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## THE MYTH OF INNOCENCE

JOSHUA MARQUIS\*

For decades in America, questions about the death penalty centered on philosophical and sometimes religious debate over the morality of the state-sanctioned execution of another human being. Public opinion ebbed and flowed with support for the death penalty, declining as civil rights abuses became a national concern in the 1960s and increasing along with a rapid rise in violent crime in the 1980s.<sup>1</sup>

Those who oppose capital punishment call themselves “abolitionists,”<sup>2</sup> clearly relishing the comparison to those who fought slavery in the 19th century. In the mid-1990s these abolitionists, funded by a cadre of wealthy supporters including George Soros and Roderick MacArthur, succeeded in changing the focus of the debate over the death penalty from the morality of executions to questions about the “fundamental fairness” or, in their minds, unfairness of the institution.<sup>3</sup> The abolitionists were frustrated by polling that showed that virtually all groups of Americans supported capital punishment in some form in some cases.<sup>4</sup>

Led by Richard Dieter of the neutral-sounding Death Penalty Information Center, opponents of capital punishment undertook a sweeping make-over of their campaign.<sup>5</sup> In addition to painting America as a rogue

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<sup>1</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SELECTED FINDINGS, VIOLENT CRIME* (1994), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/viocrm.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *FEDERAL CRIMINAL CASE PROCESSING, 2002: WITH TRENDS 1982-2002, RECONCILED DATA 1* (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp02.pdf>.

<sup>2</sup> See, e.g., Byron York, *The Death of Death*, AM. SPECTATOR, Apr. 2000, at 21.

<sup>3</sup> *Id.* at 21-23.

<sup>4</sup> *Id.* at 21.

<sup>5</sup> *Id.*

state—a wolf among the peaceful lambs of the European Union who had forsaken the death penalty—the latter-day abolitionists sought to convince America that, as carried out, the death penalty was inherently racist, that the unfortunates on death row received wretched and often incompetent defense counsel, and, most appalling, that a remarkable number of those sentenced to death were in fact innocent.<sup>6</sup>

Dieter and his allies pointed to the fact that while African-Americans make up only slightly more than ten percent of the American population, they constitute more than forty percent of those on death row.<sup>7</sup> In addition, they described some cases in which the appointed lawyers were nothing more than golfing pals with the judge making the appointment, that some of these lawyers had no previous experience with murder cases, and that in at least one case the lawyer appears to have slept through portions of the trial.<sup>8</sup>

Abolitionists painted a picture of massive prosecution, funded by the endless resources of the government and pitted against threadbare public defenders either barely out of law school or, if experienced, pulled from the rubbish heap of the legal profession.<sup>9</sup>

But most compelling of all the arguments that called capital punishment “fatally flawed” were the stories of men who had served years on death row, a few coming close to their scheduled execution only to be released because a court had determined that they were “exonerated.” Television programs showed dramatic footage of Anthony Porter, freed from Illinois’s death row, running into the arms of his savior, Northwestern University journalism professor David Protess.<sup>10</sup> A handful of other stories of “innocents on death row” filled magazines, television programs, and symposia on college campuses across the country.

In the face of horrific crimes like the murder of more than 160 people by Timothy McVeigh, death penalty opponents sought to recruit new converts. By the time of the 2000 presidential campaign, they had succeeded in moving the debate to a point where supporters of capital punishment felt beleaguered and outgunned.<sup>11</sup> A growing number of classic conservatives, from William F. Buckley to Pat Robertson, expressed their

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<sup>6</sup> *Id.* at 21-22.

<sup>7</sup> Press Release, Amnesty International USA (Apr. 24, 2003) (cited in Associated Press, *Death Penalty Discrimination*, CBS NEWS, Apr. 24, 2003, available at [www.cbsnews.com/stories/2003/04/24/national/main550986.shtml](http://www.cbsnews.com/stories/2003/04/24/national/main550986.shtml)).

<sup>8</sup> *Burdine v. Johnson*, 262 F.2d 336 (5th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002).

<sup>9</sup> See York, *supra* note 2, at 22.

<sup>10</sup> See *id.*; see also Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381 app. A (2005) (detailing the facts of the Porter case).

<sup>11</sup> See York, *supra* note 2, at 23.

mistrust of capital punishment.<sup>12</sup> The arguments succeeded in driving down public support for the death penalty from a high of almost 80% in the late 1980s<sup>13</sup> to a low of around 65% in the year George W. Bush ran against Al Gore for president.<sup>14</sup>

Recognizing that the polls still showed majority support for the existence of the death penalty, abolitionists started advocating for a “moratorium,” suggesting that short of abolition, a halt should be declared to executions while the issue was intensively studied.<sup>15</sup> They found an unlikely ally in then-Governor George Ryan of Illinois.<sup>16</sup>

Ryan, a conservative Republican, had just two years earlier, in 1998, won election in part by underlining his support for capital punishment.<sup>17</sup> But in 1999 the Chicago Tribune began running a hard-hitting series of lengthy articles, accusing Illinois prosecutors of serious misconduct and highlighting a number of cases in which men sentenced to death row had been released when appellate courts found serious errors in their trials or claims of misconduct by police or prosecutors.<sup>18</sup> Although prosecutors and at least one state Supreme Court justice questioned Ryan’s authority simply to halt the death penalty process,<sup>19</sup> Ryan’s action effectively prevented the execution of any of the 170 men on that state’s death row.<sup>20</sup>

Ryan became a folk hero. He was lauded on college campuses across the country, cited as a profile in political courage by foreign politicians, and

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<sup>12</sup> David Firestone, *Absolutely, Positively for Capital Punishment*, N.Y. TIMES, Jan. 19, 2003, § 4, at 5.

<sup>13</sup> See, e.g., The Gallup Organization, *Question: Do Your Favor or Oppose the Death Penalty for Persons Convicted of . . . Murder* (Sept. 11, 1988) (78.94%).

<sup>14</sup> See, e.g., The Gallup Organization, *Question: Do Your Favor or Oppose the Death Penalty for Persons Convicted of . . . Murder* (June 23, 2000) (65.63%).

<sup>15</sup> See York, *supra* note 2, at 23.

<sup>16</sup> *Id.* at 22-23.

<sup>17</sup> See, e.g., Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois* (series), *Part One: Death Row Justice Derailed; Bias, Errors and Incompetence in Capital Cases Have Turned Illinois’s Harshes Punishment into Its Least Credible*, CHI. TRIB., Nov. 14, 1999, at 1.

<sup>18</sup> See Ken Armstrong & Maurice Possley, *The Verdict: Dishonor* (series), *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at 1, available at <http://www.soci.niu.edu/~criticism/wrong/tribpros10.html>; see also Michael Miner, *Prosecutors v. Journalists: The Gloves Are Off*, CHI. READER, June 9, 2000, available at [http://www.chireader.com/hottype/2000/000609\\_1.html](http://www.chireader.com/hottype/2000/000609_1.html).

<sup>19</sup> Heiple: *Execution Moratorium Illegal; “System Hasn’t Failed”*: *Departing Justice Says Ryan Doesn’t Have the Authority*, TELEGRAPH HERALD (Dubuque, IA), Oct. 4, 2000, at C5.

