(B).

[86] The statute requires proof of innocence of the underlying offense rather than innocence of the death penalty, proof by the higher burden of proof of clear and convincing evidence,

This judicial and legislative re-calibration of the availability of federal habeas corpus relief was part of a larger movement to make the accurate determination of guilt or innocence the paramount or exclusive value in constitutional criminal procedure. If Judge Friendly's *Is Innocence Irrelevant?* spurred and reflected a new outlook on habeas corpus, Judge Marvin Frankel's speech and article, *The Search for Truth: An Umpireal View*, published five years later, reflected the changing *zeitgeist* regarding the criminal process.[87] The Burger and Rehnquist Courts moved on many fronts to repudiate or limit the Warren Court's view of the criminal process as an appropriate venue for addressing claims of police and prosecutorial misconduct or for promoting abstract values (such as dignity, fairness, or equality), when vindication of such claims or values would come at the expense of accuracy in criminal trial verdicts. Many doctrines, too numerous to canvas, reflect this shift in constitutional criminal procedure toward limiting the vindication of constitutional values other than, and in tension with, verdict accuracy. Perhaps the most obvious example is the Fourth Amendment context, where the Court repeatedly cut back on the remedy of evidentiary exclusion, trading off again and again the value of incremental (in the Court's view) deterrence of police misconduct for greater accuracy of criminal dispositions.[88]

For death penalty reformers and abolitionists, however, two related doctrines generated during this truth-seeking revolution ought to be of particular concern: the constitutional doctrines regarding the right to effective assistance of counsel (*Strickland v. Washington*[89] and its progeny) and the duty of prosecutors to disclose potentially exculpatory information

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and a proof of innocence in addition to, rather than as an alternative to, a showing of cause for failure to develop the factual record in state court.

[87] Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). While Frankel was more concerned with the roles of lawyers and judges in the adversary process than with the field of constitutional criminal procedure, his admonition that the trial process had moved too far from the central mission of truth-seeking struck a chord; his article, originally given as a lecture to the New York Bar Association the previous year, was immediately cited by Justice Powell in *Stone v. Powell*, 428 U.S. 465, 488 n.25 (1976).

[88] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (fashioning an exception to the exclusionary rule for good faith reliance on the issuance of an invalid warrant); United States v. Havens, 446 U.S. 620 (1980) (permitting the use of unconstitutionally seized evidence to impeach a testifying defendant at trial); Rakas v. Illinois, 439 U.S. 128 (1978) (reformulating the doctrine of Fourth Amendment standing to seek exclusion of evidence); Stone v. Powell, 428 U.S. 465 (1976) (limiting the invocation of the exclusionary rule on federal habeas corpus review); United States v. Calandra, 414 U.S. 338 (1974) (permitting the use of unconstitutionally seized evidence in the grand jury).

[89] 466 U.S. 668 (1984).

(*Brady v. Maryland*[90] and its progeny). The current "innocence revolution" has taught us that failures of trial counsel and suppression by the state of exculpatory evidence are two of the primary causes of the conviction and sentencing to death of innocent people.[91] Yet the ex post "reasonable probability" of acquittal standard promulgated during the other "innocence revolution"—as both the "prejudice" prong of the *Strickland* analysis and the stringent definition of "materiality" in the *Brady* line of cases—has proven to be one of the biggest stumbling blocks for capital defendants in their attempts to present such claims for relief.

The Warren Court, despite its many rulings on criminal procedure, never offered a general constitutional framework for the consideration of claims by criminal defendants that their counsel provided ineffective representation. Finally, in the waning years of the Burger Court, the Court accepted the constitutional project and decided *Strickland*, a capital case in which the defendant argued that his lawyer failed to investigate and present potentially mitigating evidence prior to and during his sentencing hearing. The Court, concerned that its new, generalized standard for attorney error might open the floodgates of litigation and reversal, held that convictions (and capital sentences) should remain undisturbed even when defendants could demonstrate that their counsel's performance fell below the Court's deferential bar of reasonable competence, unless such defendants could also show "prejudice" from specific attorney errors. The Court defined "prejudice" (citing the developing *Brady* line of cases) as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," noting that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."[92] This test was not a new one for the Court; it reflected the extent to which the accuracy of outcomes had become both the beginning and the end of constitutional analysis. It is telling that Justice Marshall wrote for himself alone—without even his usual companion Justice Brennan—in questioning the ascendancy of verdict accuracy in the formulation of the *Strickland* prejudice standard:

> [T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty

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[90] 373 U.S. 83 (1963).

