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Minding Our Skepticism: A Conservative Approach to Capital Punishment

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GENERAL ACCEPTANCE VERSUS SCIENTIFIC SOUNDNESS: MAD SCIENTISTS IN THE COURTROOM

David W. Barnes

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TIME FOR A LEGISLATIVE CHANGE: FLORIDA'S STAGNANT
STANDARD GOVERNING COMPETENCY FOR EXECUTION

L. Elizabeth Chamblee

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MINDING OUR SKEPTICISM:
A CONSERVATIVE APPROACH TO CAPITAL PUNISHMENT

Michael Rowan

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MINDING OUR SKEPTICISM: A CONSERVATIVE APPROACH TO CAPITAL PUNISHMENT

MICHAEL ROWAN*

I.	INTRODUCTION.....	377
II.	THE CONSERVATIVE APPROACH: WHEN IN DOUBT, LIMIT GOVERNMENT.....	382
	A. <i>The Skeptical Foundations of Limited Government in America</i>	383
	B. <i>The Conservative Crusade and Its (Limited) Rhetoric of Limited Government</i>	387
	C. <i>The Due Process Model</i>	389
III.	“DEATH IS DIFFERENT”: GUARDING AGAINST HUMAN FALLIBILITY WHERE LIFE IS AT STAKE.....	390
IV.	A TALE OF TWO STATES: THE RESPONSES OF ILLINOIS AND FLORIDA TO FAILED JUSTICE.....	391
	A. <i>Illinois: A System “Fraught with Error”</i>	392
	B. <i>Florida: An “Extraordinary” System</i>	394
V.	THE ROLE OF DNA IN CAPITAL PUNISHMENT: A SKEPTICAL PERSPECTIVE.....	399
	A. <i>The Past: In the Beginning, There Was “Junk Science”</i>	399
	B. <i>The Present: The Emergence of DNA Technology and Its Implications for Capital Punishment</i>	400
	C. <i>The Future: Can DNA Reconstruct What It Has Deconstructed?</i>	402
VI.	ANSWERING THE CALL OF SKEPTICISM.....	403
	A. <i>A Second-Best Solution: A Somewhat Skeptical Response to Capital Punishment</i>	403
	B. <i>Best Solution: A Truly Skeptical Response to Capital Punishment</i>	406
VII.	CONCLUSION.....	407

I. INTRODUCTION

[I]t is still a metaphysical faith upon which our faith in science rests—that even we seekers after knowledge today, we godless anti-metaphysicians still take our fire, too, from the flame lit by a faith that is thousands of years old, that Christian faith which was also the faith of Plato, that God is the truth, that truth is divine.¹

Human error there is bound to be, judges being men and women, and men and women being what they are.²

* J.D. Candidate, May 2004; B.A., Geneva College 2000. Thanks to Professor Rob Atkinson for his very helpful comments on an earlier draft of this Article and Scott Cochran, Seth Miller, and Chris Hamilton for their exemplary efforts in preparing this Article for publication. All errors in this draft are, of course, my own.

1. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* § 344, at 283 (Walter Kauffman trans., Random House 1974) (1887) (emphasis omitted).

2. *Furman v. Georgia*, 408 U.S. 238, 468 (1972) (Rehnquist, J., dissenting). Interestingly, Rehnquist’s words were used not to support the majority’s concern with the arbitrariness and capriciousness in application of the death penalty, but rather to reinforce the risks posed by a human court in undermining the democratically-determined decisions of legislatures. *See id.*

[A]n error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted

Three decades ago, the Supreme Court, in *Furman v. Georgia*,³ held that the death penalty, as applied, was unconstitutional under the Eighth Amendment. While opinions varied among the justices, a plurality of the court focused on the “arbitrary” and “capricious” manner in which death sentences were imposed.⁴ Perhaps encapsulating the Court’s sentiment best was Justice Stewart, who said: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁵ But the question remained: Could capital punishment be applied so as to adequately avoid “arbitrary” and “capricious” results? Four years later, the Court, in *Gregg v. Georgia*,⁶ answered this question in the affirmative after Georgia became the first of many states to reform its system in an effort to satisfy *Furman*.⁷ In essence, the Court in *Gregg* determined that the “lightning” of capital punishment had become sufficiently precise for the state of Georgia to resume executions. Since *Gregg*, the Supreme Court has focused only on very specific aspects of capital punishment. Constitutionally speaking, the *system* of capital punishment has faced no real threats since *Furman*.

Nevertheless, chinks in the armor of capital punishment have begun to show. This is due, in large measure, to the increased viability and utilization of DNA testing. In the much-discussed book, *Actual Innocence*,⁸ Barry Scheck, Peter Neufeld, and Jim Dwyer illustrate some of our criminal justice system’s most basic flaws by relating the stories of several individuals whose convictions were overturned after DNA testing established their innocence. Some of these individuals were awaiting execution, making up but a few of an increasing

law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual’s constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

Id. Nevertheless, Rehnquist’s words ring true as they relate to the many human decisions that are made in the context of capital punishment.

3. 408 U.S. 238 (1972).

4. *See id.* at 248-49 (Douglas, J., concurring), 295 (Brennan, J., concurring), 309-10 (Stewart, J., concurring).

5. *Id.* at 309 (Stewart, J., concurring).

6. 428 U.S. 153 (1976).

7. *See, e.g.,* *Jurek v. Texas*, 428 U.S. 262 (1976) (approving the Texas death penalty system); *Proffitt v. Florida*, 428 U.S. 242 (1976) (validating the system in Florida). For a complete list of states that have executed persons since 1976, see Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Dec. 6, 2003).

8. BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

number of death penalty inmates who have been exonerated due to the testing of DNA evidence.⁹

Accordingly, public confidence in capital punishment appears to be diminishing. Actions taken, or at least considered, by both states¹⁰ and the federal government,¹¹ popular polling¹² and culture,¹³ as well as a few recent lower court decisions¹⁴ all suggest a fundamental rethinking of capital punishment. Most significantly, in Illinois, the exonerations of thirteen death row inmates led Governor Ryan first to issue a moratorium on all executions and then, later, to grant a blanket commutation to all death row prisoners.¹⁵ To some, Governor Ryan's response is part of a larger movement in which, against the background of innocence, many people have begun to doubt whether the death penalty should be applied at all.¹⁶ Perhaps unlike other

9. See *id.* at 218-20; Death Penalty Information Center, *Innocence and the Death Penalty*, at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited July 30, 2003) [hereinafter *Innocence and the Death Penalty*]. Of the 111 exonerations from death row since 1973, nearly half (46%) have occurred since 1995. See *id.*

10. See, for example, Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 396-98 (2002), for a discussion of actions taken by states to improve prisoners' access to post-conviction DNA testing. There was also, of course, the decision of Governor Ryan to issue a moratorium on executions in Illinois. See Raad Cawthon, *Illinois Governor Puts Death Penalty on Hold; He Cites Fears of the Innocent Being Executed*, PITTSBURGH POST-GAZETTE, Feb. 1, 2000, at A6. Other states have likewise considered moratoriums. See, e.g., Sara Rimer, *Support for a Moratorium in Executions Gets Stronger*, N.Y. TIMES, Oct. 31, 2000, at A18.

11. See, e.g., Innocence Protection Act of 2001, S. 486, H.R. 912, 107th Cong.; Federal Death Penalty Abolition Act of 2001, S. 191, 107th Cong.; National Death Penalty Moratorium Act of 2001, S. 233, 107th Cong.; National Death Penalty Moratorium Act of 2000, S. 2463, 106th Cong.; Federal Death Penalty Moratorium Act of 2000, H.R. 5236, 106th Cong.

12. See, e.g., Death Penalty Information Center, *Summaries of Recent Poll Findings*, at <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#ABCNewsWashPost12403> (last visited Sept. 29, 2003) [hereinafter *Summaries of Recent Poll Findings*] (citing a Jan. 24, 2003, ABC News/Washington Post poll, which "found that while 64% of Americans support the death penalty when no other alternative is offered, they remain divided on the appropriate punishment for those convicted of murder when given the option of life in prison." But, "[w]hen given a choice, 49% percent [sic] choose the death penalty and 45% choose life in prison." Also, "[t]he poll . . . revealed that 39% of respondents would like to see their governor issue a blanket commutation of death row inmates similar to that issued by Governor Ryan recently in Illinois.").

13. See, e.g., *The Oprah Winfrey Show: Death Penalty Controversy* (Harpo Prods., Inc., Sept. 28, 2000), available at <http://tapesandtranscripts.oprah.com/product.asp?ProductID=409566>; THE LIFE OF DAVID GALE (Universal Pictures 2003); Eric Slater, *Illinois' Exonerated to Urge Clemency for All on Death Row*, L.A. TIMES, Dec. 15, 2002, at A56 (discussing the play, *The Exonerated*, which has featured several Hollywood notables).

14. See, e.g., *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002) (holding the Federal Death Penalty Act of 1994 (FDPA) does not violate the Due Process Clause of the Fifth Amendment), *cert. denied*, *Quinones v. U.S.*, 2003 WL 22052 095, 72 USLW 3371 (U.S. Dec. 1, 2003) (No. 03-6148).