<sup>20</sup> Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty*, CHI. TRIB., Jan. 31, 2000, at 1.

was even nominated for the Nobel Peace prize.<sup>21</sup> Just before leaving office in 2003, Ryan stunned many when he announced a sweeping clemency, using his executive powers to release 164 men from death row and granting outright pardons to four more.<sup>22</sup>

Sensing a possible sea change in public sentiment, the abolitionists pushed for other states to follow Ryan's example. The moratorium became a leading campaign issue in the Maryland governor's race in 2002, following the outgoing governor's decision to place a moratorium on that state's use of the death penalty and commission a study to determine whether race plays a role in the application of the death penalty.<sup>23</sup>

After these apparent victories, the tide started to turn, but not in the way the abolitionists expected. Governor Ryan was dogged by a federal investigation into bribery and corruption charges that drove his approval rating to less than twenty-five percent.<sup>24</sup> His name became so toxic in Illinois politics that a Republican candidate for governor in 2004, whose last name was also Ryan but was no relation to the Governor, campaigned on first name.<sup>25</sup> After securing indictments and convictions against his top aides and even his campaign committee, federal prosecutors indicted Ryan on charges of bribery, corruption, and racketeering.<sup>26</sup>

In Maryland, Democratic gubernatorial candidate Kathleen Kennedy Townsend, who had pledged her continued support for the death penalty moratorium, suffered a defeat in the 2002 election in the wake of the Washington-area sniper shootings.<sup>27</sup> And, finally, the murder of 3,000

<sup>21</sup> Debbie Howlett, *Ex-Illinois Gov. George Ryan Indicted on Corruption Charges*, USA TODAY, Dec. 17, 2003, available at [http://www.usatoday.com/news/nation/2003-12-17-ryan\\_x.htm](http://www.usatoday.com/news/nation/2003-12-17-ryan_x.htm); see also DEADLINE (Big Mouth Productions 2004; NBC television broadcast, July 30, 2004) (reference material regarding former Governor Ryan at [http://deadlinethemovie.com/characters/governor\\_george\\_h\\_ryan.php](http://deadlinethemovie.com/characters/governor_george_h_ryan.php)).

<sup>22</sup> Maurice Possley & Steve Mills, *Clemency for All*, CHI. TRIB., Jan. 12, 2003, at 1.

<sup>23</sup> Howard Libit, *Death Penalty Issue No. 1: Impact of Moratorium to be Felt in Races for Governor; Assembly: "It'll Be the Talk of the Town;" Sept. Deadline for Study Will Put Any Change in Law on Next Year's Agenda*, BALT. SUN, May 12, 2002, (Telegraph), at 1A; see also *Finally a Moratorium*, BALT. SUN, May 10, 2002, at 22A (Editorial) (republished in CAL. BAR JOURNAL (2000), available at <http://www.calbar.ca.gov/calbar/2cbj/02jun/page8-2.htm>).

<sup>24</sup> Center for State Policy and Leadership (Univ. of Ill. at Springfield), Survey Research Office, *Approval of President Bush and Governor Ryan* (July 31, 2002), available at <http://cspl.uis.edu/SurveyResearchOffice/Common/News/ApprovalPresident.htm>.

<sup>25</sup> See Dave McKinney, *Key Election Fight Looming in Illinois*, STATELINE.ORG, Mar. 26, 2002, at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=229882> (regarding Jim Ryan).

<sup>26</sup> Matt O'Connor & Ray Gibson, *Ryan Indicted*, CHI. TRIB., Dec. 18, 2003, at 1.

<sup>27</sup> Jeff Barker, *Md. Moratorium Unlikely to Block the Death Penalty; Trial of Adult Suspect Is Expected to Finish After Study Completed; Search for the Sniper*, BALT. SUN, Oct.

people on September 11, 2001, reminded many Americans that some crimes merited the ultimate punishment.

Having largely abandoned the moral arguments against capital punishment, the modern abolition movement is now based on a trio of urban legends: (1) the death penalty is racist at its core; (2) those accused of capital murder get grossly inadequate representation; and (3) a remarkable number of people on death row are innocent.

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In the last ten years the violent crime rate in America, including the murder rate, has decreased dramatically.<sup>28</sup> A series of recent studies by economists showed an undeniable correlation between the death penalty and deterrence.<sup>29</sup>

One researcher who reported that pardons may have actually cost lives nonetheless added a postscript to the study, saying that despite the results of his study he personally believed that the death penalty remained biased against minorities.<sup>30</sup>

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26, 2002 (Telegraph), at 4A. While Townsend conceded on the campaign trail that the death penalty would be appropriate for "heinous cases" like the sniper killings, she would have continued to uphold the outgoing governor's moratorium on existing death sentences. *Id.* The Republican candidate, Robert Ehrlich, earned significant support due to his opposition to the death penalty moratorium. Tim Craig, *Police Union Backs Ehrlich, First Big Labor Group to Support GOP Candidate; Substantial Research Pledged; Opposition to Gun Control, Death Penalty Are Factors*, BALT. SUN, June 25, 2002, at 1. Interestingly, Governor-elect Ehrlich had also voiced support during his campaign for expanding the death penalty to juveniles in egregious cases, like the sniper shootings. Sarah Koenig & Ivan Penn, *Gubernatorial Campaigns Work in Sniper Issues: Ehrlich Might Widen Death Penalty, Townsend Limit Assault Weapons*, BALT. SUN, Oct. 30, 2002, at 1.

<sup>28</sup> Phillipa Thomas, *U.S. Murder Rate Drops*, BBC NEWS, Oct. 15, 2000, available at <http://news.bbc.co.uk/1/hi/world/americas/973814.stm>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *HOMICIDE TRENDS IN THE UNITED STATES: 2000 UPDATE (2003)*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/htus00.pdf>.

<sup>29</sup> Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569 (2001); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); H. Noci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (2004).

<sup>30</sup> Mocan & Gittings, *supra* note 29, at 474; see also John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 167 (2004), available at [http://www.deathpenaltyinfo.org/Blume\\_etal.pdf](http://www.deathpenaltyinfo.org/Blume_etal.pdf) (denying that their finding, that the death sentence is not disproportionately imposed on black murderers, is any proof of race-neutral application of the death penalty).

How could the death penalty not be racially biased given the disproportionate number of African-Americans convicted of murder? A Cornell University study issued in March of 2004 by law professors John Blume and Theodore Eisenberg and statistician Martin Wells<sup>31</sup>—all opponents of the death penalty<sup>32</sup>—showed that the conventional wisdom about the South's so-called "death belt," where blacks are said to be much more likely to die than whites convicted of similar murders, simply does not hold up. In the words of the authors, "[t]he conventional wisdom about the death penalty is incorrect in some respects and misleading in others."<sup>33</sup>

Until the Cornell study, the abolitionists had relied largely on the studies of David Baldus for their accusations of racism. Baldus, an Iowa law professor, claimed that race was a key factor in the imposition of death sentences.<sup>34</sup> The Cornell University study, however, drawn from statistics gathered by the U.S. Department of Justice's Bureau of Justice Statistics, showed that while African-Americans were convicted of committing 51.5% of all murders, they comprised only 41.3% of death row's population.<sup>35</sup> The study revealed that roughly ten percent of the murders were cross-racial<sup>36</sup> and that in twenty-eight states, including Georgia, South Carolina and Tennessee, blacks were under-represented on death row.<sup>37</sup> States like Texas, which had the greatest number of people on death row, actually had a lower per capita rate of imposing the death penalty than Nevada, Ohio, and Delaware.<sup>38</sup>

The Cornell study thereby confirmed what many prosecutors had suspected: that a white murderer sentenced to death was twice as likely

<sup>31</sup> Blume et al., *supra* note 30.