[91] *See* Warden, *supra* note 67, at 403 n.94 (citing Armstrong series in Chicago Tribune).

[92] *Strickland*, 466 U.S. at 694 (citing, *inter alia*, United States v. Agurs, 427 U.S. 97 (1976)).

> defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree.[93]

Marshall urged instead that the government should bear the burden of proving that incompetent lawyers were "harmless beyond a reasonable doubt," the general standard for other forms of constitutional error during criminal trials.[94]

Marshall was also the dissenting voice (this time with Brennan), on similar grounds, when the Court used the same "reasonable probability" standard to define the scope of prosecutorial duties to disclose exculpatory evidence[95] under *Brady,* the case in which the Warren Court first announced a general prosecutorial duty to disclose under the Due Process clause. *Brady*, like *Strickland*, was a death penalty case.[96] The Court reversed Brady's death sentence because the prosecutor had failed to disclose to the defense a statement by Brady's companion during the offense admitting to the actual killing (while still implicating Brady as an accomplice).[97] The Court's opinion, holding that "material" exculpatory evidence must be turned over to the defense by the state, did not offer a definition of "materiality" other than such evidence as "would tend to" exculpate the defendant or reduce the penalty.[98] In later cases, however, the Burger Court sharply circumscribed the definition of "materiality," ultimately referencing *Strickland* and concluding that undisclosed exculpatory evidence is "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[99]

Once again, Marshall took the Court to task for creating too high a bar for relief. He castigated the Court for being too "anxious to assure that reversals are handed out sparingly"[100] and urged that values other than accuracy ought to trump the preservation of guilty verdicts. Marshall appealed to the need to shape a more disinterested role for prosecutors in the adversary system and thus to avoid creating incentives for prosecutors to "play the odds."[101] He argued that the general structure of the adversary

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[93] *Id.* at 711 (Marshall, J., dissenting).

[94] Chapman v. California, 386 U.S. 18 (1967).

[95] United States v. Bagley, 473 U.S. 667, 685 (1985).

[96] *Brady*, 373 U.S. 83.

[97] *Id.*

[98] *Id.* at 88.

[99] *Bagley*, 473 U.S. at 682.

[100] *Id.* at 702 (Marshall, J., dissenting).

[101] *Id.* at 701 (Marshall, J., dissenting).

system and "equality of justice"[102] depended on the government sharing exculpatory information with defendants, regardless of the outcomes of particular cases. And he squarely urged that sometimes the "apparent"[103] fairness of trials ought to matter, even when there is no showing that a defendant is either innocent or actually harmed by the government's misconduct. In urging automatic reversal for deliberate prosecutorial failures to disclose exculpatory evidence, Marshall argued that such misconduct is "antithetical to our most basic vision of the role of the state in the criminal process."[104]

This sketch of how the now-familiar landscape of constitutional criminal procedure and habeas corpus review developed is not meant to suggest that anyone concerned about the execution of innocent people today necessarily endorses all or any of these particular doctrines. Rather, consideration of this earlier "innocence revolution" offers some cautions that might temper, at least a little, the wholesale commitment of current death penalty reformers and abolitionists to an innocence strategy. First, a lesson for reformers. Many hope that the "random audit"[105] function of DNA analysis will lead to a greater understanding of systemic problems in the criminal justice system that need reform and a greater willingness to fix them; their hopes are buoyed by the interest that policy makers, including the Illinois legislature, recently have shown in addressing issues like identification procedures and standards for capital defense counsel. But the debate over the reform of federal habeas corpus teaches that concerns about innocence can just as plausibly be used to promote the creation of special procedures only for those who can assert the possibility (or probability) of factual innocence rather than the maintenance of far more costly general protections for all defendants. If technological advances hold out hope that such "special procedures" exist or might soon be developed in capital cases, enthusiasm for general procedural reform may well dissipate.[106]

Second, and more globally, we are worried that the current focus on innocence may implicitly concede the lesser power of other systemic critiques. Larry Marshall, a towering figure in the current "innocence revolution," celebrates the fact that innocence is so uncontested a value, especially in comparison to the Warren Court's "controversial set of value

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[102] *Id.* at 695 (Marshall, J., dissenting).

[103] *Id.* at 693 (Marshall, J., dissenting).

[104] *Id.* at 704 n.6 (Marshall, J., dissenting). As in the *Strickland* context, Marshall urged the *Chapman* constitutional harmless error standard for non-deliberate failures to disclose potentially exculpatory material. *Id.* at 696.