15. Maurice Possley & Steve Mills, *Clemency for All*, CHI. TRIB., Jan. 12, 2003, at C1.

16. See, e.g., Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 739-43 (2001).

capital punishment issues, innocence is one that strikes a resounding chord with a politically relevant segment of the population.¹⁷ There is even some indication that, given a sufficient alternative, a near-majority of Americans would approve of stopping executions altogether.¹⁸

This recent shift in sentiment on capital punishment may be explained, in part, as a revisiting of an exceedingly simple but most fundamental framework for thinking about government—that is: 1) people make mistakes; 2) the costs of mistakes made by people entrusted with political power can be especially high; thus, 3) we should be extremely skeptical¹⁹ about the scope and nature of power we entrust to government. From this very simple paradigm comes an even simpler observation about its application to the death penalty: Our skepticism should be at its greatest where, as in the case of capital punishment, the grant of power to a fallible government is greatest. Notably, this position is one that does not lend itself to conventional political line-drawing. Even conservative commentator George Will, after reading *Actual Innocence*, was struck by the “heartbreaking” consequences of placing too much trust in an imperfect system.²⁰ “Capital punishment, like the rest of the criminal justice system,” Will said, “is a government program, so skepticism is in order.”²¹ Also, a *Republican* governor from Illinois issued the first moratorium on executions in recent times.²²

That there are some conservatives who have begun to submit the death penalty to greater scrutiny should come as no surprise. Rather, the philosophical underpinnings of conservatism should be seen not merely as compatible with, but, instead, as a perfectly logical foundation for, an exacting scrutiny of the state’s ultimate power—to take away the lives of its citizens. After all, conservatism is defined largely by its cautious approach to government power. As Ronald Reagan once remarked:

17. See *id.* at 733-39.

18. See *Summaries of Recent Poll Findings*, *supra* note 12.

19. The terms, *skeptical* and *skepticism*, as used in this Comment, simply refer to a “doubting or questioning attitude or state of mind,” rather than the more ambitious, philosophical form of skepticism, which posits that “absolute knowledge is impossible.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1630 (4th. ed. 2000), available at <http://www.bartleby.com/61/68/50446800.html>. The latter view is not a necessary basis for the arguments raised in this Comment.

20. George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23.

21. *Id.*

22. See Possley & Mills, *supra* note 15.

[M]an is not free unless government is limited. There's a clear cause and effect . . . that is as neat and predictable as a law of physics: As government expands, liberty contracts.²³

Likewise, the preamble to the 2000 Republican Party platform stated that “[s]ince the election of 1860, the Republican Party has had a special calling—to advance the founding principles of freedom and limited government and the dignity and worth of every individual.”²⁴ While the primary focus of conservative rhetoric is economic regulation,²⁵ the principle of limited government has no less application in the realm of criminal justice.²⁶ In fact, because the stakes are so high with criminal sanctions—i.e., life and freedom from physical restraint—reason seems to compel an even greater level of skepticism.²⁷

Often, however, the same officials who rely on the rhetoric of skepticism to argue for limited government in some areas (e.g., taxes²⁸) remain remarkably confident not just in the effectiveness of capital punishment, but of their own perfection as administrators of it.²⁹ While, in Illinois, Governor Ryan’s decisions were predicated in large part on his recognition of government fallibility, other traditionally conservative and purportedly *big government*-wary states like Florida and Texas have faithfully maintained their systems despite glaring indications of imperfection. This Comment ultimately argues that states that have yet to submit their systems to scrutiny

23. Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989), in 2 PUB. PAPERS 1718, 1721 (1991).

24. 2000 Republican Party Platform, Preamble, at <http://www.rnc.org/GOPInfo/Platform/2000platform1.htm> (last visited Dec. 6, 2003).

25. See *infra* note 28 and accompanying text.

26. See, e.g., U.S. CONST. amends. IV-VI, VIII.

27. Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 212-13 (1998) (noting that, at the time that the Constitution, and, later, the Bill of Rights were ratified, prevailing notions of liberty were principally concerned with freedom from arbitrary arrest and imprisonment).

28. During his campaign for President in 2000, George W. Bush remarked that the key distinction between himself and Al Gore was that “[h]e trusts the government—I trust you.” Steve Chapman, *Big Government is Back*, BALT. SUN, Mar. 25, 2003, at 19A. The rest is history. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

29. For example, the same George W. Bush, who, as noted above, criticized Gore for his “trust” of government confidently declared during the last debate of the 2000 campaign that:

There have been some tough [capital punishment] cases come across my desk. Some of the hardest moments since I’ve been the governor of the state of Texas is to deal with those cases.

But my job is to ask two questions, sir: Is the person guilty of the crime, and did the person have full access to the courts of law? And I can tell you, looking at you right now, in all cases those answers were affirmative.

The Presidential Debate, L.A. TIMES, Oct. 18, 2000, at A20 (emphasis added).

have, rather unhealthily, failed to recognize the inherent fallibility of governments. In other words, in these states, skepticism is lacking.

Part II of this Comment discusses the historical and intellectual roots of limited government in the United States. It explores first the commitment of the Framers, then that of modern era conservatives, to limited government. Part II also discusses, and suggests a means for reconciling, inconsistencies in the conservative commitment to limited government. Part III then discusses the notion that “death is different” as it relates to limited government. Part IV compares two very distinct responses, those of Illinois and Florida, to exonerations of death row prisoners and their clear suggestion of fallibility in these states’ systems of capital punishment. Part V focuses on the role of DNA in proving the innocence of persons who otherwise might have been executed and how this knowledge has begun to undermine public confidence in the death penalty. It also discusses, however, how the long-term impact of DNA may be to actually legitimize capital punishment. Against this background, Part VI urges that a skeptical response on the part of states that administer the death penalty means that for now, at the very least, moratoria are in order, but further argues that, even in the face of perceived certainty, the inherently fallible and highly peculiar institution of capital punishment should be abolished. Part VII briefly concludes this Comment.

II. THE CONSERVATIVE APPROACH: WHEN IN DOUBT, LIMIT GOVERNMENT

Fundamental to systems of limited government is the assumption that, notwithstanding efforts to the contrary, human beings inevitably err.³⁰ It is therefore not only in the very nature of government to limit the consequences of human fallibility,³¹ but a *limited* government takes account of the possibility that, as a human institution, “it

30. By *err*, I mean more than those instances where an individual attempts to achieve X but instead accomplishes Y. Rather, I am also referring to those instances where an individual is committed or is morally obligated to do X but, out of self-interest or some other less-than-noble desire, does Y. Thus, when I refer to error, the underlying motivation may be something as morally benign as administrative incompetence or as universally condemned as racism. In either case, the result constitutes a failure to satisfy some established legal or moral norm, and, in that sense, is an error. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 772 (1986) (defining *error* as “an act or condition of often ignorant or imprudent deviation from a code of behavior”).

31. See THOMAS HOBBS, LEVIATHAN 84 (J. C. A. Gaskin ed., 1996) (1651). In Hobbes' view:

[I]t is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man. . . .
. . . In such condition, . . . the life of man[] [is] solitary, poor, nasty, brutish, and short.

Id.

will itself become the enemy."³² The Framers of the American Constitution, given their deeply skeptical view of human nature, were thus well-poised to fashion what was, and arguably still remains, "the best device ever created for limiting government."³³

Conversely, the drastic expansion of the federal government since the Framing rests on a decidedly more optimistic view of human nature. Programs like the New Deal and the Great Society "endorsed government as [a] positive force that ameliorated wrongs and expanded the freedom of the individual."³⁴

The essence of modern era conservatism lies in its opposition to such optimism. Like the Framers before them, conservatives are deeply skeptical of man's ability to govern, and thus view big government not as the solution, but as the problem.³⁵ It is this skepticism that provides the framework for this Comment's analysis.

A. *The Skeptical Foundations of Limited Government in America*

The Ancient Hebrews, as a direct consequence of their belief in "original sin,"³⁶ were arguably the first to embrace limited government by recognizing the legitimacy of only those kings who obeyed God's law ("the Torah").³⁷ The case of King Nebuchadnezzar is illustrative. The King, in looking upon what he considered *his* kingdom, asked: "Is not this the great Babylon I have built as the royal residence, by *my* mighty power and for the glory of *my* majesty?"³⁸ The God of the Hebrews responded by rendering the proud King insane for seven years,³⁹ sending (as he did to numerous other kings)⁴⁰ the clear message that his rule was subject to a higher authority. Thus, for the Hebrews, "[l]aw [was] not merely an expression of will or power; it [was] based on transcendent principles. The legislator [was] as bound by law as . . . the subject or citizen; no one [was] above the

32. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 711 (1984). This particular recognition for the need to limit government is perhaps best reflected in Lord Acton's oft-quoted maxim: "Power tends to corrupt and absolute power corrupts absolutely." THE OXFORD DICTIONARY OF QUOTATIONS 1 (Angela Partington ed., 1992).

33. CATO INSTITUTE, CATO HANDBOOK FOR CONGRESS, POLICY RECOMMENDATIONS FOR THE 106TH CONGRESS 3 (1999).

34. CHARLES W. DUNN & J. DAVID WOODWARD, THE CONSERVATIVE TRADITION IN AMERICA 3 (rev. ed. 2003) (1996).

35. See Dinesh D'Souza, *Big Government is Still the Problem*, WASH. TIMES, Oct. 25, 2002, at A21 (quoting Ronald Reagan's dictum that "Big government is not the solution; big government is the problem.").

36. See, e.g., *Isaiah* 64:4-6; *Romans* 3:10-18; *Ephesians* 2:1-3 (English Standard Version).

37. See 1 S.E. HNER, THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES: ANCIENT MONARCHIES AND EMPIRES 238-39 (1997).

38. *Daniel* 4:30 (New International Version) (emphasis added).

39. *Id.* at 4:32-33.

