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NOTES

Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration

I. INTRODUCTION

In *Gregg v. Georgia*, the Supreme Court overturned its ruling in *Furman v. Georgia* and held that the death penalty, as administered by the states, was not per se "cruel and unusual punishment" in violation of the Eighth Amendment.[1] Yet errors continue to occur at an alarming rate in the capital punishment system—over one hundred death row inmates have been released pursuant to evidence of actual innocence since 1973.[2] Indeed, the number of death row exonerations has been steadily increasing in recent years.[3]

Of those exonerations, DNA testing played a substantial role in twelve.[4] Many more have benefited from the assistance of innocence projects funded and operated by private groups.[5] The role of these groups, combined with increased media attention to recent prison and death row releases, has contributed to a resurgence in the public debate over the role of the death penalty in the American criminal

1. 428 U.S. 153, 188-206 (1976) (Stewart, Powell & Stevens, JJ.) (overruling Furman v. Georgia, 408 U.S. 238 (1972) (holding that the death penalty as administered by the states was unconstitutional)).

2. *Innocence and the Death Penalty*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Jan. 24, 2003), *at* http://www.deathpenaltyinfo.org/innoc.html (last visited Feb. 27, 2003).

3. *Id.* Over the past ten years there has been an average of five releases per year. *Id.*

4. *Innocence: Freed from Death Row*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Jan. 24, 2003), *at* http://www.deathpenaltyinfo.org/Innocentlist.btml (last visited Feb. 27, 2003).

5. *See, e.g.*, CARDOZO LAW INNOCENCE PROJECT, *available at* http://www.cardozo.yu.edu-/innocence_project (last visited Feb. 27, 2003); INNOCENCE PROJECT NORTHWEST (Innocence Project Northwest, Seattle, WA, 2000), *at* http://www.law.washington.edu/ipnw/ (last visited Jan. 4, 2003); Raju Chebium, *Innocence Project Credited with Expanding Awareness of DNA Testing in Law Enforcement*, CNN.COM, Dec. 22, 2000, *at* www.cnn.com/2000/LAW/12/22/-innocence.project.crim/index.html (last visited Mar. 17, 2003) (stating tbat although two dozen law schools in the nation had innocence projects in 2000, these programs were not sufficient to handle the heavy caseload).

justice system.[6] A 1993 study showed that fifty-eight percent of voters were concerned about the danger of mistaken executions.[7] This percentage has risen steadily in recent years as the number of exonerations has increased.[8] In May 2001, a Gallup Poll indicated that overall public support for the death penalty has eroded from eighty percent to sixty-five percent since 1994.[9] In addition, an ABC news poll found that fifty-one percent of Americans support a nationwide moratorium on capital punishment while a commission studies its fairness.[10] The number of inmates on death row and the number of executions have both been similarly decreasing, although it is unclear

6. *See, e.g.*, Michael L. Radelet, *More Trends Toward Moratoria on Executions*, 33 CONN. L. REV. 845, 845 (2001) (arguing that recent calls for death penalty moratoria in the United States are evidence of a worldwide trend toward abolition); 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, 744-45 (2001) (explaining that advances in DNA technology and resulting increases in death row exonerations have changed public discourse about the death penalty without leading to changes in the administration of capital cases). In his article, Tabak also addresses the related problem of those sentenced to death who, although guilty, would not be on death row were it not for egregious due process violations that occurred during the investigation and the trial. Tabak, *supra*, at 762; *see also* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (providing numerous accounts of exonerations due to postconviction DNA testing).

7. STAFF OF SENATE SUBCOMM. ON CIVIL & CONSTITUTIONAL RIGHTS, COMM. ON THE JUDICIARY, 103D CONG., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS (1993) [hereinafter ASSESSING THE DANGER] (examining forty-eight cases of innocents released for various reasons), *available at* http://www.deathpenaltyinfo.org/-dpic.r06.html (last visited Feb. 27, 2003).

8. This inverse relationship—increasing evidence of wrongful convictions accompanied by a decrease in support for the death penalty—bears out Marshall's second hypothesis from his concurrence in *Furman v. Georgia*. 408 U.S. 238, 315, 361-63 (1972) (Marshall, J., concurring). Marshall's second hypothesis in *Furman* was that public support for capital punishment is based on the public's ignorance of its lack of a deterrent function, its expense as compared to life imprisonment, and other problems. *Id.*; *see also* Gregg v. Georgia, 428 U.S. 153, 231-32 (1976) (Marshall, J., dissenting) (restating his position in *Furman*); Alan W. Clarke et al., *Executing the Innocent: The Next Step in the Marshall Hypotheses*, 26 N.Y.U. REV. L. & SOC. CHANGE 309, 334 (2000-2001) (presenting study results indicating that students' support for the death penalty decreased after reading essays on the incidence of error in capital cases).

9. Other polls indicate increased public support for moratoria on executions while fairness studies assess the death penalty as administered by the states. *See generally Summaries of Recent Poll Findings*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Jan. 24, 2003), *at* http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Gallup-10/02 (last visited Apr. 11, 2003). Other studies estimate the percentage of Americans who support moratoria pending fairness studies as high as sixty-three percent. *Id.*

While sixty-five percent is a significant number, this percentage is the lowest that it has been in two decades. *Crime and Punishment: The Death Penalty Becomes a High-Profile Issue*, 49 SEP. FED. LAW. 34 (2002). In addition, many polls have found that support for the death penalty greatly diminishes when the individuals questioned are offered the alternative of supporting life imprisonment without parole. *Summaries of Recent Poll Findings*, *supra*.