[105] Rosen, *supra* note 70, at 69.

[106] *See infra* Part III.C.

judgments pursuant to constitutional values of autonomy, integrity, and respect for the individual."[107] While it is impossible not to see his point and share the relief of having an argument whose central premise is unquestioned, we hope that the Warren Court's premise that some values trump accuracy survives (even if we don't embrace the particulars of all of its doctrinal innovations). Contrary to many eloquent critics of the Warren Court's criminal procedure revolution,[108] we are not convinced that re-orienting constitutional criminal procedure around accuracy is so obviously right. We think that there are good reasons to empower criminal defendants with the ability to challenge police and prosecutorial misconduct, racial discrimination and disparity, and structural inequities in the criminal process, even when such challenges might undermine the validity of otherwise accurate criminal convictions. While focusing on innocence as a strategy does not preclude championing such challenges, it can make it harder to confidently or persuasively argue—or even think—them. Moreover, the source of such challenges is limited to the capital and criminal defense bars and the legal academy. If they channel the bulk of their time, energy, and material resources toward innocence claims and strategies, other systemic critiques may be weakened or lost.[109]

One could fairly respond that the Warren Court decisively lost its battles; why urge the defense bar and the academy to waste their time fighting the last war? Wouldn't a more fruitful strategy be to hoist the Court by its own petard and urge doctrinal and public policy reforms centered around the new paradigm of innocence? This, too, is a fair point,[110] but such a strategy might fail to recognize that there are vestiges of a counter-paradigm that still remain, which could become more vulnerable if the new paradigm were to gain complete ascendance. Consider one important example: claims for reversal of convictions in cases of race

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[107] Marshall, *supra* note 66, at 573.

[108] *See generally* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

[109] We thus turn on its head Bill Stuntz's fear that the Warren Court's recognition of greater procedural rights shifted limited defense resources away from investigating and pursuing claims of factual innocence. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997). We worry that focusing too exclusively on individual claims of innocence may drain energy away from larger systemic critiques.

[110] This is exactly the sort of argument that one of us made regarding the cognizability of "bare innocence" claims on federal habeas review. *See generally* Jordan M. Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993) (arguing that the Court's willingness to craft federal habeas as an equitable remedy without strict adherence to statutory language supports an argument for the cognizability of innocence as a claim independent from constitutional error).

discrimination in the selection of jurors and grand jurors have escaped the Court's usual demands for proof of some demonstrable effect on the verdict. Rather, in the peremptory challenge context, the Court emphasized the need to allow criminal defendants to seek remedies for discrimination against racial minorities excluded from their juries because of the importance of protecting "public confidence in the fairness of our system of justice."[111] Even more extraordinarily, the Court has repeatedly refused to apply its usual harmless error principles to racial discrimination in the selection of the grand jury,[112] even when a properly selected trial jury convicted the defendant beyond a reasonable doubt of murder, maintaining that such discrimination "'strikes at the fundamental values of our judicial system and our society as a whole.'"[113] This latter holding generated a vehement dissent by Justice Powell, one of the strongest proponents of the innocence paradigm in federal habeas and constitutional criminal procedure, contending: "The Court does not adequately explain why grand jury discrimination affects the 'integrity of the judicial process' to a greater extent than the deprivation of equally vital constitutional rights, nor why it is exempt from a prejudice requirement while other constitutional errors are not."[114] Powell puts his finger on the discordance between the Court's emerging innocence paradigm and some vestiges of the Warren Court's counter-paradigm emphasizing racial justice. These scraps of an alternative vision need to be defended and nurtured in advocacy—before courts, and before public policy-makers and the court of public opinion—lest they be discarded as the ill-fitting remnants of a clearly outmoded way of thinking.

The extent to which such an alternative vision has become subordinated to the new innocence paradigm is reflected in the title (and substance) of an article by Steve Bright, one of the country's premier capital defense lawyers and abolitionist advocates. Bright's *Is Fairness Irrelevant?*[115] is a play on the title of Judge Friendly's famous *Innocence* essay and reflects just how powerful Friendly's vision has become. Bright's call for a jurisprudence focused on fundamental fairness in procedures for racial minorities, the mentally handicapped, and the indigent, be they guilty or not, is exactly the kind of "push-back" that we need to counter the increasing dominance of the new innocence paradigm, but it is

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[111] Batson v. Kentucky, 476 U.S. 79, 88 (1986).