<sup>32</sup> See, e.g., Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *The Deadly Paradox of Capital Jurors* (Aug. 28, 2000), available at <http://ssrn.com/abstract=240285> (conveying Eisenberg's and Wells's view of the death penalty as a product of flawed democracy); *Jail Letter Led to Major Legal Test; Representation, State-Federal Questions Raised*, RICHMOND-TIMES DISPATCH, Jan. 8, 2000, available at <http://www.truthinjustice.org/stone08.htm> (quoting Blume as distrusting the accuracy of state capital convictions).

<sup>33</sup> Blume et al., *supra* note 30, at 166.

<sup>34</sup> See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

<sup>35</sup> See Blume et al., *supra* note 30, at 189-90.

<sup>36</sup> *Id.* at 192. The study indicated that 86% of white victims are killed by whites, and 94% of blacks are killed by blacks. Even accounting for some difference in the number of black and white murder victims, the number would fall somewhere between eight and twelve percent of all murders as cross-racial.

<sup>37</sup> *Id.* at 189 fig.3.

<sup>38</sup> *Id.* at 172 tbl.1.

actually to be executed than a black person sentenced to death.<sup>39</sup> It may be shockingly politically incorrect to say, but the fact is that the most horrific murders—serial killings, torture murders, and sex crimes against children—tend to be committed more frequently by white murderers than blacks.<sup>40</sup>

The next urban legend is that of the threadbare but plucky public defender fighting against all odds against a team of sleek, heavily-funded prosecutors with limitless resources. The reality in the 21st century is startlingly different. There is no doubt that before the landmark 1963 decision in *Gideon v. Wainwright*,<sup>41</sup> appointed counsel was often inadequate. But the past few decades have seen the establishment of public defender systems that in many cases rival some of the best lawyers retained privately. The Chicago Tribune, while slamming the abilities of a number of individual defense counsel in Cook County capital cases in the 1980s, grudgingly admitted that the Cook County Public Defender's Office provided excellent representation for its indigent clients.<sup>42</sup>

Many giant silk-stocking law firms in large cities across America not only provide pro-bono counsel in capital cases, but also offer partnerships to lawyers whose sole job is to promote indigent capital defense.<sup>43</sup> In one recent case in Alabama, a Portland, Oregon law firm spent hundreds of thousands of dollars of lawyer time on a post-conviction appeal for a death row inmate.<sup>44</sup> In Oregon, where I have both prosecuted and defended capital cases, it is common for attorneys to be paid hundreds of thousands of dollars by the state for their representation of indigent capital clients. And the funding is not limited to legal assistance. Expert witnesses for the defense often total tens of thousands of dollars each, resources far beyond the reach of individual district attorneys who prosecute the same cases.

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<sup>39</sup> *Id.* at 197 tbl.8. Table 8 indicates that, in eight states with racial data, 39,356 blacks were convicted of murder, with 517 sentenced to death (giving a death sentence rate of 1.31%). The same table indicates that, of 20,650 whites convicted of murder, 575 were sentenced to death (yielding a 2.78% death sentence rate).

<sup>40</sup> Sean Kelly, *This Time, Profiles Didn't Fit*, DENVER POST, Oct. 25, 2002, available at <http://www.denverpost.com/Stories/0,1413,36%257E53%257E947729,00.html>; Tanika White et al., *African-Americans Grapple With Race of Sniper Suspects: Relief at Capture, Worry About Repercussions*, BALT. SUN, Oct. 25, 2002, available at <http://www.baltimoresun.com/news/local/bal-te.md.concern25oct25.story>.

<sup>41</sup> 372 U.S. 335 (1963).

<sup>42</sup> Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois* (series), Part Two: *Inept Defenses Cloud Verdict*, CHI. TRIB., Nov. 15, 1999, at 1, available at <http://www.chicagotribune.com/news/specials/chi-991115deathillinois2,1,5386873.story?coll=chi-newsspecials-hed&ctrack=3&cset=true/>.

<sup>43</sup> Series of Telephone Interviews with Clay Crenshaw, Assistant Attorney General, Alabama (2001).

<sup>44</sup> *Id.*



As the elected prosecutor of what is considered a mid-sized county in Oregon, I have a set budget that rarely gives me more than \$15,000 a year to cover the total expenses of expert witnesses for *all* of the hundreds of cases my office prosecutes each year. Yet in one recent murder trial, one witness in the mitigation phase admitted he had already billed the state indigent defense program for over \$30,000. In a related case the investigators for the defense were paid over \$100,000.

Finally, and perhaps most importantly, we come to discuss why it matters whether someone is “innocent,” “exonerated,” “acquitted,” or merely let go. Words like “innocence” convey enormous moral authority and are intended to drive the public debate by appealing to a deep and universal revulsion at the idea that someone who is genuinely blameless could wrongly suffer for a crime in which he had no involvement. But in the practice of law, words matter enormously. To call someone “innocent” when all they managed to do was wriggle through some procedural cracks in the justice system cheapens the word and impeaches the moral authority of those who claim that a person has been “exonerated.”

Scott Turow, the bestselling novelist, spent some time as a federal prosecutor before joining a high-end Chicago law firm. He became interested in the death penalty through pro bono work that he and his firm performed for a group of death row defendants who were eventually released. Governor Ryan appointed Turow to a seventeen-member commission that sought to review Illinois’s death penalty laws.<sup>45</sup> The commission was heavily laden with “former prosecutors” like Turow, who were now criminal defense lawyers. Only one commission member was a sitting prosecutor. That member, Mike Waller, was the lone dissenter on many of the recommendations that were adopted almost in their entirety by the Illinois legislature.<sup>46</sup>

Turow has written two recent books, one fictional—*Reversible Errors*,<sup>47</sup> already a TV movie-of-the-week<sup>48</sup>—and a slim, austere volume of his personal reflections, *Ultimate Punishment*.<sup>49</sup> The novel sold well, like most of Turow’s other works. It paints the traditional urban myth of over-

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<sup>45</sup> See FORMER GOVERNOR RYAN’S COMM’N ON CAPITAL PUNISHMENT, FINAL REPORT (2002), available at <http://www.idoc.state.il.us/ccp/reports/index.html>.

<sup>46</sup> FORMER GOVERNOR RYAN’S COMM’N ON CAPITAL PUNISHMENT, COMMISSION MEMBERS, at [http://www.idoc.state.il.us/ccp/ccp/member\\_info.html](http://www.idoc.state.il.us/ccp/ccp/member_info.html) (last visited Feb. 15, 2005).

<sup>47</sup> SCOTT TUROW, REVERSIBLE ERRORS (2002).

<sup>48</sup> REVERSIBLE ERRORS (Hallmark Entertainment 2004). The movie version of the book starred William H. Macy and Tom Selleck.

<sup>49</sup> SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY (2003).

zealous and politically-ambitious prosecutors and incompetent forensics resulting in a tragic miscarriage of justice, thwarted by a brave civil attorney who is dabbling in pro-bono capital defense work, aided by his love interest, a recovering addict who sold her office as a judge and fell from grace.<sup>50</sup>

Popular culture, most of it not as well-crafted as Turow's, has created an entire alternate universe that posits a legal system that regularly hurls doe-eyed innocents onto death row through the malevolent machinations of corrupt cops and district attorneys who either earn bonuses for the innocent people they convict or are so intent on advancing their careers that they disregard the truth and conceal evidence that might clear the defendant. These fantastic constructions are prominent in television programs like *The Practice*<sup>51</sup> (mercifully axed), in movies like *True Believer*<sup>52</sup> and *True Crime*,<sup>53</sup> as well as in popular fiction. There is an axiom in journalism that it's not news how many planes landed safely today. Accordingly, it's not surprising that the news articles that make the front page of major publications are about the exceedingly rare cases where the convicted defendant did not, in fact, commit the offense.