10. *Summaries of Recent Poll Findings*, *supra* note 9.

whether the decreases are related.[11] For the first time since 1976, fewer executions have been occurring each year, even in leading death penalty states.[12] This decrease is likely due to both a reduction in the crime rate and decreased public support for the death penalty.[13]

While there has been a sharp decrease in executions in recent years, the number of inmates on death row nationwide continued to increase until very recently.[14] Significant systemic reforms have not accompanied the shift in public opinion concerning the death

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11. Adam Liptak, *Death Row Numbers Decline as Challenges to System Rise*, N.Y. TIMES, Jan. 11, 2003, at A1 (citing public realization of problems in the administration of the death penalty as the probable reason for this decline).

12. Brooke A. Masters, *Executions Decrease for the Second Year; Va., Texas Show Sharp Drops amid a National Trend*, WASH. POST, Sept. 6, 2001, at A1. In 1999, the number of executions peaked at ninety-eight, the greatest numher of executions since the early 1950s. *Id.*; *see also Key Facts at a Glance: Executions*, BUREAU OF JUSTICE STAT. (U.S. Dep't of Justice, Washington, D.C., Jan. 8, 2003), *at* http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm (last visited Feb. 27, 2003) (noting that eighty-five inmates were executed in 2000, thirteen percent fewer than in 1999). In 2001, there were sixty-six executions, a twenty-two percent decline from 2000, yet the number climbed to seventy-one in 2002. *Executions by Year*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Apr. 22, 2003), *at* http://www.deathpenaltyinfo.org/-article.php?scid=8&did=146 (last visited Apr. 11, 2003).

13. *Key Facts at a Glance: Executions*, *supra* note 12; *see also* SOURCEBOOK OF CRIM. JUSTICE STATISTICS ONLINE, tbl.6.82, *Prisoners Executed Under Civil Authority*, *available at* http://www.albany.edu/sourcebook/1995/pdf/t682.pdf (last visited Apr. 11, 2003). In 2001, the number of death row inmates decreased for the first time since capital punishment was reinstated. *See Key Facts at a Glance: Executions*, *supra* note 12.

Public opinion enters the capital punishment system slowly—both because it must do so indirectly and because of systemic bias. While prosecutors, defense attorneys, and capital juries are all members of the public, they are also all the products of their roles in the system. For example, juries in capital cases are selected on the basis of their willingness to impose the death penalty. They are therefore not necessarily a reflective sample of the public. If public opinion is indeed causing a decrease in capital convictions, it is doing so in spite of the fact that capital juries are composed of the members of the public who are more inclined to support the death penalty. Public opinion outside of the capital jury context may therefore be shifting more rapidly than that of the "public" that is present in the system. *See, e.g.*, Tabak, *supra* note 6, at 750-52 (discussing how shifting public attitudes toward the death penalty will slowly alter the manner in which it is administered). Tabak also examines the effects of these changing considerations on the judiciary, prosecutors, and governors. *Id.*

14. *See, e.g.*, *Prisoners on Death Row*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Dec. 15, 2002) (providing that the inmates on death row decreased in 2001 for the first time since 1975), *at* http://www.ojp.usdoj.gov/bjs/glance/dr.htm (last visited Feb. 27, 2003); Raju Chebium, *Reports of a Flawed Legal System Push Death Penalty Debate into High Gear*, CNN.COM (stating that there were 3,670 people on death rows nationwide in 2001), *available at* http://www.cnn.com/LAW/trials.and.cases/case.files/0006/deathpenalty/overview.html (last visited Feb. 27, 2003); *see also* Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Oct. 1999) (examining the United States' response to international efforts to curtail the application of the death penalty), *at* http://www.deathpenaltyinfo.org/dpicintl.html (last visited Feb. 27, 2003); *supra* note 13 and accompanying text. The United States is one of the few industrialized nations that have retained capital punishment.

penalty.[15] Neither death penalty statutes nor the manner in which the courts address capital cases has changed significantly in tandem with shifting public support.[16] In fact, most recent exonerations have resulted from inmates' determined insistence on DNA testing and the intervention of private advocacy groups, rather than from changes in the prosecution of capital cases or in the administration of the death penalty.[17] In other words, innocents' avoidance of execution has often been the outcome of nothing more than a fortunate convergence of unusual circumstances. The criminal justice system is not preventing wrongful executions—private citizens are.[18]

The consequence of these errors is even more disturbing: proof of innocence on death row means that innocents have almost certainly been executed since 1976.[19] Estimates have put the number as high as

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15. *See* Tabak, *supra* note 6, at 739-43 (providing a list of "symptoms" of increasing public awareness of the problems with capital punishment). Tabak's list includes, inter alia, the American Bar Association's 1997 resolution calling for a moratorium on executions until certain enumerated problems are corrected, the increased attention of the media to capital cases, the Illinois moratorium on executions after several releases, and the publication of *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted.* Tabak, *supra* note 6, at 739-43. *See generally* DWYER ET AL., *supra* note 6.

16. *See* Tabak, *supra* note 6, at 745. Tabak claims that judges have not yet noticed the shift in public support for capital punishment, and that even once they do, any judicial response will not occur quickly. *Id.* There is evidence, however, of the beginnings of judicial responsiveness to public opinion shifts. Two federal judges recently found that the death penalty as administered is unconstitutional because of the risk of executing innocent individuals. United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev'd*, 2002 U.S. App. LEXIS 25164 (2d Cir. 2002); United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002). Although one of the decisions was overturned on appeal, and the other may also be reversed, the holdings sparked significant public debate. *See, e.g.*, Pam Belluck, *Second Ruling Against U.S. Death Penalty*, N.Y. TIMES, Sept. 25, 2002, at A15.