40. See, e.g., 1, 2 *Samuel*; 1, 2 *Kings*; 1, 2 *Chronicles* (New International Version).

law.⁴¹ It was an essential framework for man, who, “brought forth in iniquity,⁴² could not be trusted to govern independent of “the statutes of God and his laws.”⁴³

Through the Protestant reformers and, later, the American Puritans, the Hebrew notion of limited government as a necessary consequence of human fallibility was continued.⁴⁴ In protesting the excesses of the once-unassailable powers of the Roman Church, Martin Luther declared that:

Unless I am convinced by Scripture and plain reason—I do not accept the authority of the popes and councils, for they have contradicted each other—my conscience is captive to the Word of God.⁴⁵

Calvin similarly believed that government was only legitimate insofar as it adhered to the law as set forth in Scripture. If it failed to do so, Calvin implored: “[L]et us not pay the least regard to it”⁴⁶ It was a message that the Puritans seized as they left England for America in search of a “City upon a Hill” where they could “keep [God’s] Commandments and His Ordinances, and His laws, and the Articles of [their] Covenant with Him.”⁴⁷ Their colonial descendants would realize, however, that even an ocean’s distance was not necessarily a guarantee to freedom from a government entrusted with too much power.

Accordingly, picking up where Luther and Calvin left off, but taking the concept of limited government a step further, the American revolutionaries grew to reject monarchical rule altogether:

41. CATO INSTITUTE, CATO HANDBOOK FOR CONGRESS, POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS 11 (2003) [hereinafter CATO HANDBOOK FOR 108TH CONGRESS]. The CATO Institute, a foremost authority in the area of limited government, views limited government as an institution that originated among “ancient Hebrews and . . . Greek philosophers” and culminated in the Anglo-American tradition, first with the Magna Carta of 1215, followed by “the Petition of Right of 1628, the Bill of Rights of 1689, the American Declaration of Independence,” and, ultimately, the Bill of Rights in 1789. See *id.* at 11-12.

42. *Psalm* 51:5 (English Standard Version).

43. *Exodus* 18:16 (English Standard Version).

44. The Greco-Roman tradition also figured quite prominently in the development of limited government. In particular, it is the Romans to whom we owe “checks and balances” as a means of checking government excess. See FINER, *supra* note 37, at 396.

45. A Mighty Fortress for Our God, *Luther at the Imperial Diet of Worms (1521)*, at <http://www.luther.de/en/worms.html> (last visited Dec. 6, 2003).

46. 4 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION: THE EXTERNAL MEANS OR AIDS BY WHICH GOD INVITES US INTO THE SOCIETY OF CHRIST AND HOLDS US THEREIN § 32 (Henry Beveridge trans., 1990), available at <http://www.bible.org/docs/history/calvin/institut/ci400021.htm>. In proclaiming Calvin’s importance, one author has declared: “He that will not honor the memory and respect the influence of Calvin, knows but little of the origin of American liberty. He bequeathed to the world a republican spirit in religion, with the kindred principles of republican liberty.” 2 WILLIAM J. JACKMAN, HISTORY OF THE AMERICAN NATION 322 (1911) (quoting GEORGE BANCROFT, LITERARY AND HISTORICAL MISCELLANIES 406-07 (1855)).

47. John Winthrop, *A Model of Christian Charity*, in THE AMERICAN STUDIES ANTHOLOGY 12, 18 (Richard P. Horwitz ed., 2001) (1630) (quoting *Deuteronomy* 30:16).

That the Almighty hath here entered his protest against monarchical government is true, or the scripture is false. And a man hath good reason to believe that there is as much of kingcraft as priestcraft in withholding the scripture from the public in Popish countries. *For monarchy in every instance is the Popery of government.*⁴⁸

And the matter did not end there. Mindful of man's fallibility, the leaders of the new American nation were not merely concerned with casting off the yolk of monarchical rule. Rather, more to the point was Jefferson's view, as stated in his *A Summary View of the Rights of British America*, that "history has informed us that bodies of men as well as individuals are susceptible of the spirit of tyranny."⁴⁹

Though it was far more radical than anything that the Protestant Reformers likely envisioned, the philosophy that underlay the new American nation was much the same—as James Madison wrote:

[W]hat is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.⁵⁰

Madison and other Founders of the American Republic knew better than to view government less than skeptically.⁵¹ Thus, within the government, the founders instituted a system of "checks and balances" to ensure that no branch would become too powerful or, ide-

48. THOMAS PAINE, *COMMON SENSE* 76 (Penguin Books 1981) (1776) (emphasis added). As an alternative to the fallible rule of monarchies, Paine wrote: "[L]et it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING." *Id.* at 98.

49. CATO HANDBOOK FOR 108TH CONGRESS, *supra* note 41, at 10 (quoting THOMAS JEFFERSON, *A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA* 9 (1774)).

50. THE FEDERALIST NO. 51, at 337 (James Madison) (Modern Library ed., 1937).

51. Indeed, at least one author has contended that the otherwise *enlightened* Madison was not above the influence of Calvinism and its skepticism:

Madison's point of view is doubtless connected with the idea of tolerance as it had been developed by Locke and the Anglo-French Enlightenment. But it also contains a trace of biblical influence. American Calvinism retained, against the optimism of the European Enlightenment, the consciousness of original sin. Madison did not seek to render man good, nor did he count on his goodness. He knew man's corruption and, thus, deployed what I will call the strategy of Babel. Following the Eternal, who had dispersed men so that they could not unite in the project of a fatally bad goal, Madison dispersed citizens into innumerable interest groups and religious denominations, in order to render them incapable of building the totalitarian civ. of persecuting and oppressing one another Since men, because of original sin, see their most sublime enterprises (and especially those) turn to disaster and to crime, let us divide them so that they will only be capable of partial and localized evils.

Alain Besançon, *The Church Embraces Democracy*, *CRISIS*, Sept. 1995, at 32, 34. Madison likely found influence in John Witherspoon, a Presbyterian minister, who directed Madison's graduate program at the College of New Jersey. See James H. Smylie, *Madison and Witherspoon: Theological Roots of American Political Thought*, 22 *PRINCETON. U. LIBR. CHRON.* 118, 118-32 (1961).

ally, more powerful than any other.⁵² Likewise, state governments and the federal government were intended to function as checks on each other.⁵³ And, government officials would be, through popular elections, subject to the will of political majorities.⁵⁴

None of these checks were necessarily effective, however, in checking the government's greatest exercise of power: taking away the "life or liberty"⁵⁵ of an individual, primarily through administration of criminal justice. Here, the Bill of Rights, "in order to prevent [the government's] misconstruction or abuse of its powers"⁵⁶ where its exercise thereof is greatest, recognized individual rights independent of the government.⁵⁷

The Framers, ever conscious of human fallibility, thus instituted a system of government designed "to leave open for transgressors no door which they could possibly shut."⁵⁸ Since the Framing, however,

52. See Cass R. Sunstein, *The Beard Thesis and Franklin Roosevelt*, 56 GEO. WASH. L. REV. 114, 118-19 (1987). Sunstein states:

[T]he Framers did not believe that a system of deliberative representation was sufficient in itself. The system of checks and balances was designed to serve a variety of supplemental functions, providing safeguards in the event of a breakdown in representative processes. That system would, for example, furnish a measure of protection against factionalism; some groups might be able to usurp the power of one branch, but they would be unlikely to obtain power over all three.

Id.

53. See *id.* at 117, 119.

Three basic commitments underlay the original constitutional design. The first was to some form of 'limited government,' . . . the second was to a system of checks and balances[,] . . . [and] the third was to federalism . . .

. . . .
The federal system provided an additional set of safeguards[,] . . . a kind of vertical separation of powers, protecting private rights . . .

Id.

54. See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245 (1997) (explaining that "democracy is a form of limited government" because it "requires that political officials observe limits on their behavior[,] including "abiding by election results").

55. While the inalienability of property rights has been the subject of some debate, "life and liberty," included within both the Lockean and Jeffersonian constructions of natural rights, have not. See, e.g., Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 AM. U. L. REV. 9 (1987); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351 (1997).

56. U.S. CONST. pmbl. to amends. I-X.

57. See Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 407 (1986) (contending that the Bill of Rights embodies an "individualist theory of natural rights") (quoting Morris R. Cohen, *The Bill of Rights Theory*, in LAW AND THE SOCIAL ORDER 148, 149 (1933)).

58. 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 299 (2d ed. rev. 1889). In an analysis, much like that laid out in this section, Bryce observed:

Some one has said that the American Government and Constitution are based on the theology of Calvin and the philosophy of Hobbes. This is at least true, that there is a hearty Puritanism in the view of human nature which pervades the instrument of 1787. It is the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut. Compare this spirit

decidedly less skeptical views of human nature have prevailed in American governance. It is this departure from the Framers' skepticism to which the emergence of modern era conservatism owes its inspiration.

B. The Conservative Crusade and Its (Limited) Rhetoric of Limited Government

One account of American history since the Framing provides that:

By the close of the nineteenth-century, government was looked on more and more as a redemptive force to do good for society [T]he lessons of the Framers about government were forgotten

. . . .

. . . [The views of the Progressive Reformers] represented a fundamental change in the understanding of human nature. Far from being suspicious of concentrated government power, Progressives saw concentrated government power as an important lever to enact social and economic change

. . . .

. . . The New Deal can be seen . . . as the culmination of this view of human nature⁵⁹

Such optimism continued to predominate during the 1960s as the Kennedy and Johnson administrations "raised hopes that poverty, racism, and chronic unemployment . . . would disappear through liberal legislation" ⁶⁰ The cumulative impact of these efforts was a massive expansion in the size and authority of the federal government, a result clearly inconsistent with "the Founding notion that the national government had limited powers over economic and social development."⁶¹

Failed liberal policies during the 1960s and 1970s, however, inspired a "conservative renaissance," which offered Americans an "alternative vision" of government.⁶² Under this vision, big government was not the solution to the nation's problems; rather, it was the problem.⁶³ Like the Framers before them, the conservatives' adherence to the principle of limited government was grounded in their understand-

with the enthusiastic optimism of the Frenchmen of 1789. It is not merely a difference of race temperaments; it is a difference of fundamental ideas.