One of the most striking examples of truth and fiction blended in popular culture is a play called *The Exonerated*, which just finished a successful two-year run off-Broadway and is now touring the United States.<sup>54</sup> The play profiles six people who were once on death row and now walk free.<sup>55</sup> The clear implication is that they are innocent in the classic sense of that word—that they didn't do it, weren't there, didn't participate. Yet two of the six, Sonia "Sunny" Jacobs and Kerry Cook, stand convicted by their own guilty pleas<sup>56</sup> of the murders for which they were supposedly

<sup>50</sup> See generally TUROW, *supra* note 47.

<sup>51</sup> *The Practice* (regular ABC television broadcasts).

<sup>52</sup> TRUE BELIEVER (Columbia Pictures 1989).

<sup>53</sup> TRUE CRIME (Warner Brothers 1999).

<sup>54</sup> JESSICA BLANK & ERIK JENSEN, THE EXONERATED (2004); see also The Culture Project @ 45 Bleecker, at <http://www.45bleecker.com/exonerated.html> (last visited Jan. 26, 2005).

<sup>55</sup> BLANK & JENSEN, *supra* note 54, at xvi.

<sup>56</sup> Entry of Plea at 17-33, *State v. Jacobs* (No. 76-1275CF) (Fla. Broward County Ct., Oct. 9, 1992); Stipulation of Evidence, *State v. Cook*, No. 1-77-179 (Tex. Smith County Ct., Feb. 16, 1999) (on file with author). When a defendant agrees in a plea bargain that the state could prove a certain set of facts, as occurred in both the Cook and Jacobs cases, that becomes the truth as much as it can ever be established in the eyes of the law. A stipulation is an agreement that certain facts are true. See BLACK'S LAW DICTIONARY 1269 (5th ed. 1979) ("An agreement, admission or confession made in a judicial proceeding by the parties thereto or their attorneys.") (citing *Bourne v. Atchison, Topeka & Santa Fe Ry.*, 209 Kan. 511, 517 (1972)). A court record, complete with affirmation of counsel and signed by a

“exonerated.”<sup>57</sup> A third, Robert Hayes, is currently serving a lengthy prison sentence for a crime eerily similar to the one for which the play claims he was exonerated.<sup>58</sup> Neither the script, nor the reviews of, nor most of the press for *The Exonerated* bear any resemblance to the stark facts of these cases.

Imagine everything you did between the years of 1976 and 1992. Now remove all of it. Those 16 years were taken away from Sunny Jacobs, convicted and sentenced to death for a crime she did not commit. But her story is not unique. And it could happen just as easily to you. *The Exonerated* tells the true stories of six innocent survivors of death row.

– Advertisement for the play *The Exonerated*<sup>59</sup>

Susan Sarandon, Debra Winger, Mía Farrow, Vanessa Redgrave and other stars of stage and screen have been pleased at the chance to read the

judge, is tantamount to a guilty plea, and probably more compelling than a guilty verdict in the face of a defendant's contention they did not commit the act.

<sup>57</sup> Although my article focuses on Sunny Jacobs in particular, *The Exonerated* makes equally astounding misrepresentations about Kerry Cook. Mr. Cook was not the victim he and *The Exonerated* portray him to be. Despite Cook's denial of any contact with Linda Joe Edwards—the woman for whose murder he was arrested and convicted—Cook told two different people that he had watched a woman undress through a window in Edwards's condominium. Defendant's Stipulation of Evidence at 2, *State v. Cook*, No. 1-77-179 (Tex. Smith County Dist. Ct., Feb. 16, 1999) (on file with author). Police identified Cook's fingerprints both on the inside of the sliding glass door of the victim's condominium and on a statue believed to be the murder weapon. *Id.* at 1, 2. And during his 1978 trial, Cook confessed to a reserve deputy that he killed Edwards. *Id.* at 1. Moreover, the man Cook claims really killed Linda Jo Edwards passed a polygraph during which he attested to his own innocence. Report from Eric J. Holden, M.A., Behavioral Measures & Forensic Services, L.L.C., Polygraph Examination Administered to James Lee Mayfield on February 11, 1999 (Feb. 12, 1999) (on file with author).

<sup>58</sup> Hayes is one of the exonerated that is honored in the play. Hayes was tried and convicted, but the case was sent back because some of the DNA evidence used to convict him was still in its infancy and therefore did not pass the scientific standard for admissible evidence. *Hayes v. State*, 660 So. 2d 257, 262-66 (Fla. 1995). In his second trial, without all of the DNA evidence, Hayes was acquitted. Thus, the play's representation of Hayes as exonerated is more accurate than that of Sonia Jacobs or Kerry Cook.

Nevertheless, it is worth telling the reader some more facts. Since his acquittal, Robert Hayes has been convicted of another crime, which occurred before and was nearly identical to the crime for which he had been acquitted. Wanda DeMarzo, *Murder-Rape Suspect Back in Jail After DNA Glitch*, MIAMI HERALD, Oct. 14, 2003, available at <http://www.fadp.org/news/Herald-20031014.htm>; Elizabeth Rinaldo, *Man Admits to Killing Woman in 1987*, ONEIDA DAILY DISPATCH (N.Y.), Nov. 17, 2004, available at [http://www.oneidadispatch.com/site/news.cfm?newsid=13389710&BRD=1709&PAG=461&dept\\_id=68844&rft=8](http://www.oneidadispatch.com/site/news.cfm?newsid=13389710&BRD=1709&PAG=461&dept_id=68844&rft=8).

The point is that yes, Robert Hayes was found not guilty by a jury for one crime, but he also pled guilty to a similar homicide, rendering it questionable whether his first jury trial “got it wrong.”

<sup>59</sup> See, e.g., The Culture Project @ 45 Bleeker, *supra* note 54.

words of a woman who stands convicted of two murders. *The Exonerated* was rated the third-best play of 2002 by *Time* magazine, and many reviewers (and, most likely, audiences) have accepted these effective theatrics as the truth. For example, veteran theater critic John Simon declared that “[d]ocudramas can take liberties with the truth in subtle, sometimes unintentional ways,” but that he has “no reason to disbelieve” authors Erik Jensen and Jessica Blank’s version of the truth.<sup>60</sup> Obviously Mr. Simon has only seen and read the play, not the trials involved. In fact, Sunny Jacobs, the main character in *The Exonerated*, is legally guilty, and contrary to claims made by the play, cannot be deemed factually innocent. Sunny Jacobs is a woman who has been exonerated only by theater critics or other glitterati who take these claims at face value.

During the off-Broadway run of *The Exonerated*, one reviewer recounted that, after Sunny and her children were kidnapped by the real killer, “Sunny and [her common law husband] were arrested for murder along with the killer, who made a deal with the state attorney and accused the couple.”<sup>61</sup> In an English production of the play, Jacobs is described as “a yoga instructor” who calls herself “a hippie. I was a peace-and-love person. I’m a vegetarian.”<sup>62</sup> No mention of her several arrests for gun and drug charges<sup>63</sup> or her admission that she participated in gunning down two men.<sup>64</sup> Another review calls her “a young mother trying to protect her children and her mate . . . caught in a police shooting. . . .”<sup>65</sup>

Here are the facts, gained from the trial transcripts, published opinions of the Florida Supreme Court<sup>66</sup> and the U.S. Court of Appeals for the

<sup>60</sup> John Simon, *Bay Tripper: David Henry Hwang Takes on Flower Drum Song, Set in a San Francisco Nightclub, but It’s Rodgers and Hammerstein Who’d Be Singing the Blues; A Play About the Death Penalty Is—Exhilarating*, N.Y. MAG., Oct. 28, 2002, available at [http://newyorkmetro.com/nymetro/arts/theater/reviews/n\\_7880/](http://newyorkmetro.com/nymetro/arts/theater/reviews/n_7880/).