17. *See* DWYER ET AL., *supra* note 6; *see also* 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, 961-86 (2002) (outlining the various difficulties of access to DNA testing—especially posthumously to determine if innocents have indeed been executed).

A notable recent exception to the lack of governmental action to reduce errors in the administration of capital punishment occurred in January when Governor George Ryan of Illinois commuted all 156 death row sentences in that state. *See* Associated Press, *Illinois Governor to Commute All Death Row Sentences*, N.Y. TIMES, Jan. 11, 2003; *In Ryan's Words: 'I Must Act,'* N.Y. TIMES, Jan. 11, 2003.

18. According to Richard Dieter, the executive director of the Death Penalty Information Center, most cases of innocence "were discovered not because of the normal appeals process, but rather as a result of new scientific techniques, investigation by journalists, and the dedicated work of expert attorneys, not available to the typical death row inmate." Richard Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*, DPIC (Death Penalty Info. Ctr., Washington, D.C., July 15, 1997), *at* http://www.deathpenaltyinfo.org/-inn.html (last visited Feb. 27, 2003).

19. *See, e.g.*, *Case Studies of Innocents Released*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Jan. 24, 2003) (hypothesizing as to the number of innocents who bave been executed), *at* http://www.deathpenaltyinfo.org/dpic.r06.html (last visited Jan. 5, 2003); Alice Kim, *Death Penalty Exposed*, NEW ABOLITIONIST, *available at*

one innocent person exonerated for every seven executed.[20] The mere possibility of this outcome is adequate justification for reform, and reliance on private innocence projects to correct the mistakes of the justice system is neither efficient nor desirable. By retaining the current system, the states and the federal government are implicitly acknowledging either that government action is inadequate to deal with the problem of mistaken convictions or that such mistakes are not actually a problem. Systemic reform to the capital punishment system, at both the state and federal levels, is necessary to prevent—or at least to curtail—the occurrence of wrongful convictions.[21] Such systemic reform must be thorough to be effective, beginning with an honest acknowledgement of the problem and the imposition of moratoria on executions at both the state and federal levels while studies clarify the extent of the problem.[22]

While current proposed legislation,[23] including the Innocence Protection Act,[24] addresses the problem of wrongful convictions by working to ensure that they never occur, little has been done to address the problems faced by those wrongfully convicted individuals who have recently been released. Inmates wrongfully convicted and later released pursuant to exculpatory DNA evidence should be

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http://www.nodeathpenalty.org/newsab0201/index.html (last visited Feb. 27, 2003) (describing the recent execution of Malcolm Rent Johnson and subsequent discovery of additional evidence). In *Furman v. Georgia*, Justice Marshall's concurrence stated that "[w]e have no way of judging how many innocent persons have been executed, but we can be certain that there were some." 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring). One study reported twenty-three instances of innocent people being executed in the United States in this century. Hugo A. Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 71 (1987).

20. DWYER ET AL., *supra* note 6, at 218.

21. *See, e.g.*, Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 471-72 (1996) (arguing that the criminal justice system in general and capital punishment in particular are inherently fallible).

There are also those who argue for the abolition of the death penalty because it is immoral, unconstitutional, or simply an inefficient form of deterrence. For example, in his dissent in *Gregg*, Justice Brennan argued that capital punishment, "for whatever crime and under all circumstances," violates the Eighth Amendment prohibition on "cruel and unusual punishment" as well as Fourteenth Amendment due process requirements. 428 U.S. 153, 229 (1976) (Brennan, J., dissenting). His dissent emphasized that the Eighth Amendment should be interpreted to take into account "evolving standards of decency." *Id.* at 227. These arguments, however, are beyond the scope of this Note.

22. *See* ABCNEWS WASH. POST POLL, POLLINGREPORT.COM Apr. 20-24, 2001 (showing that fifty-one percent of the public support a halt to all executions while an independent commission studies the fairness of state administration of capital punishment), *available at* http://pollingreport.com/crime.htm (last visited Feb. 27, 2003).

23. Current proposed legislation includes the Innocence Protection Act and state efforts to improve inmates' access to postconviction DNA testing.

24. Innocence Project Act, S. 486, 107th Cong. (2001); H.R. 912, 107th Cong. (2001); *see also* discussion *infra* Part V (discussing proposed legislative reforms).

restored to their preconviction position in society. To compensate these individuals and to attempt to prevent wrongful convictions, states and the federal government must create a system of restitution for innocent people who spend time on death row. Such a system should address all aspects of the problem and should seek to restore "innocence" to the greatest extent possible—by providing compensation for lost wages, pain and suffering as well as psychological and reentry assistance. The federal and state governments must take responsibility for mistakes in the administration of capital punishment, or government attempts to hold citizens accountable for their actions will increasingly lack legitimacy.

This Note will examine the necessity of a dual approach to the problem of wrongful capital convictions: implementing systemic changes to prevent mistaken convictions and improving available remedies for those who have been wrongfully convicted and rightly released. Part II will discuss the extent of the problem and the primary factors leading to wrongful convictions. Part III will detail the importance of postconviction DNA testing, the difficulties faced by inmates seeking such testing, and the problem of using that evidence once it is obtained. Part IV will examine three case studies of innocent men released from death row—their trials, releases, and lives since release. Part V will analyze proposed solutions to the problem of wrongful convictions and current developments at both the state and federal levels, including the proposed Innocence Protection Act. Part VI will examine current methods by which released inmates can seek compensation. After noting that both the current system and the major proposals for reform do little to account for those innocents wrongly convicted and later released, Part VII will present proposals for systemic changes and access to postrelease rehabilitation and restitution.