Id.

59. See Todd J. Zywicki, *The Nature of the State and the State of Nature: A Comment on Grady & McGuire's Paper*, 1 J. BIOECONOMICS 241, 254-56 (1999).

60. DUNN & WOODWARD, *supra* note 34, at 2.

61. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105 (1991).

62. DUNN & WOODWARD, *supra* note 34, at 2-3.

63. See D'Souza, *supra* note 35, at A21.

ing of human nature. As the authors of *The Conservative Tradition in America* explain:

The conservative view . . . is centered around the Biblical doctrine of 'original sin'—the idea that man is morally flawed and imperfectible. . . . [And] although some conservatives base this belief on the biblical account of the fall of man, such a belief is not a necessary condition for a conservative's distrust of human nature. A conservative may distrust human nature because he does not trust man's ability to hold to moral values or to govern without making serious mistakes.⁶⁴

In a speech he gave on behalf of the Goldwater campaign in 1964, Ronald Reagan warned that:

'[T]he full power of centralized government' . . . was the very thing the Founding Fathers sought to minimize. They knew that governments don't control things. A government can't control the economy without controlling people. And they know when a government sets out to do that, it must use force and coercion to achieve its purpose.⁶⁵

Such skepticism was at the heart of Reagan's Revolution sixteen years later⁶⁶ and continues to be a dominant thread in mainstream conservatism today.⁶⁷

From Reagan onward, the most common prescription for what ails the conservative are tax reductions designed "to starve politicians of the resources with which they would regulate the economy, pursue their favorite projects, redistribute wealth, and reward clients who kept them in office."⁶⁸ The practical limits of conservative skepticism do not, however, extend much further. That is, while conservatives assume a dismal view of human nature as it pertains to the government's ability to regulate the economy, they remain confident of its competence in other areas. Most inconsistent, perhaps, is the conservative's faith in the government's ability to administer criminal justice. With regard to the Fourth Amendment, for instance, one author points out that:

[Though][t]he label 'conservative' can be associated with theories espousing limited government[,] . . . [i]n the contemporary fourth

64. DUNN & WOODWARD, *supra* note 34, at 53.

65. Ronald Reagan, *Rendezvous with Destiny*, Address on Behalf of Senator Barry Goldwater (Oct. 27, 1964), available at www.reaganfoundation.org/reagan/speeches/rendezvous.asp.

66. See John R. Kasich, *Rekindling Reagan's Revolution*, WASH. TIMES, Oct. 12, 1994, at A19 ("The president's message was straightforward—government is the problem, not the solution. To correct the problem, Mr. Reagan offered four common sense proposals: tax cuts, sound monetary policy to reduce inflation, spending restraint and deregulation.").

67. See E.J. Dionne, Jr., *Conservatism Recast: Why this President's Reach Could Be Monumental*, WASH. POST, Jan. 27, 2002, at B1.

68. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 17 (1991).

amendment context, . . . the term ‘conservative’ is more likely to be linked with those favoring expansive executive branch authority to search and seize and ‘liberal’ with those favoring individual liberty.⁶⁹

This Comment seeks to resolve this inconsistency where it matters most: in the context of the death penalty. Here, the “Due Process Model” of criminal justice provides a useful starting point to bridge the gaps in conservative skepticism.

C. *The Due Process Model*

Like conservatism, the “Due Process Model” of criminal justice proceeds from the basic observation that humans are fallible:

[P]eople are notoriously poor observers of disturbing events—the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion, so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused—which the police are not.⁷⁰

Thus, “informal factfinding processes” are not sufficient to definitively establish “factual guilt,”⁷¹ because these processes, as with all things human, err.⁷² Instead, under the “Due Process Model,” not only is there an “insistence on formal, adjudicative, adversary, fact-finding processes [and] . . . full opportunity [for the accused] to discredit the case against him,” but in recognizing human fallibility, even these processes are subject to “further scrutiny” through the appeals process.⁷³ While, to some extent, adherence to the “Due Process Model” of justice has diminished in recent times,⁷⁴ due process remains an essential component of our limited form of government; and even the weakest due process is, fundamentally, a recognition that governments make mistakes.⁷⁵

The standard, under even the most demanding due process, is not, of course, to restrain governmental action absent certainty. This is

69. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 206 n.15 (1993).

70. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 14 (1964). The alternative to the “Due Process Model,” according to Packer, is the “Crime Control Model.” See *id.* at 6.

71. *Id.*

72. See *Furman v. Georgia*, 408 U.S. 238, 468 (1971) (Rehnquist, J., dissenting).

73. See Packer, *supra* note 70, at 14.

74. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

75. See Packer, *supra* note 70, at 14.

neither practical nor possible. A society such as this one could not possibly function unless it was free to make informed, rational judgments at the risk of error. Accordingly, in criminal justice, the standard for guilt is not "beyond any doubt" but, rather, "beyond a reasonable doubt."⁷⁶ One can easily imagine that the former standard would result in a high rate of release for the guilty and, consequently, further infliction of suffering upon the innocent. The standard, then, is one of near, but not absolute, certainty. Implicit in this compromise is this society's need for criminal justice-by-government, coupled with an obligation on the part of government to proceed within carefully delineated boundaries.

Yet where limitations are generally necessary in governmental administration of criminal justice, they are particularly relevant where, rather than loss of liberty or other lesser criminal sanctions are threatened, the right to life itself is at issue. The next part briefly discusses the relevance of the notion, "death is different," as it relates to the fallibility of governments.

III. "DEATH IS DIFFERENT": GUARDING AGAINST HUMAN FALLIBILITY WHERE LIFE IS AT STAKE

One question that arises in response to the charge of human fallibility in administration of the death penalty proceeds something like: "Are not all human choices, . . . and most relevantly, all choices regarding criminal punishment, vulnerable to . . . [the] same objection[]?"⁷⁷ To this, there exists another simple yet nonetheless compelling response: "Death is different."⁷⁸ As Justice Brennan wrote: "Death is a unique punishment[,] . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."⁷⁹ Put simply, the stakes are extraordinarily high in capital punishment, higher perhaps than with any other consequence of government action.

One response to death's uniqueness is a call for heightened vigilance where a sentence of death is being adjudicated. This may be thought of as a sort of "super-due process," described by Charles Black as flowing from the concept of "death is different":

76. *In re Winship*, 397 U.S. 358, 361-64 (1969).

77. CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 29 (2d ed. 1981).

78. See *Woodson v. North Carolina*, 428 U.S. 280, 292-98 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("[D]eath is different in kind from any other punishment imposed under our system of criminal justice . . . [and it cannot] be imposed under sentencing procedures that create[] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner.").

79. *Furman v. Georgia*, 408 U.S. 238, 286-87 (1972) (Brennan, J., concurring).

[D]eath is different . . . [thus] the infliction of death by official choice ought to require a higher degree of clarity and precision in the governing standards than we can practicably require of all choices, even of choices for punishment.⁸⁰

Yet, while administrators of the death penalty might take special care to avoid error, this, of course, does not mean that they will not err. Even assuming a reduction in frequency of error, the question remains whether death's "uniqueness" is appropriately taken into account simply by shoring up procedural safeguards. In capital punishment, the consequence of even the most occasional error is exceptional both in the degree of its injustice as well as its irreversibility. The next part of this Comment compares the responses of Florida and Illinois to this dilemma.

IV. A TALE OF TWO STATES: THE RESPONSES OF ILLINOIS AND FLORIDA TO FAILED JUSTICE

Thus far, this Comment has put forth the theoretical case for viewing the institution of capital punishment skeptically. We need not merely hypothesize, however, about the tragedy that can ensue from granting fallible governments the power to impose the death penalty. Rather, the exonerations of those who have been wrongfully convicted and sentenced to death tell us that, at the very least, the system of capital punishment can come dangerously close to taking innocent life.⁸¹ Among those politically entrusted with carrying out the death penalty, there appears to be a consensus on the importance of avoiding such a fateful error. Where the disagreement lies instead is in whether the humans responsible for administering the system can be completely confident in their ability to do so. This disagreement is highlighted by the very different responses of Governor Ryan and Governor Bush to indications of imperfection in their states' systems of capital punishment.

80. BLACK, *supra* note 77, at 29-30.

81. That is, if it hasn't happened already. See Anne-Marie Moyes, Note, *Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing*, 55 VAND. L. REV. 953 (2002) (discussing the opposition of states to testing DNA evidence in cases of individuals already executed). In one case, the State of Virginia "vehemently opposed" posthumous DNA testing for fear that "it . . . would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man." *Id.* at 956-57 (quoting Petition for Appeal at 9 n.6, *Roman Catholic Diocese v. Fruit* (Va. 1999) (No. 99-1834); Record of Hearing Before Circuit Court Judge Edward Hanson, Jr. (June 15, 1998), at 82, *Roman Catholic Diocese v. Fruit* (Va. Cir. Ct. of Va. Beach 1998) (No. CL 98-122)).