<sup>61</sup> Lucy Komisar, “*The Exonerated*” *Chills in Tails of Death Row Innocents*, TURBULA, Winter 2004, at <http://turbula.net/2003-summer/theater-exonerated.html>.

<sup>62</sup> Michael Ellison, *Escape from the Electric Chair: How Wrongly Convicted Death Row Prisoners Made Theatre History*, GUARDIAN (U.K.), Jan. 3, 2001 (Arts Theatre), at 14, available at <http://www.guardian.co.uk/arts/story/0,3604,417155,00.html>.

<sup>63</sup> Entry of Plea, *supra* note 56, at 17-18; Arrest Report of Sonia Jacobs (on file with author).

<sup>64</sup> Entry of Plea, *supra* note 56, at 29.

<sup>65</sup> Jeannie Lieberman, *The Exonerated: But Are They?*, THEATERSCENE.NET, Nov. 15, 2002, available at <http://www.theatrescene.net/ts%5Carticles.nsf/OBP/AB0F0F875FF4057E85256C75002094E4?OpenDocument>.

<sup>66</sup> Jacobs v. Florida, 357 So. 2d 169 (Fla. 1978); Jacobs v. State, 396 So. 2d 713 (Fla. 1981).

Eleventh Circuit,<sup>67</sup> and from reviewing the tapes and transcripts of police interrogations:<sup>68</sup>

Canadian constable Donald Irwin was on a “ride-along” with his friend Phillip Black, a trooper for the Florida State Police, on the morning of February 20, 1976.<sup>69</sup> Trooper Black had met Corporal Irwin of the Ontario Provincial Police and the two had visited each other’s homes over the years.<sup>70</sup>

Black and Irwin were checking a car parked at a rest stop along I-95 near Pompano Beach.<sup>71</sup> The Camaro was occupied by two men—Jesse Tafero (Jacobs’s boyfriend and the father of their infant son) and a prison pal of Tafero’s named Walter Rhodes<sup>72</sup>—and Jacobs and her two children.<sup>73</sup> Two truck drivers saw the trooper order the men out of the car, leaving only Jacobs and her two children in the car.<sup>74</sup> Jacobs admitted to firing one shot from inside the car.<sup>75</sup> The State’s theory, which ultimately resulted in convictions, was that she then handed the gun, which she had purchased in North Carolina, to Tafero, who fired several more shots.<sup>76</sup>

Both Irwin and Black lay dying when the group stole the trooper’s car and took off.<sup>77</sup> One of the truck drivers who witnessed the event saw a man later identified as Rhodes with his hands in full view (i.e., no gun in hand).<sup>78</sup> A TASER dart was discovered in the door of the cruiser.<sup>79</sup> In the Camaro, an empty container for a TASER weapon was found in the back

<sup>67</sup> *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992).

<sup>68</sup> Statement of Sonia Jacobs on Feb. 20, 1976 (Complaint 76-2-3612; taken at Palm Beach County Sheriff’s Office, in reference to Broward County Sheriff’s Office Case), *State v. Jacobs* (Fla. Broward County Ct.) (No. 76-1275CF) (on file with author).

<sup>69</sup> *Jacobs*, 952 F.2d at 1285.

<sup>70</sup> Series of Telephone Interviews with Michael Satz, Trial Prosecutor of Sonia Jacobs and Current State Attorney of Broward County (2003-04); *see also Jacobs*, 396 So. 2d at 715; Entry of Plea, *supra* note 56, at 19.

<sup>71</sup> Entry of Plea, *supra* note 56, at 20.

<sup>72</sup> *Id.*

<sup>73</sup> *Jacobs*, 952 F.2d at 1285.

<sup>74</sup> Entry of Plea, *supra* note 56, at 24-25; Trial Transcript at 929-30, *Jacobs* (No. 76-1275CF) (testimony of Pierce Hyman, truck driver, on July 12, 1976); *id.* at 1076 (testimony of Robert McKenzie, truck driver, on July 12, 1976).

<sup>75</sup> *Jacobs*, 952 F.2d at 1296; *see also* Entry of Plea, *supra* note 56, at 29; Trial Transcript at 931, *Jacobs* (No. 76-1275CF) (testimony of Pierce Hyman, truck driver, on July 12, 1976) (stricken testimony).

<sup>76</sup> Telephone Interview with Michael Satz, Trial Prosecutor of Sonia Jacobs and Current State Attorney of Broward County (Feb. 23, 2005) [hereinafter Satz Interview, 2005]; *see also* Entry of Plea, *supra* note 56, at 21-22.

<sup>77</sup> Entry of Plea, *supra* note 56, at 22.

<sup>78</sup> *Id.* at 25.

<sup>79</sup> *Id.* at 32.

seat near where Jacobs and her kids had been seated.<sup>80</sup> Expended shells from a semi-automatic pistol registered to Jacobs were found both outside and inside the car, consistent with some shots being fired from inside the car.<sup>81</sup>

After taking the trooper's car, the group then kidnapped an elderly man and his Cadillac, initially claiming they had to take a sick child to the hospital.<sup>82</sup> With Rhodes at the wheel and with the 9mm pistol (owned by Jacobs) strapped to a holster around Tafero's waist, they tried to run a roadblock.<sup>83</sup> Police opened fire and shot Rhodes in the leg.<sup>84</sup>

Officers initially were unclear about Jacobs's relationship to the men. She clarified it by kissing Tafero<sup>85</sup> and later telling her nine-year old that she loved him and for him "to keep [his] mouth shut."<sup>86</sup> Shortly thereafter, officers asked Jacobs, "Do you like shooting troopers?"<sup>87</sup> "We had to," she said,<sup>88</sup> and while being transported she told officers that she had fired the first shot.<sup>89</sup>

Jacobs's version in the play? "It all happened so fast, you know. I just ducked down to cover the kids. . . . We were kidnapped at that point. . . . I know there must be a roadblock. 'Hey we're gonna be rescued! Help is on the way, you know, the cavalry!'"<sup>90</sup>

The prosecution gave Walter Rhodes, who denied firing any of the fatal shots, a lie detector test; when he passed they allowed him to plead guilty to murder in the second-degree.<sup>91</sup> He agreed to testify against Jesse Tafero and Sunny Jacobs.<sup>92</sup> Tafero was tried first, convicted, and sentenced to death.<sup>93</sup> Jacobs was tried next and also convicted.<sup>94</sup> Although gushing

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<sup>80</sup> Satz Interview, 2005, *supra* note 76. The actual TASER weapon was found in an attaché case along with several personal effects, including Jacobs's passport and Jesse Tafero's baptismal certificate.

<sup>81</sup> Entry of Plea, *supra* note 56, at 31.

<sup>82</sup> *Jacobs*, 396 So. 2d at 715-16.

<sup>83</sup> Entry of Plea, *supra* note 56, at 23.