II. THE EXTENT OF THE PROBLEM—EXAMPLES OF FACTORS CONTRIBUTING TO WRONGFUL CONVICTIONS IN CAPITAL CASES

The number of innocent death row inmates recently released is even more disturbing when compared to the number of capital convictions. Only about two percent of murder convictions, less than two-tenths of one percent of all convictions for violent crimes, and only three-hundredths of one percent of all criminal convictions, lead to death sentences.[25] Statistics on exonerations indicate, however, that

25. Gross, *supra* note 21, at 472-73. Recent proof of a high error rate in capital cases should lead to a reexamination of the possibility of error in all aspects of state and federal criminal justice systems.

there may be higher incidence of error in capital cases than in other criminal cases.[26] Studies reveal a ratio of one exoneration based on evidence of actual innocence for every five to seven executions.[27] These numbers demonstrate the serious likelihood that innocent people are put to death under the current system of capital punishment. A recent study found that serious errors occur in almost seventy percent of all trials leading to the death penalty.[28]

The occurrence of wrongful convictions in capital cases is too prevalent to be the result of any single isolated factor, especially since there is substantial variation in the administration of the death penalty in the thirty-eight states with capital punishment.[29] Numerous factors have contributed to the high incidence of these erroneous convictions, including faulty forensic science, prosecutorial and police misconduct, racial prejudice, inadequate defense counsel, and mental incompetence.[30] It is also possible, as many of those who advocate the abolition of capital punishment argue, that the errors are

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According to Elizabeth Semel, the director of the death penalty clinic at the University of California at Berkeley, "The death penalty is the tip of the criminal justice iceberg. If you expend millions of dollars to make the death penalty more fair in its application, what about the majority of cases where you have many similar problems?" Jodi Wilgoren, *Panel in Illinois Seeks to Reform Death Sentence*, N.Y. TIMES, Apr. 15, 2002, at A1.

26. *See* Gross, *supra* note 21, at 474-97 (examining factors contributing to increased errors in certain types of criminal cases in general and in capital cases in particular). Scott Turow also contends that "the very impulse that makes the public want the death penalty for heinous crimes prevents the system from careful discernment in those cases." Jodi Wilgoren, *Opposing Executions, in Fiction and in Real Life*, N.Y. TIMES, Nov. 30, 2002, at B9. Death penalty scholar James Liebman has noted tbat the overall error rate in capital cases in the United States is sixty-eight percent. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1950 (2000).

It is also possible that this unusually high rate of identified mistakes is the result of heightened scrutiny applied to capital sentences after the fact. *See* Tabak, *supra* note 6, at 736 (explaining that the criminal justice errors uncovered by DNA testing should alert society to the possibility of error when such testing cannot be done). In addition, many guilty defendants avoid the death penalty by way of guilty plea bargains—an option that innocent individuals are not as likely to choose as guilty individuals.

27. Clarke et al., *supra* note 8, at 319.

28. Chebium, *supra* note 14. These serious errors included unreliable evidence, inadequate representation, and questionable expert testimony. *Id.* According to Chebium, recent studies caused the American Medical Association to call for a national moratorium on the death penalty until the problem of the availability of DNA testing to death row inmates is resolved. *Id.*

29. The twelve states without the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The District of Columbia also does not have the death penalty, and Illinois and Maryland have recently enacted death penalty moratoria. *See States with the Death Penalty*, CNN.COM *at* http://www.cnn.com/LAW/trials.and.cases/case.files/0006/map/map.html (last visited Jan. 5, 2003).

30. *See* ASSESSING THE DANGER, *supra* note 7.

the inevitable by-product of fallible human nature.[31] One study examined all of the capital convictions and appeals between 1973 and 1995 and found that the overall rate of prejudicial error in capital cases was sixty-eight percent.[32] The three most common errors in capital cases were "extremely incompetent" defense lawyers, prosecutorial misconduct, and faulty jury instructions.[33]

Moreover, recent federal action may increase the risk of wrongful convictions and executions. In 1995, Congress ceased funding postconviction defender organizations that were in place in twenty states.[34] In addition, certain federal statutes, including the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[35] curtail the appellate routes available to inmates on death row, thus decreasing the length of time between conviction and execution. The AEDPA limits the availability of federal habeas corpus review for those on death row by requiring that a death row inmate file a habeas petition within six months after his capital conviction is affirmed on appeal.[36] Currently, the average length of time that wrongly convicted inmates spend on death row is eight years.[37] This length of time is significant for two contrasting reasons. Eight years is a long time for an innocent person to spend on death row, but if the time between capital sentencing and execution decreases, there will be even less time to correct mistakes of justice.[38]

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31. Clarke et al., *supra* note 8, at 321 (quoting the Staff Report for the House Judiciary Committee).

32. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at i (2000).

33. *Id.* at ii.

34. Catherine Cowan, *States Revisit the Death Penalty*, ST. GOV'T NEWS, May 1, 2001, at 12.

35. 28 U.S.C. § 2263(a) (2000); *see also* Tabak, *supra* note 6, at 737 (explaining that the AEDPA undercuts courts' ability to review capital sentences for possible errors); Joseph L. Hoffman, *Justices Weave Intricate Web of Habeas Corpus Decisions*, 37 TRIAL 62 (Dec. 2001) (similar).