[112] *See* Vasquez v. Hillery, 474 U.S. 254, 261 (1986) (citing previous cases).

[113] *Id.* (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

[114] *Id.* at 271 (Powell, J., dissenting).

[115] Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997).

also the kind of analysis that can be subordinated to or even weakened by the siren call of appeals to the problem of innocence. Bright, like other abolitionist advocates, has naturally begun to highlight the issue of innocence,[116] but there is some uneasy tension between such arguments and more traditional arguments about fair procedures and the possibility of redemption. We worry that too much enthusiasm for and emphasis on innocence may play a supporting role in rendering other values apparently "irrelevant."

B. INNOCENCE PROJECTS AND THE UNDERMINING OF TRADITIONAL PUBLIC DEFENSE VALUES

The preceding section outlines our fear that too vigorous an embrace of the "innocence revolution" might skew both the analysis and advocacy of the defense bar and the academy, two key sources of critique of the administration of capital punishment. An additional fear, elaborated in this section, is that the institutional mechanism by which the "innocence revolution" has proceeded might have an unintentional but unavoidable negative impact on the fragile capital and criminal defense bars. At first, the "innocence revolution" proceeded in an *ad hoc* fashion, as revolutions are wont to do. The famous and oft-told story of Anthony Porter's exoneration by journalism students is an example of the fortuity of some of the early cases.[117] In recent years, however, there has been an explosion of "innocence projects" modeled on the path-breaking Innocence Project of Cardozo School of Law founded in 1992 by Barry Scheck and Peter Neufeld, both former public defenders themselves. The Cardozo project has been hugely successful in using DNA testing to expose erroneous findings of guilt, responsible for well over 100 DNA exonerations of convicted inmates to date.[118] There are now forty-two other "innocence projects" in the United States,[119] some of which follow the Cardozo model of pursuing only DNA exonerations, but most of which pursue innocence claims by traditional evidentiary means, as well.[120] A substantial majority of such projects are, like the Cardozo project, either run by, housed at, or

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[116] Stephen B. Bright, *Will the Death Penalty Remain Alive In the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1 (2001).

[117] *See* Warden, *supra* note 67, at 422 app. A.

[118] *See* Thomas Adcock, *Innocence Project Expanding Its Horizons*, LEGAL TIMES, Dec. 29, 2003, at 9 (project claims responsibility for 140 exonerations).

[119] *See* The Innocence Project, *at* http://www.innocenceproject.org/about/index.php (listing innocence projects by state).

[120] *See* Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1106 & 1106 n.32 (2003).

affiliated with law schools.[121] Despite the undisputable fact that the work done by the original Innocence Project and many of its progeny has been extraordinary in its quality and absolutely breath-taking in its results, the proliferation of the institutional form of the law school-based "innocence project" raises some troubling issues within the larger world of criminal and capital defense.

First, consider the effect of the existence of such projects on attorney-client relationships in individual cases and on the issue of client trust in a public defense system more generally. Ellen Suni, a law professor and co-founder of the Midwestern Innocence Project, has written a thoughtful article on ethical issues raised by the distinctive relationships established by "innocence projects" with their clients.[122] While the precise nature of such relationships varies across projects, they are almost always more limited than full-fledged criminal defense representation. Suni's article addresses and proposes some solutions to thorny issues relating to confidentiality, conflicts of interest, and duties of zealous representation raised by "innocence" representation. The concerns we seek to raise here are related to, but distinct from, those Suni addresses. Our concerns are not focused on the application of existing ethical rules to this new form of representation; rather, we are worried that the proliferation of such limited representational relationships—especially if they outlast the DNA revolution—will create problematic (even if "ethical") attorney-client relationships that may undermine trust in criminal defense relationships more generally.

The most problematic aspects of the relationships forged by the innocence projects are their limited and conditional nature. Many projects take on only those legal claims predicated on the claimant's total innocence of the crime charged and terminate the relationship if it is determined that the claimant has no colorable innocence claim. Thus, actual or potential clients whose claims turn out to be only partial or purely legal defenses (that might establish that the grade of their convicted offense was too high or might mitigate their punishment or might undermine only the legal rather than the factual basis for their conviction), if they are not initially screened out by an innocence project, may have their non-innocence claims ignored or abandoned mid-stream. As Suni points out, innocence projects can avoid or ameliorate ethical issues posed by such limited representation by not taking on formal representation of a client at all or by delaying formal representation until the case is sufficiently screened for innocence and

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[121] *See* Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413, 415 n.4 (2002).