<sup>84</sup> *Id.*

<sup>85</sup> *Jacobs*, 396 So. 2d at 717.

<sup>86</sup> Trial Transcript at 2184, *Jacobs* (No. 76-1275CF) (testimony of Valjean Haley, Deputy, Palm Beach County Sheriff's Dep't, on July 12, 1976).

<sup>87</sup> *Jacobs*, 396 So. 2d at 717; *Jacobs*, 952 F.2d at 1291.

<sup>88</sup> *Jacobs*, 396 So. 2d at 717.

<sup>89</sup> *Jacobs*, 952 F.2d at 1296.

<sup>90</sup> BLANK & JENSEN, *supra* note 54, at 28.

<sup>91</sup> *Jacobs*, 396 So. 2d at 716.

<sup>92</sup> *Id.*

<sup>93</sup> *Jacobs*, 952 F.2d at 1285.

<sup>94</sup> *Id.*

reviews of *The Exonerated* refer to readings from actual transcripts,<sup>95</sup> Jacobs never testified at trial before a jury. Her only testimony was before a judge in a pre-trial motion, seeking to keep statements she made to investigators away from the trial jury. She chose to invoke her constitutional right not to testify, but now wants to be vindicated in the court of public opinion, where there is no Fifth Amendment.

The jury recommended life in prison but the judge overruled the jury and imposed a death sentence.<sup>96</sup> The Florida Supreme Court in turn overruled the trial judge and reduced the sentence to life.<sup>97</sup> Jacobs served five years on death row, not sixteen as the play would have the audience believe,<sup>98</sup> before being released into the prison's general population. Another decade went by and the case ended up before the federal appeals court that oversees Florida. In ordering a new trial, the Eleventh Circuit made no findings about Sunny Jacobs's factual innocence but held that a polygraph administered to Walter Rhodes contained answers that were inconsistent with some of Rhodes's testimony, and should have been turned over to the defense.<sup>99</sup> The court also ruled that some of Jacobs's statements should not have been admitted against her at trial (these did not include her statement that she had fired the first shot).<sup>100</sup> The appeals court ordered a new trial for Jacobs.<sup>101</sup>

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<sup>95</sup> Sharon Perlmutter, *The Exonerated*, TALKIN'BROADWAY.COM (Regional News and Review: Los Angeles), available at <http://www.talkinbroadway.com/regional/la/la69.html> ("The play is not fiction. Its text was derived from trial transcripts, records of police interrogations, depositions, and interviews with some of the over 100 people who have been The Exonerated after conviction of capital murder."); see also Martin F. Kohn, 'Exonerated' Castigates the Death Penalty, DETROIT FREE PRESS, Feb. 22, 2004, at [http://www.freep.com/entertainment/newsandreviews/exon22\\_20040222.htm](http://www.freep.com/entertainment/newsandreviews/exon22_20040222.htm); Amy Goldwasser, *The Exonerated*, SALON.COM, Oct. 20, 2000, available at <http://dir.salon.com/news/feature/2000/10/20/exonerated/index.html?pn=1>; Emio Hernandez, *Unjust Prison Drama The Exonerated in Final Weeks Off-Broadway*, PLAYBILL, Jan. 6, 2004, at <http://www.playbill.com/news/article/print/84012.html>; Richard Zoglin, *The Best Theater*, TIME, Dec. 17, 2002, available at <http://www.time.com/time/bestandworst/2002/theater.html>.

<sup>96</sup> *Jacobs*, 952 F.2d at 1285.

<sup>97</sup> *Jacobs*, 396 So. 2d at 718.

<sup>98</sup> BLANK & JENSEN, *supra* note 54, at 66. In *The Exonerated*, the character of Sunny Jacobs asks the audience to "reflect: From 1976 to 1992, just remove that entire chunk from your life, and that's what happened." *Id.* Blank and Jensen make no mention of the fact that, of those sixteen years, only five were actually spent on death row.

<sup>99</sup> *Jacobs*, 952 F.2d. at 1287-89.

<sup>100</sup> *Id.* at 1291-96.

<sup>101</sup> *Id.* at 1296.

Jacobs was represented by top-notch defense counsel who had become personally devoted to her cause.<sup>102</sup> She was released from prison in 1992 after entering an *Alford* guilty plea, allowing her to claim she didn't really commit the crime but still plead guilty to take advantage of the plea offer.<sup>103</sup> Jacobs pled guilty to two counts of Murder in the Second Degree, the same charges to which Rhodes pled.<sup>104</sup> At the plea and sentencing hearing, the prosecutor recited the facts the state could prove.<sup>105</sup> Jacobs and her lawyers agreed the state could prove those facts.<sup>106</sup> Witnesses had died, and Rhodes had recanted and then unrecanted at least twice.<sup>107</sup> (He now maintains that his original testimony was correct.<sup>108</sup>) After sixteen years of battling in the courts, the prosecutor decided that a plea to Murder in the Second Degree and seventeen years in prison was an acceptable result.<sup>109</sup>

In the play, the clear impression is that Sunny Jacobs was freed from prison by a guardian angel: "But after all that, one day, the guard came into my cell and told me I was getting out. I thought he was trying to trick me."<sup>110</sup>

No court ever "exonerated" Sonia Jacobs. She was convicted of the same crime as Walter Rhodes, who actually served more time than Jacobs. She is *legally guilty by virtue of a plea and sentence*.<sup>111</sup> But she came from a wealthy white family. Her background isn't what people expect from a murderer. The elegant Mimi Rogers played her in a made-for-TV movie, *In the Blink of an Eye*, which aired on ABC in 1996.<sup>112</sup> The inconvenient facts of her cold-blooded executions of two innocent men from the back seat of a Camaro while her nine-year-old son looked on were deleted from the movie, to make her release from prison palatable to the television audience.

The Jacobs case caught my attention a few years ago and I have spent hundreds of hours reading trial transcripts and appellate decisions, listening

<sup>102</sup> Satz Interview, 2005, *supra* note 76.

<sup>103</sup> See *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>104</sup> Entry of Plea, *supra* note 56, at 37.

<sup>105</sup> *Id.* at 17-23.

<sup>106</sup> *Id.* at 34.

<sup>107</sup> *Id.* at 36.

<sup>108</sup> Affidavit of Walter Norman Rhodes, Jr. (Mar. 28, 1991) (on file with author) ("I . . . was standing at the front of the police car with my back turned and hands raised when Sonia and Black exchanged shots with each other. I turned my head in time to see Tafero grab the gun from Sonia, turn, and fire four shots at Black and then two at Irwin."); Telephone Interview with Sara Estes, wife of Walter Rhodes (Feb. 27, 2005).

<sup>109</sup> Entry of Plea, *supra* note 56, at 36; see also Satz Interview, 2005, *supra* note 76.

<sup>110</sup> BLANK & JENSEN, *supra* note 54, at 66.

<sup>111</sup> See Entry of Plea, *supra* note 56.

<sup>112</sup> *In the Blink of an Eye* (ABC television broadcast, Mar. 24, 1996).



to tape recordings of Jacobs's questioning and conducting extensive interviews with several of those involved with the case. After such scrutiny, the claim of "exoneration" made by the eponymous play simply fails. The concept of "innocence" is cheapened when used to describe Jacobs, whose guilt is supported not only by her own plea, but more importantly the actual facts surrounding her case.