36. § 2263(a); Judge Josephine Linker Hart, *Available Post-Trial Relief After State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence,"* 22 U. ARK. LITTLE ROCK L. REV. 629, 632 (2000) (describing the standard for granting a new trial based on newly discovered evidence in Arkansas).

37. *Innocence: Freed from Death Row*, *supra* note 4, *at* http://www.deathpenaltyinfo.org/-Innocentlist.html (last visited Feb. 27, 2003).

38. *See* Stephen J. Spurr, *The Future of Capital Punishment: Determinants of the Time from Death Sentence to Execution*, 22 INT'L REV. L. & ECON. 1, 19 (2002) (presenting data showing that the probability of execution once a death sentence is imposed has been increasing concomitant with a decrease in tbe amount of time between sentence and execution).

A. Faulty Forensic Science

"Junk science" is one factor contributing to the conviction of the innocent. There have been numerous cases of "experts" and forensic scientists who have lied about their credentials and who have knowingly presented erroneous findings.[39] The recent case of forensic scientist Joyce Gilchrist highlights the problematic effects of relying on supposedly unbiased experts in the field of forensic science.[40] While working with the Oklahoma City Police Department, Gilchrist's testimony helped to send twenty-three defendants to death row.[41] Since there is now evidence that Gilchrist gave false or flawed testimony throughout her twenty-one-year career as a forensic scientist, all of the cases are being reexamined.[42] However, eleven of the men she helped to send to death row have already been executed.[43] There is evidence that Gilchrist's violations were not necessarily an aberration and that questionable practices may be widespread in the field of forensic science.[44]

Much of the controversy surrounding forensic science stems from the lack of regulation in the field.[45] There is no license requirement for forensic scientists, and states' regulatory schemes vary dramatically.[46] In addition, forensic science laboratories often

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39. *See, e.g.*, Paul C. Giannelli, *Impact of Post-Conviction DNA Testing on Forensic Science*, 35 NEW ENG. L. REV. 627, 629-30 (2001) (providing examples of forensic scientists who lied about their credentials, gave false or misleading testimony, and provided erroneous reports); Deborah Hastings, *Testimony Doubted in Execution Case*, AP NEWS, Aug. 29, 2001 (describing Gilchrist's role in convicting Malcolm Rent Johnson, who was recently executed amid doubts of his guilt), *available at* http://www.truthinjustice.org/malcolm-johnson.html; Jeffrey Kofman, *Death Sentence Overturned: Judges Cite Police Chemist's Testimony*, ABCNEWS.COM, Aug. 14, 2001 (describing the case of Alfred Brian Mitchell, whose death sentence was recently overturned after the court determined that Joyce Gilchrist provided false DNA evidence which may have led to the conviction), *available at* http://abcnews.go.com/sections/us/DailyNews/death-penaltyreversal_010814.html (last visited Mar. 17, 2003).

40. *See* Kofman, *supra* note 39. There were questions concerning the validity of Gilchrist's testimony years ago. *Id.* Although prosecutors have maintained that her work was not essential to the cases and that the outcomes would have been the same without her testimony, a federal court disagreed. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See* Giannelli, *supra* note 39, at 630.

45. *See generally* Paul C. Gianelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 472-73 (1997) (arguing for the creation of independent forensic science laboratories); Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 HARV. J.L. & TECH. 109 (1991) (examining problems in forensic science and advocating increased regulation).

46. Jonakait, *supra* note 45, at 129.

lack clearly established procedures.[47] Critics of the system argue for increased training for forensic scientists,[48] license requirements, a federal regulatory scheme for all forensic science laboratories,[49] peer review requirements,[50] and a requirement that states verify the credentials of their expert witnesses. Faulty forensic science can lead to the dual problems of acquitting the guilty and convicting the innocent.[51] A mandatory regulatory scheme for forensic laboratories may reduce both of these risks and help to restore legitimacy to the system. In combination with state moves to create DNA databases, such regulation could also substantially aid police investigations.

B. Police and Prosecutorial Misconduct

A second major factor leading to the conviction of innocent individuals involves the extensive role the police and state prosecutors play in criminal cases. Although the tendency is to blame wrongful convictions on errors at trial, the errors often occur much earlier, during the investigation of the crime.[52] First, there is the risk that the police or citizens may identify the wrong person as the criminal.[53] Such a result may occur more often in capital cases, in which the pressure on the investigators—from their superiors, the public, and prosecutors—to produce a suspect is particularly intense.[54] Once the police force has put its authoritative opinion behind a suspect's guilt, the criminal justice system is often set irreversibly in motion against that person, whether or not he is guilty.[55]

In especially heinous cases, this momentum may result in prosecutorial tunnel vision, blinding the government to other potential suspects or to exculpatory evidence.[56] Prosecutorial reluctance to disclose potentially exculpatory evidence can lead to wrongful

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47. *Id.* at 157.

48. *Id.* at 124-28.

49. *Id.* at 116, 178-80 (suggesting the Clinical Laboratory Improvement Act as a regulatory model).

50. *See id.* at 133.

51. *Id.* at 114.

52. Gross, *supra* note 21, at 475.

53. *Id.*

54. *Id.* at 477-78.