[122] *See* Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921 (2002).

ensuring that their clients are well-informed of the limits of the representational relationship.[123] But from the perspective of the client, however, no matter how delayed the formal representation or how informed the consent, there is bound to be some misunderstanding, disappointment, and sense of betrayal—especially given that the vast majority of potential "innocence" clients will be indigent and unsophisticated inmates seeking post-conviction relief without many other possible avenues of legal representation.

As innocence projects become an established feature of the post-conviction inmate assistance landscape, individual inmate experiences of being screened out by such projects will multiply (whether the screening is immediate or, more problematically, after a period of investigation and/or representation). And, as the use of DNA evidence becomes more a part of the pre-trial rather than the post-conviction world, the screening of post-conviction cases for "innocence" will become more difficult, time-consuming, and subjective, with fewer clear victories. We worry that, in such a world, relationships between indigent defendants and their un-chosen representatives at all stages of the criminal process will become more problematic than they already are. The lack of trust that already exists between many indigent defendants and their appointed representatives will be exacerbated.[124] Moreover, many defendants may feel compelled, or more compelled than they already do, to present themselves as factually innocent to their attorneys, neglecting or refusing to provide information that might support powerful legal defenses.

The growth of the innocence project as institution may have repercussions not only for the attitudes of criminal defendants and inmates, but also for public defenders as well. Former defenders who now run legal clinics in law schools have written compellingly of the need that public defenders have for sustenance in their roles.[125] This need arises in large part from hostile questioning by members of the public—including other lawyers—about how defenders justify their zealous defense of the guilty:

> Criminal lawyers cannot escape the scorn heaped upon our clients. Some see us as indistinguishable from those we represent. . . . Unfortunately, it is not just our parents' friends at random social gatherings who think this way—it is our friends. It is the people with whom we have grown up, gone to college, and even gone to law

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[123] *See id.* at 960-64.

[124] *See* Victoria Bonilla-Argudo, as told to Mark Pothier, *The Advocate*, BOSTON GLOBE, Jan. 9, 2005 (Magazine), at 18 (court-appointed criminal defense lawyer in Boston reporting that indigent clients "call some of us 'public pretenders'").

[125] *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999).

> school—a sad sign of the values being taught in the legal academy. . . . There is seldom admiration. More and more, when they come to understand that we represent our clients proudly and zealously, no matter the accusation, there is contempt.[126]

The hostility and incomprehension that public defenders face will necessarily be exacerbated by the growth of special-duty public defenders who represent exclusively innocent clients. As one leader of a traditional public defense clinic wryly commented on the creation of an innocence project at his law school, "What should we put over our door—'*Guilty* Project'?" Given the criminal justice system's desperate need to recruit and retain lawyers willing to take on traditional indigent criminal defense, a need especially acute in death penalty cases, we should be aware and concerned about the impact that innocence projects might have on such recruitment and retention.

This concern has particular bite in law schools, where the next generation of lawyers is inculcated and trained. While innocence clinics no doubt can and do provide valuable experiences for students,[127] their close connections with and dependence upon law schools make them an even more prominent part of legal education than they are a part of the larger world of criminal justice. While innocence clinics may draw in and enroll students who would not otherwise consider work relating to criminal defense, we worry that they might also attract much of the next generation of public defenders, who will then never be trained in the more traditional indigent criminal defense clinics run by law schools. The lack of training is less important than the lack of inculcation in the next generation of traditional criminal defense values and sustaining narratives. We thus need to think hard about the motivations, attitudes toward role, and habits of investigation and legal analysis that innocence clinics may inculcate in students.

C. LEGITIMATION AND ENTRENCHMENT

We have commented more extensively elsewhere on the dilemma faced by death penalty abolitionists that reforms that may genuinely improve the administration of capital punishment also may make it harder to abolish altogether.[128] The "innocence revolution" presents two specific applications of this more general concern. First, the current focus on DNA evidence carries within it the seeds of later legitimization of a "reformed"

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[126] Smith & Montross, *supra* note 125, at 446.

[127] *See, e.g.*, Medwed, *supra* note 120, at 1150 (describing the pedagogical benefits of involving students in innocence project case screening).

[128] *See* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L. J. 417 (2002).

death penalty. Second, the rhetoric of innocence is in some tension with the deepest normative arguments against capital punishment.