A. *Illinois: A System "Fraught with Error"*⁸²

In 1982, Anthony Porter was convicted of two murders and sentenced to death.⁸³ Sixteen years later, he exhausted his last standard appeal.⁸⁴ It appeared that time, so far as the legal system was concerned, was the only thing left to be dispensed with before Anthony Porter's execution.⁸⁵ For Porter, that meant fifty hours—his suit had already been pressed, his coffin sized, his last meal ordered.⁸⁶ Then, the Illinois Supreme Court granted Porter a reprieve, not because it doubted his guilt, but because it doubted his intelligence.⁸⁷ In the frequently bizarre world of capital punishment, there remained a question of whether Porter was intelligent enough to comprehend his impending death.⁸⁸ Enter Professor Protes and a team of Northwestern journalism students.⁸⁹ Hiring a private investigator, Protes and his students sought to establish that Porter was undeserving of the death penalty, not due to his lack of intelligence, but, rather, due to his innocence. In less than a year, a group of outsiders did what, in seventeen years, the law failed to do: free an innocent man condemned to die.⁹⁰

Porter's case marked the twelfth time since Illinois resumed executions in 1977 that a death row inmate was exonerated.⁹¹ One exoneration later, Illinois earned the distinction of exonerating more people in its capital punishment system than it executed.⁹² For the governor and many others, the time had come for skepticism.⁹³

On January 31, 2000, Governor George Ryan announced a moratorium on all executions in Illinois, pending a closer examination of his state's system of capital punishment.⁹⁴ At its core, Governor Ryan's decision reflected a coming to terms with the fallibility of a

82. Press Release, Governor George H. Ryan, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000) [hereinafter *Moratorium Press Release*], at <http://www.state.il.us/gov/press/00/Jan/morat.htm> (last visited Oct. 6, 2003).

83. Norman L. Greene, Governor George H. Ryan, Donald Cabana, Jim Dwyer, Martha Barnett & Evan Davis, *Governor Ryan's Capital Punishment Moratorium and the Executioner's Confession: Views from the Governor's Mansion to Death Row*, 75 ST. JOHN'S L. REV. 401, 408 (2001).

84. *Id.*

85. *Id.*

86. *Fatal Flaws of Capital Punishment*, CHI. TRIB., Feb. 12, 1999, at N26; Slater, *supra* note 13, at A56.

87. Greene et al., *supra* note 83, at 408.

88. *Id.*

89. *Id.*

90. *Id.* at 409.

91. Aaron Chambers, *Warm Statewide Reception for High Court's Capital-Case Rule Changes*, CHI. DAILY L. BULL., Jan. 23, 2001, at 1.

92. *Id.*

93. See *Moratorium Press Release*, *supra* note 82.

94. *Id.*

system for which he was ultimately responsible. In commenting on the exonerations, Ryan remarked:

I cannot support a system, which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life.⁹⁵

As to what it would take for Ryan to resume executions, he was very clear:

Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate.⁹⁶

For the time being, then, Ryan asked himself whether he could “prevent another Anthony Porter—another innocent man or woman from paying the ultimate penalty for a crime he or she did not commit?”⁹⁷ His answer was clearly that he could not (“Today, I cannot answer that question”).⁹⁸ Still unanswered to that point, though, was the question: Did Ryan really believe that he could ever achieve a degree of “moral certainty” that would satisfy him enough to resume his state’s system of executions? The answer to that question arguably came a little less than three years later when Ryan commuted the sentences of every death row prisoner in the state of Illinois to life.⁹⁹ Like Justice Blackmun nearly a decade earlier, Ryan declared that he would never again “tinker with the machinery of death.”¹⁰⁰ His rationale, once again, turned on the notion of human fallibility:

Our capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates.¹⁰¹

As a theoretical matter, Ryan hinted that capital punishment might, in fact, be a deserving punishment for some.¹⁰² However, as a practical matter, he had seen enough. While reform might have been Ryan’s initial goal, scrutiny of the system revealed far more problems

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See Governor Explains Why He Commuted Death Sentences*, CHI. DAILY HERALD, Jan. 12, 2003, at 2 [hereinafter *Governor Explains*].

100. *Id.*

101. *Id.*

102. *See id.* (“If I did not take this action, I feared that there would be no comprehensive and thorough inquiry into the guilt of the individuals on death row or of the fairness of the sentences applied.”). This statement may suggest that, had Ryan been confident that such an inquiry would have been conducted, he may not have been so inclined to grant the blanket commutation.

than answers.¹⁰³ Cognizant of his own fallibility and that of others responsible for the system, the conservative governor could not, as a matter of conscience, entrust an inefficient system with matters of life and death.¹⁰⁴

B. Florida: An “Extraordinary” System

While much attention has focused on Illinois, its seventeen exonerations are but a distant second to the twenty-three death row prisoners Florida has exonerated since 1973.¹⁰⁵ The case of the latest such prisoner to be exonerated, Rudolph Holton, is illustrative of Florida’s administration of, and more importantly for this Comment, its response to flaws in, its system of capital punishment.

The case against Rudolph Holton was a fairly typical one. A white witness testified against a black defendant who, according to the witness, resembled the murderer in very racially or ethnically peculiar ways—in Holton’s case, the witness testified that Holton, like the murderer, was a black man with “frizzy hair” and “shaving bumps.”¹⁰⁶ The key witness for the prosecution was a jailhouse informant.¹⁰⁷ The judge was especially fond of the death penalty, so much so that he proudly bore the nickname “Hanging Harry.”¹⁰⁸ The defense lawyer was court-appointed and the case was one of several that she was trying to manage at the time.¹⁰⁹ The jury was all white.¹¹⁰ The prosecutor was willing to test the boundaries of the adversarial system.¹¹¹ And then, of course, there was the defendant: a poor, black drug addict.¹¹²

In his closing statement, the prosecutor, arguing the reliability of a black jailhouse informant, implored: “Ladies and gentleman . . . this is a horrible crime that *even* a fellow black inmate will not tolerate.”¹¹³ Regarding the prosecution’s key piece of evidence—an African-American pubic hair in the victim’s mouth—the prosecutor em-

103. *Id.* (“The facts I have seen raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole.”).

104. *See id.*

105. Death Penalty Information Center, *Exonerations by State*, at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#state> (last visited Dec. 6, 2003) [hereinafter *Exonerations by State*].

106. Answer Brief of Appellee at 15, *State v. Holton* (Fla. Aug. 1, 2002) (No. SC01-2671), at http://www.wfsu.org/gavel2gavel/briefs/01-2671_ans.pdf (last visited Oct. 2, 2003).

107. David Karp, *The Innocence Defense* (pt. 1), ST. PETERSBURG TIMES, Feb. 9, 2003, at 22A [hereinafter Karp pt. 1].

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (emphasis added).

phasized that, because Holton was an African-American, he could not be excluded.¹¹⁴ He dismissed the probability that the hair was the victim's since she, too, was an African-American: "I would just defy anybody to tell me how those are her hairs, how she got them."¹¹⁵ Due to the work of an underpaid yet dedicated lawyer and a state agency that is presently on the brink of extinction, the confident prosecutor would soon be defied.¹¹⁶

Beginning in 1996, Linda McDermott, a lawyer with Capital Collateral Representative (CCR), Florida's state-funded agency responsible for post-conviction capital appeals, set out to prove Rudolph Holton's innocence.¹¹⁷ On little more than \$30,000 a year, McDermott determined to go *the extra mile* on Holton's case.¹¹⁸ Her Tampa supervisor, however, was not so willing to accommodate. To him, McDermott's *extra mile* was simply a euphemism for "wasting tax dollars."¹¹⁹ Accordingly, he established new rules for CCR in which interviews with witnesses had to be conducted by telephone and severe restrictions were placed on overtime.¹²⁰ The new rules prompted McDermott to resign from CCR only to return to its seemingly more committed Tallahassee office.¹²¹ Her return proved to be a fortuitous one for Holton.¹²²

After meeting with Barry Scheck in 1998, McDermott determined that new DNA technology was the key to Holton's case—it would determine whether the state's key evidence, the pubic hair, did, in fact, belong to Rudolph Holton.¹²³ It, she soon discovered, did not.¹²⁴ Not long after this revelation, the state's jailhouse informant retracted his testimony—referring to Holton, the informant explained: "I set him up."¹²⁵ Then, it was discovered that the victim had, ten days earlier, accused someone other than Rudolph Holton of raping her—a fact that was never raised at trial.¹²⁶ The case against Rudolph Holton had been completely debunked.

Holton's exoneration marked Florida's 23rd and the nation's 111th since executions resumed in 1973.¹²⁷ Florida, by far, leads the country

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. David Karp, *The Innocence Defense* (pt. 2), ST. PETERSBURG TIMES, Feb. 10, 2003, at 7A [hereinafter Karp pt. 2].

126. *Id.*

127. *Innocence and the Death Penalty*, *supra* note 9.

in exonerations of death penalty prisoners.¹²⁸ This, however, can be and has been looked at in very different ways. From the reformist—or skeptical—perspective, twenty-three exonerations reflects a flawed system. To others, the exonerations are an indication that the system is working.