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In an article published November 27, 2003, *Contra Costa Times* reporter Georgia Rowe glibly parroted, "American history is rife with people who were convicted of crimes they didn't commit."<sup>113</sup>

In 1998, Northwestern University sponsored a conference that celebrated a group of people it claimed were innocents on death row. One of the men on stage was Dr. Jay Smith, made infamous by Joseph Wambaugh's book *Echoes in the Darkness*<sup>114</sup> and one of the 118 men the Death Penalty Information Center fetes as having been "freed from death row."<sup>115</sup> The real story is not so festive.

Dr. Smith was convicted of the murder of high school English teacher Susan Reinert and her two children.<sup>116</sup> A jury concluded that Smith and another teacher had conspired to murder Reinert, and that her children were collateral damage of the murder scheme, killed because they might have given witness.<sup>117</sup> Reinert's body was recovered, but the children have never been found.<sup>118</sup>

A state appellate court held that prosecutors had failed to disclose the existence on the victim's body of a few grains of sand that might possibly have supported Smith's claim of innocence.<sup>119</sup> Smith's conviction was set

<sup>113</sup> Georgia Rowe, *Curran Theatre Does 'Exonerated' Justice*, CONTRA COSTA TIMES (Cal.), Nov. 27, 2003, at D1, available at [http://www.realcities.com/mlid/cctimes/entertainment/performing\\_arts/7362764.htm](http://www.realcities.com/mlid/cctimes/entertainment/performing_arts/7362764.htm).

<sup>114</sup> JOSEPH WAMBAUGH, *ECHOES IN THE DARKNESS* (William Morrow & Co. ed., 1987).

<sup>115</sup> Jayne Keedle, *Death of Innocents*, CUTV.COM, available at <http://www.cutv.com/dpenalty.htm> (last visited Feb. 6, 2005); DEATH PENALTY INFORMATION CENTER, INNOCENCE: FREED FROM DEATH ROW, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Feb. 23, 2005).

<sup>116</sup> Commonwealth v. Smith, 568 A.2d 600, 602 (Pa. 1989).

<sup>117</sup> *Id.* at 602-04.

<sup>118</sup> *Id.* at 603.

<sup>119</sup> Smith v. Holtz, 210 F.3d 186, 193-194 (3d Cir. 2000). A state appellate court set aside Smith's conviction as a result of the admission of certain hearsay statements. The state was then prevented from retrying Smith due to prosecutorial misconduct in withholding the "lifters."

aside and he was freed from a life sentence in prison.<sup>120</sup> Emboldened by his newfound freedom (and despite his undisturbed convictions for theft by deception, receiving stolen property, possession of a firearm without a license and possession of marijuana<sup>121</sup>), Smith filed lawsuits against the State of Pennsylvania, the officer who arrested him and everyone connected with his prosecution.<sup>122</sup>

There was only one problem: Smith was not innocent. In its final decision throwing Smith's case out of court, the U.S. Court of Appeals for the Third Circuit concluded: "Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished by consideration of the suppressed lifters and quartz particles, and Smith has therefore not established that he is entitled to compensation for the unethical conduct of some of those involved in the prosecution."<sup>123</sup>

Yes, there are a few people who actually did not do it. Some are true poster boys: Kirk Bloodsworth, a Maryland man who was convicted of murder and later exonerated by DNA testing.<sup>124</sup> Cases like Bloodsworth's show that the years and layers of appeals required in capital cases do in fact catch the rare mistake that wrongfully jails or condemns an innocent man.

Most have stories more akin to Anthony Porter, whose release was due in large part to the work of journalism students at Northwestern University. What doesn't make it into the stock footage of him running jubilantly into the arms of Professor Protes upon his release from prison is how he got to prison in the first place. Porter was committing an armed robbery in the same park, at the same time as a drug murder.<sup>125</sup> He ran from the park, gun in hand, in full view of witnesses who identified Porter to the police.<sup>126</sup> Porter denied not only the murder, but even being in the park, a lie he maintained until after his convictions were affirmed.<sup>127</sup>

The justice system is far from perfect and has made many mistakes, mostly in *favor* of the accused. Hundreds, if not thousands, have died or lost their livelihoods through embezzlement or rape because the American

<sup>120</sup> *Smith*, 568 A.2d at 610.

<sup>121</sup> *Smith*, 210 F.3d 186.

<sup>122</sup> *Id.* at 194.

<sup>123</sup> *Id.* at 201.

<sup>124</sup> THE INNOCENCE PROJECT, THE CASE OF KIRK BLOODSWORTH, *available at* [http://www.innocenceproject.org/case/display\\_profile.php?id=21](http://www.innocenceproject.org/case/display_profile.php?id=21) (last visited Feb. 6, 2005).

<sup>125</sup> Monica Davey, *Porter's Convictions Upset*, CHI. TRIB., Mar. 11, 1999 (Late Edition), at 1.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

justice system failed to incarcerate people who were guilty by any definition.

Since the death penalty was re-authorized in 1976 by the Supreme Court,<sup>128</sup> there have been upwards of 500,000 murders.<sup>129</sup> About 7,000 murderers were sentenced to death and about 3,700 remain on death row today.<sup>130</sup> About nine hundred and fifty have been executed.<sup>131</sup> Appellate courts at the state and federal levels have imposed what one justice called “super due process”<sup>132</sup> for convicted capital murderers, overturning almost two-thirds of all death sentences, a rate far exceeding that in other cases.<sup>133</sup> Virtually none have been overturned because of “actual innocence.”<sup>134</sup>

Some claim that a civilized society must be prepared to allow ten guilty men to walk free in order to spare one innocent. But the well-organized and even better-funded abolitionists cannot point to a single case of a demonstrably innocent person executed in the modern era of American capital punishment.

Instead, let's tally the *additional* victims of the freed: *Nine*, killed by Kenneth McDuff, who had been sentenced to die for child murder in Texas and then was freed on parole after the death penalty laws at the time were overturned.<sup>135</sup> *One*, by Robert Massie of California, also sentenced to die and also paroled. Massie rewarded the man who gave him a job on parole

<sup>128</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>129</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf>; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, various years, at [www.fbi.gov/ucr/ucr.htm](http://www.fbi.gov/ucr/ucr.htm) (last visited May 12, 2004). Data is also available at National Archive of Criminal Justice Data, Institute for Social Research, University of Michigan, at <http://www.icpsr.umich.edu/NACJD/ucr.html> (last visited Jan. 11, 2005).

<sup>130</sup> AMNESTY INTERNATIONAL, FACTS AND FIGURES ON THE DEATH PENALTY, available at <http://web.amnesty.org/pages/deathpenalty-facts-eng> (last visited Feb. 15, 2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT STATISTICS, at <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited Feb. 15, 2005); Marcia Coyle, *68 Percent Error Rate Found in Death Case Study*, NAT'L L.J., June 9, 2000, available at <http://www.truthinjustice.org/68percent.htm>.

<sup>131</sup> AMNESTY INTERNATIONAL, *supra* note 130. As of February 15, 2005, Amnesty put the number at 944.

<sup>132</sup> *Gregg*, 428 U.S. at 154 (Powell, J., concurring).

<sup>133</sup> James Liebman et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995* (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman/>.

<sup>134</sup> See generally DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE (Hugo Adam Bedau & Paul G. Cassell eds., 2004).