The focus of the innocence revolution on DNA exonerations contains three perils for the future. First, the "random audit"[129] function of current DNA exonerations is a time-limited phenomenon. At the present moment, most highly publicized DNA exonerations are post-trial and appeal, thus dramatically exposing failures of our criminal justice process to make reliable determinations of guilt and supporting advocacy for reform of the justice process and reform or abolition of the death penalty. Each new exoneration provides a new swell of support for such reforms. As DNA testing becomes more of an established part of the pre-trial process, however, there will (thankfully) be fewer and fewer post-trial exonerations. This inevitable and salutary development, however, may well lead the public to think that the problem of innocent people on death row is "fixed," as there will no longer be any indisputable means of post hoc proof of the system's fallibility. Jim Liebman has captured this problem beautifully, noting: "What DNA giveth to the death penalty reform impulse . . . DNA reform can taketh away."[130] Liebman also presciently predicted the second peril—the use of DNA by proponents of the death penalty to salvage capital punishment by safeguarding it with required DNA testing.[131] This is exactly the route Governor Mitt Romney of Massachusetts has pursued in seeking to reinstate capital punishment there, as Joe Hoffmann reports from his work as co-chair of the Massachusetts Governor's Council in this symposium.[132] Finally, what Liebman sees as a hope for the future, we see as a third peril of the current focus on DNA evidence in the debate about innocence and capital punishment. Emphasis on the wonders of DNA fans the public's hopes and even expectations that there are or soon will be irrefutable means, available in all or most cases, to "prove" truth outside of the costly and expensive criminal process.[133] If such means actually are quickly developed, we agree with Liebman that they might take over the DNA "random audit" function. But we fear that public hopes and expectations may well outstrip science for a substantial period of time, creating impediments to the political will to pour effort and resources into deep reform of the criminal justice process.

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[129] *See* Rosen, *supra* note 70.

[130] Liebman, *supra* note 50, at 549.

[131] *Id.* at 547-48.

[132] *See* Joseph L. Hoffmann, *Protecting the Innocent: The Massachusetts Governor's Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561 (2005).

[133] *See* Liebman, *supra* note 50, at 551 (describing new "Hitchcockian" technologies such as "Brain Fingerprinting").

At a much higher level of abstraction, we worry that the tone and rhetoric of a focus on the problem of executing the innocent in debates about the death penalty is in some tension with the deepest normative arguments against capital punishment. Those arguments depend crucially on some notion of the human dignity even of those who are entirely guilty of heinous offenses,[134] and on some limit to what we are willing to do, as a self-governing collective, to even the worst offenders. If innocence is cast as the central problem in capital punishment, then avoiding execution of innocents becomes the sought-after solution, deflecting the doubts and hesitations that abolitionists need to nurture about the limits of what extreme sanctions should be visited on the guilty.

The obvious reply to the foregoing is that the issue of innocence seems to have a lot more traction among actual people at this point in time than abstract normative arguments do, so why not use whatever seems to work at the moment? The reason to hesitate and perhaps hold back just a little is that the abolitionist movement stands in relation to the deep normative arguments against capital punishment the way the defense bar stands in relation to the Warren Court's vision of criminal procedure—each is the keeper of a rather delicate, unpopular flame, and each has some responsibility to preserve the valuable parts of its legacy even as it seeks, as all effective advocates do, to use the tools of the moment to get the job done.

CONCLUSION

Revolutions in action and in thought are by nature hostile to the discarded past. They tend to disparage the principles of the old regime and exaggerate their departures. Change, not continuity, is valued. The emerging academic, popular, and political focus on the problem of innocence in the death penalty has the hallmarks of a revolution in this regard. After years of relative dormancy, the concern surrounding the risk of executing the innocent has emerged as a defining, perhaps *the* defining issue in the national death penalty debate. As part of its ascendancy, the argument from innocence claims normative superiority because of the unquestionable values it serves (who possibly supports punishing or executing the innocent?). It also claims timeless appeal, because any

[134] *See* Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.").

criminal justice system is inevitably as fallible as the humans who implement it.

We are genuine admirers of the advocates who have brought claims of innocence to light and urged widespread reform to prevent such errors. But we are also mindful of the contingency of the argument from innocence. We do not believe that the claim of normative distinctiveness withstands close scrutiny. Nor do we regard the power of the innocence concern to be timeless; we have sought to demonstrate that its appeal varies with facts on the ground. We have thus sought to provide normative and temporal context to the discussion of innocence's role in the capital punishment debate. We accordingly urge caution in looking to the argument from innocence as necessarily the strongest, either normatively or strategically, in seeking reform or abolition of the death penalty.