After Holton's exoneration, Florida's governor, Jeb Bush, was asked about the need for a comprehensive review of its system, similar to that conducted in Illinois. Bush replied: "I don't think it's necessary for our state . . . We have a criminal justice system that protects the rights of these folks [death penalty inmates like Rudolph Holton] in an extraordinary way and continues to do so."¹²⁹ Confident that all the people for whom he has signed death warrants were "deserving" of the death penalty, Bush instead asserted that the real problem is the slow pace of Florida's death machinery.¹³⁰ Additionally, the cost of capital punishment—at least the cost of post-conviction defense for people like Rudolph Holton—is something Bush has sought to change.¹³¹ Ironically, citing budget concerns, Bush has proposed a phase-out of the very agency (CCR) that was responsible for "protecting the rights of . . . folks" like Rudolph Holton in "an extraordinary way" by proving their innocence—thus saving their lives—through post-conviction representation.¹³²

Essentially, Bush and other relevant political and judicial actors in Florida have refused to recognize the fallibility of Florida's system and their roles within it. It is an especially peculiar position for Bush who, for instance, has prided himself on a tax policy which he claims functions as "liberation from the slavery of big, bloated government."¹³³ After all, the same "big, bloated government" that arguably threatens to enslave the taxpayer was perhaps summed up best by Tom Feeney, former Speaker of the Florida House of Representatives, political ally of Governor Bush, and ardent supporter of capital punishment:

[M]ake no mistake about it: One of the dangers of big government is that the largest atrocities in human history, from the execution of Christ to the Nazi holocaust of Jews and others they considered

128. The closest three states after Florida are Illinois (17), Oklahoma (7), and Texas (7). *Exonerations by State*, *supra* note 105.

129. Peter Wallsten, *Death Row Review Is Not Needed, Bush Says*, MIAMI HERALD, Jan. 28, 2003, at B1, available at <http://www.miami.com/mld/miamiherald/news/state/5045518.htm>.

130. *Id.*

131. *See id.*

132. *Id.*; Karp pt. 2, *supra* note 125, at 7A.

133. Jeb Bush, *Lower Taxes Offer Liberation from Big Government*, ST. PETERSBURG TIMES, Jan. 18, 2002, at 15A.

undesirable, have been perpetrated and organized by big government.¹³⁴

Indeed, while paying taxes to an excessively large, inefficient government certainly has its problems, the greatest danger of “big government,” as Feeney suggests, has been in its power to determine who is entitled to life and who is not.

Unlike Governor Ryan, however, neither Bush nor Florida’s Republican-controlled house or senate have so much as conceded that Florida’s death penalty system is less than perfect, much less recognized a need for reform. Questions that have yet to be submitted to serious scrutiny are: What if Linda McDermott had not gone *the extra mile*? What if there was no agency, as may soon be the case, to employ someone like McDermott who has the institutional knowledge and dedication to provide effective post-conviction assistance? What if a frustrated and hopeless Rudolph Holton’s request to have his death warrant signed in 1996 was granted?¹³⁵ What if, as was the case with another death row inmate who was eventually cleared,¹³⁶ Rudolph Holton had died while waiting for someone to prove his innocence? What if the jailhouse snitch had not retracted his statement? What if the DNA evidence leading to Holton’s exoneration was mishandled or misplaced so as not to allow for its testing? The “what if?” game is not a purely conjectural one—in many cases, the sequence of events may be such that, unlike the Holton investigation, chance disfavors the discovery of truth and instead confirms otherwise tenuous legal conclusions.¹³⁷ Moreover, one should not forget

134. Tom Feeney, *Good Policy Is Good Politics*, Address Before the Heritage Foundation, Lecture No. 706 (May 24, 2001), at <http://www.heritage.org/Research/PoliticalPhilosophy/HL706.cfm> (last visited Dec. 6, 2003).

135. See Karp pt. 1, *supra* note 107, at 22A.

136. See Moyes, *supra* note 81, at 986 (noting that “[t]he [Frank Lee] Smith case represents the first time that a death row prisoner has been posthumously exonerated through DNA testing”). Moyes describes the progression of events leading to Smith’s posthumous exoneration as follows:

Years after Smith’s conviction, a key prosecution witness recanted her testimony, insisting that she had wrongly identified Smith after police pressured her and warned her that Smith was dangerous. Smith’s lawyers, convinced of his innocence, requested the courts’ permission to have DNA testing performed on semen evidence. The State of Florida strongly opposed the testing and accused Smith’s lawyers of merely trying to delay justice. While his lawyers continued to plead for access to the evidence, Smith was diagnosed with cancer, and died in 1999 in a prison hospital.

After Smith’s death, his lawyers continued to fight to have the DNA evidence tested and sought an order to keep the State from destroying the evidence. Initially, prosecutors maintained their opposition to the testing. But, through the process of negotiations, the parties were able to reach an agreement, under which the evidence was sent to an FBI lab for testing. In December 2000, the FBI announced that the DNA tests exonerated Smith.

Id. at 985-86 (footnotes omitted).

137. See, e.g., *id.*

that, despite his eventual exoneration, Rudolph Holton spent sixteen years of his life condemned to die for a crime he did not commit.

The point here is that Governor Bush does not, anymore than Governor Ryan, have any real basis to claim as a matter of absolute certainty that “every death warrant” he has signed has, in fact, led to the death of “deserving” persons.¹³⁸ At best, he might say that the evidence was overwhelming, that, after careful consideration, he could not reasonably consider those for whom he signed death warrants as anything but guilty.

Even then, though, the question becomes whether this level of certainty should suffice. It is essentially a moral inquiry, the answer to which relies principally on one’s individual valuation of life. Oddly enough, under this equation, it is conservatives, the very people who have traditionally been most supportive of the death penalty, who perhaps should be most skeptical of its use.

In the case of Governor Bush, for instance, he, like many other conservatives, proudly professes his respect for life as critical to his personal as well as his political makeup. For example, in commenting on the bill he signed to clear the way for Florida license plates bearing the anti-abortion message, “Choose Life,” Bush flatly declared, “I believe taking an innocent life is wrong.”¹³⁹ Thus, Bush clearly espouses the view that life—at least innocent life—is sacred, and that, therefore, it should not be taken away. Its implications for the abortion debate aside, Bush’s statement is hardly a controversial one. It is with regard to the “guilty,” instead, that many reasonable people disagree about the morality of taking a life. It is not enough, however, for Bush and others to defend their position regarding capital punishment on grounds that it only involves the killing of guilty persons. This is unless (as he suggests) in every case, Bush is absolutely certain (beyond *any* doubt) that the death warrants he signs are for the “deserving.”¹⁴⁰ This implies not only his own infallibility but, to a large extent, that of every other human being—prosecutors, witnesses, police officers, defense attorneys, trial judges, appellate judges, etc.—who is in some way responsible for the rendering and review of death sentences. For someone who, as already noted, readily voices his skepticism of government, certainty as to any bureaucratic or judicial decision is a profoundly peculiar position. That this position of absolute certainty pertains to what is arguably the gov-

138. See Wallsten, *supra* note 129.

139. Interview by the Florida Baptist Witness with Jeb Bush, Governor of Florida (Oct. 31, 2002), at <http://www.sonovasystems.com/fbw/bush.html> (last visited Dec. 6, 2003).

140. See Wallsten, *supra* note 129.

ernment's greatest power¹⁴¹—where one would instead expect a heightened degree of skepticism—is all the more perplexing.

Rudolph Holton escaped Florida's "machinery of death." How much of this was due to chance and how much was due to the effectiveness of a system that originally condemned him is not something that is conducive to precise calculation. However, so long as it is at least conceivable that chance, rather than systemic perfection, was the major factor in his exoneration, it seems that the system should undergo the same type of scrutiny that took place in Illinois under Governor Ryan. As Linda McDermott modestly remarked following Rudolph Holton's release, Holton's case should at the very least serve as "an important step to meaningfully review the process" of capital punishment in Florida.¹⁴² An important part of any such review should be an assessment of the role DNA has played and can continue to play in capital punishment systems or, alternatively, whether the emergence of DNA technology has changed the landscape of capital punishment in some more fundamental way. The next part addresses these issues.

V. THE ROLE OF DNA IN CAPITAL PUNISHMENT: A SKEPTICAL PERSPECTIVE

A. *The Past: In the Beginning, There Was "Junk Science"*

Part of the case against Rudolph Holton hinged on a single hair—expert testimony determined the hair to be that of an African-American, and since Holton was an African-American, he could not be excluded.¹⁴³ The prosecutor, as earlier noted, made much of this fact. That this evidence merely meant Holton was one of over thirty million African-Americans¹⁴⁴ included in the category of people who matched the hair was, apparently, a point ultimately lost on the jury. This, as was later confirmed, was an outrageously tenuous basis for condemning a man to death. It was, however, by no means an anomalous one.

Hair evidence dates back to the middle part of the nineteenth century, and has since been manipulated by experts and clever prosecutors to prosecute scores of innocent defendants.¹⁴⁵ Part of the problem

141. This point appears to be lost on Bush: "It concerns me if anyone's innocent in prison, not just Death Row[.]" Wallsten, *supra* note 129. Thus, in statements like these, Bush seems unconcerned with the particular gravity of capital punishment.

142. *Id.*

143. Karp pt. 1, *supra* note 107, at 22A.

144. See Press Release, United States Department of Commerce News, Facts from the Census Bureau for Black History Month (Feb. 5, 1996), available at <http://www.census.gov/Press-Release/blkhis1.html> (estimating that there were 33 million African-Americans in the U.S. in 1994).

145. See SCHECK ET AL., *supra* note 8, at 161-63.

is that hair evidence is generally unreliable. In the 1970s, the U.S. Law Enforcement Assistance Administration (LEAA) tested the proficiency of hair analysis in criminal trials.¹⁴⁶ The results revealed error rates of 27.6 percent to 67.8 percent.¹⁴⁷ Moreover, there was very little consistency in results among different labs.¹⁴⁸ As the authors of *Actual Innocence* declare, “[i]f DNA technology is at one end of the spectrum . . . then hair evidence is at the other end.”¹⁴⁹ Still, in cases like Holton’s, experts and prosecutors continue to frame hair evidence in ways that suggest a probativeness that far exceeds its actual relevance.