<sup>135</sup> Mike Cochran, *McDuff Likely to Take Grisly Secrets to Grave*, Nov. 24, 1996, ASSOCIATED PRESS, available at <http://www.lubbockonline.com/news/112496/mcduff.htm>.

by murdering him less than a year after getting out of prison.<sup>136</sup> *One*, by Richard Marquette, in Oregon, sentenced to “life” (which until 1994 meant about eight years in Oregon) for abducting and then dismembering women.<sup>137</sup> He did so well in a woman-free environment (prison) that he was released—only to abduct, kill and dismember women again.<sup>138</sup> *Two*, by Carl Cletus Bowles, in Idaho, guilty of kidnapping nine people and the murder of a police officer. Bowles escaped during a conjugal visit with a girlfriend, only to abduct and murder an elderly couple.<sup>139</sup>

The victims of these men didn’t have “close calls” with death. They are dead. Murdered. Without saying goodbye to their loved ones. Without appeal to the state or the media or Hollywood or anyone’s heartstrings.

Discouraged over polls that have consistently shown public support for capital punishment between sixty-five and eighty-five percent over the last quarter century,<sup>140</sup> proponents of the death penalty have decided to tap into an understandable horror that people who are truly innocent of the murder of which they stand convicted are on death row. They are turning into doe-eyed innocents the few murderers who have slipped through one of the countless cracks in the law afforded to capital defendants. They want us to believe that any one of us could be snatched at any time from our daily freedoms and sentenced to die because of a false and coerced confession, police corruption, faulty eyewitness identification, botched forensics, prosecutorial misconduct, and shoddy and ill-paid defense counsel.

There are a handful of people who have spent time, in some cases many years, on death row, for crimes they genuinely did not commit. The

<sup>136</sup> Rob Rossi, *Capital Punishment and Voices from Death Row*, THE RECORDER, Jan. 19, 1996, available at <http://www.courtstv.com/archive/map/library/capital/voices.html>; Jennifer C. Vergaras, *Death Penalty, Massie Execution Criticized at Justice Conference*, TIDINGS ONLINE, Mar. 23, 2001, available at <http://www.the-tidings.com/2001/0323/deathpenalty.htm>.

<sup>137</sup> House Committee on Judiciary, Subcommittee on Criminal Law, March 27, 1997, Or. State Leg., available at <http://arcweb.sos.state.or.us/legislative/legislativeminutes/1997%20LEGIS%20WEB/4th%20layer/house.jud.html/hjudcr.327.html> (statement of Rep. John Minnis); THE OREGONIAN, AN OREGON CENTURY, 1960’S LIFE, available at [http://www.oregonlive.com/century/1960\\_life.html](http://www.oregonlive.com/century/1960_life.html) (a statistical view of life in Oregon in the 1960’s).

<sup>138</sup> THE OREGONIAN, *supra* note 137.

<sup>139</sup> Jim Redden, *Tumultuous Times Fattened the Files*, PORTLAND TRIB., Sept. 17, 2002, available at <http://www.portlandtribune.com/archold.cgi?id=13719>.

<sup>140</sup> Joseph Carroll, *Americans and the Death Penalty*, The Gallup Polls, 1965-2002, available at <http://www.gallup.com/poll/content/login.aspx?ci=14371>; CLARK COUNTY PROSECUTING ATTORNEY (Indiana), A SUMMARY OF GALLUP POLLS RELATING TO THE DEATH PENALTY, available at <http://www.clarkprosecutor.org/html/death/opinion.htm> (last visited Feb. 6, 2005).

number bandied about by the abolitionists is just past the 100 mark.<sup>141</sup> But a closer examination using a more realistic definition of innocence—that is, had no involvement in the death, wasn't there, didn't do it—drops the number to thirty or even twenty-five.<sup>142</sup> At a seminar in February of 2004 held by the Federal Bar Council of New York, U.S. District Court Judge Jed Rakoff, who made history in 2001 by ruling the death penalty unconstitutional, acknowledged that his research showed the number to be closer to thirty.<sup>143</sup> The larger question is whether the problem of wrongful convictions in capital cases is an episodic or epidemic problem.

For those who believe that no rate of error is acceptable, the death penalty can never be “reformed” sufficiently, despite the claims that they are seeking only to insure a fairer system. Yet these same advocates urge the substitution of life without parole, claiming (as is sometimes true) that many inmates consider a life sentence to be worse than execution. Peel back the layers of this reckoning and you'll find these advocates claiming that it is just as horrible to threaten to take away the remaining days of a murderer's life, and therefore we must abolish all long prison sentences as well as the death penalty. In a debate at the American Bar Association's annual convention in Chicago in 2001, I confronted Nadine Strossen<sup>144</sup> of the American Civil Liberties Union on that very question. I asked her, if I would—for the sake of argument—abandon my support for capital punishment, would she, on behalf of the ACLU, affirm her support for sentences of life without possibility of parole? She honestly responded that she could not; that it was an ever-changing political and moral environment.<sup>145</sup> And therein lies the dilemma. If there are people so dangerous, so evil that that they can never be trusted to walk among us, how will we answer to their next victims? What level of risk are the abolitionists willing to accept for those who will die at the hands of a McDuff, a Marquette, or a Massie?

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<sup>141</sup> Kris Axtman, *US Milestone: 100th Death Row Inmate Exonerated*, CHRISTIAN SCI. MONITOR, Apr. 12, 2002, available at <http://www.csmonitor.com/2002/0412/p01s02-usju.html>; Stephen Bright, *Capital Punishment, Capital Crime?*, ALTERNATIVE RADIO, Mar. 2, 2002, available at <http://www.alternativeradio.org/programs/BRIS001.shtml>.

<sup>142</sup> Comments by Judge Jed Rackoff (S.D.N.Y.), Federal Bar Council Conference in Manzanillo, Mexico, Feb. 19, 2004; see also Peter DuPont, *The Rakoff Rule*, WALL ST. J., July, 10, 2002, available at <http://www.opinionjournal.com/columnists/pdupont/?id=110001967> (questioning the number of convicted persons that are actually “innocent”).

<sup>143</sup> Comments by Judge Jed Rackoff, *supra* note 142 (in response to a presentation by the author).

<sup>144</sup> See Justice Talking, available at <http://www.justicetalking.org/viewprogram.asp?progID=196> (last visited Jan. 14, 2005) (detailing a short biography of Nadine Strossen).

<sup>145</sup> Nadine Strossen, American Civil Liberties Union, Comments at the American Bar Association Conference in Chicago, Ill. (2001) (responding to questions by the author).

The number of death sentences is, in fact, decreasing. Criminal sentences for crimes other than murder have become tougher, terms of imprisonment more certain, and perhaps more significantly, the rate of murder is down overall. Prosecutors and juries are properly and appropriately becoming even more discriminating about determining who should die for their crimes. It is a journey not taken lightly.

Likewise, casting the accused as true innocents caught up by a corrupt and uncaring system only discredits a movement that has legitimate moral arguments. Nothing excuses making the victims nameless and faceless, making martyrs out of murderers, and turning killers into victims.

Some may wonder why it should matter if the number of people who were genuinely exonerated is 30 or 150. Many will claim that even one innocent person put to death is an intolerable number, but those who make that argument are demanding an impossibility—a perfect system. Such errors are episodic, not epidemic, and merit the most rigorous review, precisely as occurs in 21st century capital jurisprudence.

But if one of the primary engines in the debate over capital punishment is that wrongful capital convictions are rampant, then the devil is very much in the details. To call a man with blood on his hands innocent stains not only the truth, but calls into question the actual innocence of the fewer number who are truly exonerated.

In a subject as emotionally charged as the death penalty these claims must be made precisely—by all sides. Intellectual honesty is a critical ingredient to a meaningful discussion of this important subject. Death penalty opponents risk losing their credibility when they are reckless with the truth.