55. *Id.*

56. *Id.* at 487; *see also* discussion *infra* Part IV (providing case studies which may illustrate this tendency). *See generally* Richard A. Berk et al., *Chance and the Death Penalty*, 27 LAW & SOC'Y REV. 89 (1993) (discussing prosecutors' alleged capriciousness in deciding whether or not to pursue the death penalty); Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus, and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233, 266-67 (2002) (recounting Kirk Bloodsworth's testimony before the Senate Judiciary Committee).

convictions when prosecutors either knowingly or negligently withhold exculpatory evidence or admit false evidence at trial.[57] Examples of false confessions and lying informers are common in both capital and noncapital cases.[58] Innocent defendants are sometimes pressured into confessing to crimes they did not commit, especially when the prospect of a plea bargain is presented to them.[59] When there is particularly egregious evidence of prosecutorial misconduct, prosecutors may be held liable for contributing to the conviction of the innocent.[60]

The most common prosecutorial cause of wrongful convictions in capital cases, however, is the failure of the prosecution to exercise its discretion to dismiss the charges against defendants.[61] Prosecutors often continue to pursue cases in which the evidence is extremely weak and even cases in which there is substantial evidence of the defendant's innocence.[62] This persistence may be due either to the prosecution's belief that the defendant is the guilty party or to

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57. *See, e.g.*, Miller v. Pate, 386 U.S. 1, 2 (1967) (invalidating a conviction where prosecutors deliberately misrepresented that shorts were bloody, when they knew the stains were paint); *see also* DWYER ET AL., *supra* note 6, at 175-80 (providing examples of wrongful convictions resulting from prosecutorial misconduct, including the case of Rolando Cruz and Alejandro Hernandez). Of course, this type of egregious misconduct remains the exception rather than the rule, and it can occur in both capital and noncapital cases. However, this Note seeks to demonstrate that the consequences of such misconduct are especially grave in capital cases.

58. Gross, *supra* note 21, at 479-85. One study found that misidentifications by eyewitnesses were a factor in fifty-two percent of mistaken convictions. *Id.* at 479. Gross also discusses examples of criminals implicating innocent defendants to exculpate themselves or to gain favors from authorities. *Id.* at 481-82; *see also* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Convictions from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) (providing a skeptical look at supposedly false confessions and exonerations); Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2002, at A1 (providing a recent example of a false confession).

59. Richard A. Leo & Richard J. Oshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 487 (1998). The Supreme Court has held, however, that the coercive use of a plea bargain does not violate the defendant's right to due process. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

60. *See Liability for Negligently Causing Arrest or Prosecution of Another*, 99 A.L.R.3d 1113 (1999) (describing sources of liability for negligently causing arrest or prosecution of another).

61. Gross, *supra* note 21, at 489. According to Gross, such prosecutorial discretion is exercised less often in capital cases than in cases involving other felony charges. *Id.*

However, the most common cause of wrongful convictions overall—incorrect eyewitness identifications—occurs during the investigation. *See* Monika Jain, Comment, *Mitigating the Dangers of Capital Convictions Based on Eyewitness Testimony Through Treason's Two-Witness Rule*, 91 J. CRIM. L. & CRIMINOLOGY 761 (2001) (arguing that the Supreme Court should overturn death sentences supported by only one eyewitness identification as violations of the Eighth Amendment, unless there is independent corroboration of the incriminating facts from the eyewitness account); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001) (presenting compelling evidence of the unique risk of cross-racial misidentification).

62. Gross, *supra* note 21, at 489.

systemic and public pressure to convict.[63] An innocent defendant who makes it to trial faces a high risk of conviction because it is often too late to correct errors at that point.[64] This probability is then compounded by the possibility of inadequate defense counsel at trial.

C. *Inadequate Defense Counsel*

Court-appointed counsel is available to those defendants who request it at both the trial and appellate levels.[65] However, even if the right to appointed counsel is established, there is no guarantee that such counsel will be effective.[66] While inadequate representation at trial or on appeal can give the defendant grounds to bring an ineffective assistance of counsel claim after the fact, there is currently no standard ensuring the adequacy of representation prior to trial.[67] At this stage, there is abundant evidence of defense counsel inadequacy, ambivalence, and error, due to both a lack of standards and a lack of funding.[68] Inadequate representation can be particularly harmful in capital trials, due to the finality of the sentence.[69] In addition, ineffective assistance of counsel at the trial and appellate levels may limit the capital defendant's options at a later point.[70]

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63. *Id.*

64. *Id.* at 492-93. Gross explores possible reasons for this high risk, including prosecutorial persistence and the typical characteristics of capital juries. *Id.*

65. U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963); Douglas v. California, 372 U.S. 353, 357-58 (1963).

66. *See, e.g.*, Letty S. Di Guilio, *Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes and Due Process in Capital Cases*, 9 B.U. PUB. INT. L.J. 109 (1999) (citing State v. Scudder, 722 N.E.2d 1054 (Ohio Ct. App. 1998) (holding that the state statute providing for the right to appointed counsel did not include a right to "effective assistance" from that counsel)). Di Guilio argues that death penalty inmates have a right to counsel and to effective assistance in postconviction proceedings, based on either the Sixth or Fourteenth Amendment. *Id.* at 110.

67. *See* Strickland v. Washington, 466 U.S. 668, 687-96 (1984) (establishing the standard for proving an ineffective assistance of counsel claim). This claim is available to defendants after they receive inadequate representation. *Id.* However, it does little to prevent inadequate assistance from occurring in the first place—except by deterring defense counsel from performing poorly and encouraging them to represent their clients well.

68. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837-38 (1994) (detailing particularly egregious examples of ineffective assistance of counsel and the resulting disproportionate impact on poor capital defendants); Tabak, *supra* note 6, at 756-57 (providing an example of ineffective assistance of counsel and a defendant's inability to have his sentence reversed).

69. *See, e.g.*, McFarland v. Scott, *cert. denied*, 512 U.S. 849, 1256 (1994) (Blackmun, J., dissenting) (addressing "the crisis in trial and state postconviction legal representation for capital defendants that forms the backdrop to the federal right to counsel"); *see also Strickland*, 466 U.S. at 684-87 (holding that the standard of review for an inadequate assistance of counsel claim is the same for death row inmates as for other defendants).

70. *See* discussion *infra* Part III.

The Supreme Court has articulated a strict burden which a convicted individual must meet to prove that representation at the trial stage was ineffective.[71] First, a convicted criminal must show that the attorney did not perform as would a reasonably competent attorney in the same circumstances.[72] This inquiry is highly fact-specific and essentially puts an attorney on trial, with each side presenting legal experts' opinions as to what would constitute reasonable representation in that particular situation.[73] Even if defense counsel at the trial stage failed to perform at a reasonable level of competence, the conviction stands unless the defendant can also prove that those errors were prejudicial.[74] A defendant who brings an ineffective assistance of counsel claim has a difficult burden of proof that is rarely overcome.[75]

The problem of inadequate defense counsel continues to have grave consequences even after conviction.[76] While there is a guarantee of court-appointed counsel at the trial and appellate stages, no such guarantee protects prisoners seeking postconviction relief from their sentences.[77] Recent moves to eliminate funding for most postconviction defender organizations will make it even more difficult for those contesting death sentences to find adequate representation.[78]

Although the relative impact of each of these factors on the occurrence of wrongful convictions in capital cases remains unclear, mistaken convictions clearly occur and will continue to occur absent systemic change. The likelihood of wrongful executions will only increase if wrongful convictions are not prevented or discovered.

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71. *Strickland*, 466 U.S. at 684-87.

72. *Id.* at 693.

73. *Id.*

74. *Id.*

75. The burden of proof for a claim of ineffective assistance of counsel is the same for a convicted defendant in any case, whether capital or not. *Id.*

76. *See* discussion *infra* Part III.

77. *See* discussion *infra* Part III; *see also, e.g.*, State of Ohio v. Scudder, 722 N.E.2d 1054 (Ohio Ct. App. 1998) (holding that convicted defendant had no constitutional right to effective assistance of counsel in postconviction relief proceeding and that a petition for postconviction relief may be dismissed without a hearing); *see also* McFarland v. Scott, 512 U.S. 849, 1256-57 (1994) (Blackmun, J., dissenting) (discussing the lack of standards and adequate compensation for counsel for capital defendants and inmates pursuing postconviction relief).

78. *See, e.g.*, AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001) (noting that almost half of the states that administer the death penalty have recently stopped funding their postconviction defender programs and death penalty resource centers); Harvey Berkman, *Costs Mount for Indigent Defense*, NAT'L L.J., Aug. 7, 1995, at A18.

III. THE IMPORTANCE OF DNA TESTING AND THE OBSTACLES TO ITS USE

A. The History and Importance of DNA Evidence

DNA evidence has become increasingly effective at simultaneously exonerating innocent individuals and helping to identify the guilty.[79] Since DNA testing can both prevent wrongful convictions before the fact and correct them once they occur, the methods by which the accused and the convicted obtain access to DNA testing are critical.[80] Changing public attitudes about the death penalty seem to reflect an increased awareness of the importance and efficacy of DNA testing.[81] The vast majority of Americans support a guaranteed right to DNA testing for all death row inmates.[82] Nevertheless, the hurdles faced by an inmate seeking to prove his actual innocence usually are insurmountable.

B. Difficulties of Obtaining DNA Testing

While DNA evidence can be dispositive when it is available, it is only an option in the small number of cases in which significant

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79. Raju Chebium, *Innocence Project Credited with Expanding Awareness of DNA Testing in Law Enforcement*, CNN.COM, *at* http://www.cnn.com/2000/LAW/12/22/innocence.project.crim/-index.html (last visited Feb. 25, 2003) (explaining the role Scheck and Neufeld played in increasing public awareness of the importance of DNA testing for both conviction and exoneration); Rudolph Giuliani, *DNA Testing Aids the Search for Truth*, N.Y. L.J., May 1, 2000 (stating that DNA is the most effective tool to protect the innocent, convict the guilty, and possibly even to prevent crimes); *see also* LAFAVE ET AL., 1 CRIMINAL PROCEDURE § 1.4(e) (2d ed. 1999) (discussing the essential dual functions of the criminal justice system: protecting the innocent and convicting the guilty).

There are, of course, disadvantages to DNA testing. For example, critics cite privacy concerns, possible discriminatory application of DNA testing or use of DNA evidence, and potential Fourth Amendment search implications. *See generally* discussion *infra* Part V.B (discussing and addressing some of these criticisms).

80. *See, e.g.*, discussion *infra* Part IV.C (providing an example of a combined exoneration and incrimination in the Earl Washington case study).

81. *Id.*; *see supra* notes 6-16 and accompanying text.