Hair evidence, moreover, has merely been one of several pseudo-scientific tools that state experts have used to convict innocent persons. In Florida, for instance, “superdog” sniffing was used to secure the capital conviction of Juan Ramos.¹⁵⁰ Not to be outdone, though, Mississippi employed the services of an expert whose principal tools were a blue laser and yellow goggles.¹⁵¹ Even fingerprinting, while certainly more reliable than hair evidence and its curious counterparts, has frequently been misinterpreted, misused, and, at times, even manipulated to the detriment of numerous innocent defendants.¹⁵² In short, while there may be much in the way of positive commentary to make on the historical role of science in criminal justice, it suffices to say, for now, that science—particularly junk science—has often been used as a means to artificially legitimate otherwise tenuous evidence. In some cases, this incompetence—or worse, corruption—has been the basis for convicting innocent individuals and even condemning some of them to death.

B. The Present: The Emergence of DNA Technology and Its Implications for Capital Punishment

One author writing in response to the role of DNA in the debate over capital punishment has asked “What’s DNA got to do with it?”¹⁵³ After all, of the hundred or so exonerations of death row inmates since 1973, only ten percent required DNA testing.¹⁵⁴ In answering

146. *Id.* at 162.

147. *Id.*

148. *Id.* at 162-63.

149. *Id.* at 163.

150. *Id.*

151. *Id.* This expert claimed his margin of error was “[s]omething less than [his] savior, Jesus Christ.” *Id.*

152. See Simon A. Cole, *Fingerprint Identification and the Criminal Justice System: Historical Lessons for the DNA Debate*, in *THE TECHNOLOGY OF JUSTICE: THE USE OF DNA IN THE CRIMINAL JUSTICE SYSTEM* (David Lazer ed., forthcoming 2004), available at <http://www.ksg.harvard.edu/dnabook/>.

153. See James S. Liebman, *The New Death Penalty: What’s DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 527 (2002).

154. *Id.* at 541.

this question, the author puts forth two basic reasons why DNA has a good deal to do with the death penalty debate. First, he argues, DNA testing can provide “seemingly conclusive proof of innocence.”¹⁵⁵ Its impact is powerful, and its results are virtually immune to debate. This is much unlike the more or less mythical conception of the exonerated death row inmate who “got off” on some “procedural technicality.” Innocence backed by science is something capital punishment apologists are virtually defenseless to contest.

The second reason relates to the contrast between a seemingly infallible science, in the case of DNA, and a fallible human apparatus (i.e., the criminal justice system). When DNA exonerates, the perception, rightly or wrongly, is one in which science, invulnerable to error, trumps the decisions of error-prone human beings. Unlike the many other cases where one group of human beings (e.g., appellate judges) overrule the decisions of another group of human beings (e.g., trial judges, juries, etc.), DNA exonerations are cloaked in scientific certainty. The net effect is that DNA functions to remind us of our “inherent fallibility and corruption” as humans, and how our “institutions” (e.g., criminal justice courts) cannot help but reflect these traits.¹⁵⁶ Perhaps, it is for this reason that process, at least as it relates to DNA, has been elevated in death penalty-friendly states like Texas and Florida.¹⁵⁷ Even in these states, where confidence in *swift* and *severe* criminal justice seems to reign supreme, the science of DNA is nevertheless afforded deference.¹⁵⁸ In these and other states, prisoners, capital and otherwise (depending on the state), now have a limited right to petition the courts to test relevant DNA evidence.¹⁵⁹

These laws, to some degree, mitigate the diminution in due process that has increasingly characterized capital litigation in recent years.¹⁶⁰ There are, however, some fairly evident and not-so-evident limitations worth noting. First, and most obviously, DNA statutes only have applicability where there is DNA evidence to test. Thus, had a jury convicted Rudolph Holton without relying on physical evidence but had instead based their verdict on eyewitness testimony or a coerced confession, DNA testing would not have been of any use. Likewise, DNA testing would have been of no value had the state lost the hair or otherwise tampered with it so that it could not be tested. These variations on the facts of Holton’s case are not only plausible—

155. *Id.* at 543.

156. *See id.*

157. *See* Aaron P. Stevens, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 925-26 (2001).

158. *See id.* at 931.

159. *See generally* Goldberg & Siegel, *supra* note 10, at 396-98 (discussing actions taken by states to improve prisoners’ access to post-conviction DNA testing).

160. *See* Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

they are actually very much reflective of barriers that have been faced by other capital litigants.¹⁶¹

A less obvious problem is that, in some states (e.g., Florida), although a statutory right to DNA testing is conferred, it must be exercised according to a prescribed set of criteria.¹⁶² That is, the process maintains an adversarial nature, which means, in essence, that a prisoner's petition for DNA testing can be denied in the absence of a showing of cause for the testing. While arguments have been made for a more absolute right, namely a constitutional right inhering under the Due Process Clause,¹⁶³ courts have not been receptive.¹⁶⁴ Ironically then, as it now stands in states like Florida, DNA testing, though it is now much more readily available, is ultimately left to the discretion of systems whose fallibility has been demonstrated, in large part, through DNA testing.¹⁶⁵

C. *The Future: Can DNA Reconstruct What It Has Deconstructed?*

This Comment has thus far discussed the role DNA has played in undermining the credibility of capital punishment. This trend will likely continue as DNA technology becomes more accessible to capital prisoners. However, as some commentators have suggested, the long-term impact of DNA actually might be to legitimate capital punishment.¹⁶⁶

Ricky Nolen McGinn was convicted by the state of Texas for raping and killing his step-daughter.¹⁶⁷ As his execution date approached, his lawyers pushed to have critical evidence submitted to DNA testing.¹⁶⁸ The state consented, but unlike the case of Rudolph Holton, DNA evidence indicated that McGinn was, in fact, guilty.¹⁶⁹ The state proceeded with his execution. An editorial that followed declared:

Death penalty opponents have worked hard to undermine that public confidence [in the accuracy of death penalty decisions]. To hear some of them talk, you'd think everybody on death row was

161. See SCHECK ET AL., *supra* note 8, at 172-73, 188.

162. See Goldberg & Siegel, *supra* note 10, at 396-97 (describing criteria necessary to obtain DNA testing of evidence).

163. See Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 549 (2002).

164. See, e.g., *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002).

165. See Goldberg & Siegel, *supra* note 10, at 393.

166. See, e.g., John B. Wefing, *Wishful Thinking by Ronald J. Tabak: Why DNA Evidence Will Not Lead to the Abolition of the Death Penalty*, 33 CONN. L. REV. 861 (2001).

167. *Id.* at 862 n.5.

168. *Id.*

169. *Id.*

innocent. There is absolutely no reason to think such a thing. DNA testing has the potential to counter that impression.¹⁷⁰

Indeed, DNA has and will surely continue to indicate guilt in many cases, both at trial and during the post-conviction process. While DNA will probably also continue to exonerate the innocent, this may become less and less likely as DNA testing is increasingly utilized at trial. First, when DNA testing is performed at trial, this provides convictions with the same cloak of scientific certainty that exonerations enjoy. For those convicted on the basis of DNA evidence, there seems little if any hope that testing would have utility in the post-conviction process. Second, testing at trial should, theoretically, now keep people like Rudolph Holton from ever being wrongfully convicted in the first place. Further, as the system becomes more effective at the front-end, DNA testing might also help to legitimize the system even as it exposes its flaws. Presumably, where DNA evidence is relevant in a capital case, it will, in most instances, be tested before the state executes. Thus, Rudolph Holton goes free. A relative few of us might be outraged that a man could spend sixteen years of life on death row for a crime he did not commit, but the story hardly has the front page and system-destabilizing potential that executing an innocent person would have. On the other hand, Ricky Nolen McGinn is executed. The good guy goes free, the bad guy dies—we know this because DNA tells us so.

As long as this scenario continues to prevail, the tide that is now shifting toward moratoria or even abolition may soon recede back to a solid support for capital punishment. Such a recession would, in failing the test of skepticism, continue to entrust what is perhaps the greatest of all powers to a fallible government. The next Part argues that the only truly skeptical approach to the issue of capital punishment is to deprive the government of so great a power.

VI. ANSWERING THE CALL OF SKEPTICISM

A. *A Second-Best Solution: A Somewhat Skeptical Response to Capital Punishment*

In the recent film, *The Life of David Gale*,¹⁷¹ Gale, the abolitionist, is challenged at one point by the quasi-fictionalized governor of Texas to name for him just one innocent person whom his state has executed. The governor declares that, if Gale can do so, he will immediately issue a moratorium. Gale is speechless.

170. *Id.* (quoting *DNA Testing Can Prove Guilt as Well as Innocence*, THE STATE (Columbia, S.C.), July 26, 2000, at A14).

171. THE LIFE OF DAVID GALE, *supra* note 13.

The fictional governor's confidence is not without a real-life analogue. Jeb Bush, in the face of what many consider a flawed system of capital punishment in Florida, remains confident that, in his state, only the "deserving" are executed.¹⁷² Implicitly, Bush has challenged abolitionists and other reformers, like the fictional Gale, to find the person who was not "deserving," the person executed by the state of Florida who was *actually* innocent. While, practically speaking, finding this person could be the stake that finally pierces through the heart of capital punishment once and for all, it is not necessary as a basis for responding either to Gale's fictional governor or to the real Governor Bush.

In the movie, Gale has nothing to say in response to the governor. It is a strange silence for Gale, a professor of philosophy and apparent admirer of Socrates.¹⁷³ A simple Socratic reply for Gale might have been: "Governor, I cannot point to any executed person who has been proven innocent. However, because it has not been proven, does that necessarily mean that it has not happened? And, more specifically, how, Governor, do you know with *absolute* certainty that you have never signed a death warrant for an innocent person?" Had this been Gale's response, the presumably conservative governor, at the very least, would have been forced into an uncomfortable discussion about the appropriate level of trust to place in government power. At most, he would have been left as speechless as Gale. Perhaps, it is the risk of such a dialogue that helps to explain why, when Governor Bush has been challenged to debate by one of Florida's foremost abolitionists, he has declined.¹⁷⁴

Imagine, however, that the fictional governor, in a moment of intellectual honesty, replies: "Professor Gale, I can't answer your question . . . It surely gives me pause for thought . . . I am, after all, just a human being . . . how can I know anything with absolute certainty?"¹⁷⁵ But just as Gale begins to crack a triumphant smile, the governor continues: "Professor Gale, maybe you're right. We've been

172. See *supra* Part IV-B. Bush's confidence has, at times, been more clearly stated: "I can tell you from my perspective which is . . . from my perspective which is, which relates to the death warrants I have signed . . . uh I have absolutely no doubt that the people were, were guilty. *Absolutely no doubt.*" Abe Bonowitz & SueZann Bosler, *A Discussion with Jeb Bush on the Death Penalty*, COUNTERPUNCH, July 19, 2002, at <http://www.counterpunch.org/bonowitz0719.html> (emphasis added) (last visited Dec. 6, 2003).

173. Also, in the film, Gale's most notable work is entitled "Dialogical Exhaustion."

174. Letter from Tara H. Wainwright, Director of Scheduling, Office of the Governor, to Floridians for Alternatives to the Death Penalty (Aug. 7, 2002) (on behalf of the Governor), at <http://www.fadp.org/jebreject.html> (last visited Dec. 6, 2003).

175. This hypothetical statement is not unlike a question that Governor Ryan had asked regarding his authority to make decisions about who receives the death penalty: "I don't know anybody who wants to put people to death. As a *mere mortal*, what gives me the right to make that decision?" Debbie Howlett, *Illinois Governor Out to Stop Death*, USA TODAY, Mar. 29, 2002, at 3A (emphasis added).

doing things the wrong way—too much power in the hands of folks like me who, every now and again, make mistakes.” But, he stops, thinks for a moment, and continues: “But that doesn’t mean we have to throw the baby out with the bathwater, does it? I mean there’s this DNA stuff, right? We rely on it to let people off death row. Why can’t we rely on it to execute people? What if this state agreed not to execute anyone unless DNA proves a person guilty first?” Perhaps again, Gale is left with nothing to say.

Once more, however, there is a possible response. For now, though, it is worth mentioning that, from a skeptical perspective, the fictional governor’s compromise certainly would be far more acceptable than the present system. It at least attempts to resolve the issue of factual uncertainty by replacing fallible human discretion with a reasonably certain science. Within this framework, the risk of executing an innocent person would probably diminish. Even a scientifically-clothed system of capital punishment, though, still fails the test of skepticism.

First, regardless of how reliable DNA technology becomes, it is ultimately only as dependable as the human beings who use it. As with fingerprinting and other technologies, DNA testing is susceptible to human error and even manipulation. Much like DNA now, fingerprinting was once considered “foolproof.”¹⁷⁶ This perception enabled much official corruption, and consequently, the destruction of many innocent lives.¹⁷⁷ Thus, one author well-versed in this subject has urged:

Precautions should be taken to ensure that forensic DNA evidence receives ongoing scrutiny from the courts, the defense bar, and the scientific community and is not turned into a black box whose conclusions are treated as unassailable, error-free gospel.¹⁷⁸

In recent times, the O.J. Simpson trial serves as the most well-known example of how individuals within the criminal justice system are capable, either by virtue of incompetence or corruption, to make an otherwise reliable science unreliable. The issue in the Simpson trial was not whether to trust DNA technology, but rather, whether to trust the persons responsible for handling the DNA. Although efforts are being made to curb potential corruption, the fact remains that it is possible—in other words, DNA, like fingerprinting before it, is not “foolproof.”

Secondly, DNA is of no value in ascertaining key elements in capital crimes and sentencing. DNA might prove that a defendant killed, but it cannot tell a jury whether the defendant intended to kill or

176. See Cole, *supra* note 152.

177. *Id.*

178. *Id.*

whether his killing was “heinous, atrocious, or cruel.”¹⁷⁹ These matters are still left to the more or less subjective determinations of juries. This relates to the final problem with placing too much emphasis on DNA testing. For all its worth, DNA can do nothing to remedy the disproportionate application of the death penalty to racial and economic minorities. In Illinois, where the nation’s renewed debate on capital punishment first surfaced, Governor Ryan noted that 35 African-Americans were convicted and sentenced to death by all-white juries.¹⁸⁰ If DNA had been available in all of these cases, it could have done nothing, short of proving the defendants’ innocence, to mitigate the potential of racism as a factor in whether these men would be condemned to die. To address a problem like that, a much more drastic response is needed—a more skeptical response is needed.

B. Best Solution: A Truly Skeptical Response to Capital Punishment

As noted, DNA is hardly a panacea for the woes of capital punishment. Most significantly, from a skeptical perspective, DNA cannot cure fallible human government. Thus, at best, we are left with a better system, not an infallible one. In some areas of government—education, taxes, even criminal justice for the most part—it is only rational, and hardly immoral, to accept the inevitability of imperfection. “Death,” however, is “different.” From this, we might ask *how different?* In other words, might we risk the death of some innocents for the good of society?

These questions are ultimately moral in nature. But, while the question of whether death might serve as an acceptable means to an arguably larger end may make for good philosophical discussion, it is not really a subject for serious debate in this society. Rather, the capital punishment debate has focused not on whether it is moral to kill an innocent person, but instead on whether we are, in fact, taking any such risk.¹⁸¹ Those that support capital punishment say that

179. See Steven G. Gey, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. REV. 67, 94-99 (1992) (explaining the difficulty of applying standards such as the “heinous, atrocious, and cruel” (HAC) one, which is used in Florida).

180. *Governor Explains*, *supra* note 99, at 2.

181. Some have, however, raised the argument that risking the lives of the innocent is, indeed, morally justified. Despite its apparent irrelevance, the *execute at our own-moral risk* position may at least score some points for intellectual honesty. It proceeds as follows:

One of the most common, and surely the most persuasive, arguments against capital punishment is that the state may execute an innocent person. One reason for its effectiveness is that proponents of capital punishment often do not know how to respond to it.

That’s a shame. For while the argument is emotionally compelling, it is morally and intellectually shallow.

First of all, there is almost no major social good that does not lead to the death of innocent individuals. Over a million innocent people have been killed

we are not. It is a position, however, that is grounded in faith, not certitude.¹⁸²

To those politically entrusted with the choice, there is an alternative. To prove the efficacy of the death penalty in the face of evidence (i.e., exonerations) to the contrary, confident governors and legislatures have a means to shut up naysayers—they can simply freeze executions, closely examine the system, and report back to those who insist there is something wrong that, in fact, all is well—when this process is complete, they can resume executions. This, from the skeptical (and the abolitionist) perspective, would be a step in the right direction for states like Florida. Inevitably, though, it seems that it is a step that, if taken sincerely, can only lead to abolition.¹⁸³

Illinois is not unique. Systems of capital punishment, wherever they may be, are like all other human institutions: “fraught with error.” States may do much, as they often do with a range of issues, to become more competent in their administration of capital punishment. But increased competence is where the hope ends. For the state serious in its opposition to taking “innocent” life, certainty—not competence—should be the requisite threshold. To be *certain* that death is not visited upon the innocent, there is but one option.

VII. CONCLUSION

To be consistent, the skeptic can no more say that innocent people are being killed than she can say that they are not. It is enough, though, for a society that purports to respect life, to recognize it is operating a system that runs the *risk* of killing the innocent. States might reasonably look to procedural reforms, but, in the end, they

and maimed in car accidents. Would this argue for the banning of automobiles? To those whose criterion for acceptable social policy is that not one innocent die, it should.

If it were proven that a strictly enforced 40-miles-per-hour speed limit on our nation's highways would save innocent lives, should we reduce highway limits to 40 miles per hour? Should all roller coasters be shut down because some innocents get killed riding on them?

Dennis Prager, *More Innocents Die When We Don't Have Capital Punishment* (June 17, 2003), at <http://www.townhall.com/columnists/dennisprager/dp20030617.shtml> (last visited Dec. 6, 2003); see also Wesley Lowe, *Wesley Lowe's Pro Death Penalty Webpage*, at <http://www.wesleylowe.com/cp.html#risk> (last visited Dec. 6, 2003). Lowe quotes a U.S. Senate Report which states: “All that can be expected of . . . [human authorities] is that they take every reasonable precaution against the danger of error . . . If errors are . . . made, this is the necessary price that must be paid within a society which is made up of human beings.” *Id.* Judging, however, from the insistence of Governors like Jeb Bush that they have never signed death warrants for the un-“deserving,” it is doubtful the U.S. Senate Report reflects the norms of national or local constituencies regarding the value of innocent life. See *supra* notes 16-18 and accompanying text.

182. See NEITZSCHE, *supra* note 1, § 344, at 283.

183. This assumes, of course, that all is not well and that a close examination of any capital punishment system would reveal as much.

only return us to the same fundamental problem that prompted calls for reform in the first instance: We human beings cannot be sure that the reforms we implement are not flawed, nor can we ensure that even the best reforms will withstand the prospect of further human error. Thus, cognizant of our fallibility, we are left with a moral dilemma: Is the prospect of death for the innocent an acceptable price for continuing to operate a fallible, and arguably quite flawed, system of capital punishment?