82. *See Key Facts at a Glance: Executions*, *supra* note 12 (presenting poll results showing that ninety-one percent of Americans support requiring courts to allow death row inmates access to DNA tests).

biological evidence is properly collected from the crime scene.[83] Even in cases in which DNA analysis is possible, most inmates, including those on death row, do not have access to DNA testing.[84] Those inmates who attempt to procure DNA testing of biological evidence from the crime scene face an imposing set of procedural and substantive hurdles. First, the inmate usually must make a *Brady* motion to test the DNA evidence from the crime scene.[85] In addition, although some current state statutory proposals could alter the procedure,[86] the heightened standards for obtaining a new trial are applied once the inmate seeks to introduce evidence from postconviction DNA testing.[87] An inmate often must prove a constitutional violation at trial to introduce the evidence.[88] Similarly, courts do not always consider the denial of access to DNA testing to be a violation of constitutional due process guarantees.[89]

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83. *See* Tabak, *supra* note 6, at 735-36 (noting that exoneration is more likely in rape-murder cases than in murder cases, because of the greater likelihood of finding incriminating biological evidence at the crime scene in those cases).

84. *See, e.g.*, Associated Press, *Virginia Court Rules Against DNA Testing in Rape Trial*, N.Y. TIMES, Jan. 24, 2002 (discussing a recent federal appeals court ruling that a man convicted of rape has no constitutional right to DNA testing of the evidence). The court held that the denial of testing was not a due process violation and that state or federal legislation, rather than the courts, should address the issue of postconviction DNA testing. *Id. But see* Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001) (finding that the plaintiff had a "due process right of access to genetic material for the limited purpose of DNA testing" because it could provide exculpatory evidence).

85. *See* Brady v. Maryland, 373 U.S. 83 (1963) (granting relief where exculpatory evidence had been withheld by prosecution). The *Brady* Court set the standard for overturning a conviction based on due process violations and established the requirements that the prosecution disclose exculpatory evidence to the defense and attempt to rectify false evidence. *Id.* Some courts have extended its holding to allow DNA testing of evidence after trial, since such testing may result in exculpatory evidence. *See, e.g.*, Commonwealth v. Brison, 618 A.2d 420, 423 (Pa. Super. Ct. 1992) (allowing DNA testing despite the amount of time elapsed since trial, due to potentially exculpatory nature of DNA evidence); State v. Thomas, 586 A.2d 250, 253-54 (N.J. Super. Ct. App. Div. 1991) (same); Dabbs v. Vergari, 570 N.Y.S.2d 765, 769 (N.Y. Sup. Ct. 1990) (allowing DNA testing under *Brady*); *see also* Lugosi, *supra* note 56, at 235 (explaining the use of *Brady* motions to obtain postconviction DNA testing).

86. Most states now have statutes allowing postconviction DNA testing. *See* discussion *infra* Part VI.B; *see also* Frances X. Clines, *Virginia May Collect DNA in Every Arrest for a Felony*, N.Y. TIMES, Feb. 17, 2002, at A22 (stating that both chambers of the Virginia General Assembly have adopted versions of the plan to enlarge the state's DNA database, which is already the largest in the nation, to include genetic samples from everyone arrested on suspicion of a violent crime). *But cf.* Associated Press, *supra* note 84 (detailing a Virginia inmate's recent unsuccessful attempt to obtain DNA testing).

87. *See, e.g.*, State v. El-Tabech, 610 N.W.2d 737, 749 (Neb. 2001) (denying petitioner's request to compel state-funded postconviction DNA testing, because there was no statutory authorization for such a claim or for such tests, even under the Nebraska Post-Conviction Act).

88. *Id.*

89. *State v. Scudder*, 722 N.E.2d 1054, 1057 (Ohio Ct. App. 1998) (stating that "it is well settled that constitutional issues may not be considered in a postconviction proceeding where they have already been, or could have been, litigated by the defendant on direct appeal"). For

Even if an inmate succeeds in obtaining DNA testing of the crime scene evidence for comparison with his own DNA, the procurement and processing of the potential DNA evidence must meet strict requirements to guard against contamination.[90] Failure to follow the protocol for collecting DNA and for maintaining a proper chain of custody can introduce errors which will render the evidence inadmissible.[91]

C. Difficulties of Using DNA Evidence in a Motion for a New Trial Based on Newly Discovered Evidence or Habeas Corpus Review

Even if a death row inmate succeeds in obtaining DNA testing of evidence from the crime scene and even if the testing irrefutably proves his innocence, there is no automatic exoneration. In the current system, an inmate with DNA evidence of his innocence still must either (1) obtain a new trial based on newly discovered evidence to have his conviction overturned and to be released from prison, or (2) seek a writ of habeas corpus in state or federal court if efforts to obtain relief in state court have been exhausted.[92] Both of these options are difficult, due to considerable procedural hurdles and heavy burdens of proof.[93]

Before trial, the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crimes charged.[94] However, because of a presumption that the verdict is correct and a need for finality, the burden changes in the postconviction context. After conviction, the burden shifts to the

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this reason, even if courts did consider the denial of DNA testing to be a due process violation, inmates still would be unable to raise that issue in postconviction proceedings if they had not done so on appeal. *But see* Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) (providing an example of a recent case holding that inmates do have a constitutional right to DNA testing of evidence that could be used to prove their innocence); *see infra* note 245 (explaining that the Act, if implemented, would make it a due process violation to deny an inmate the right to DNA testing).

90. *See, e.g.*, John E. Smialik et al., *The Microscopic Slide; DNA in Criminal Investigations*, FBI L. ENFORCEMENT BULL., Nov. 1, 2000, at 18 (describing the importance of DNA evidence both to incriminate and to exonerate and the difficulties of proper collection and testing).

91. *Id.* (providing guidelines for ensuring against contamination of collected DNA evidence).

92. Several states have recently enacted the Uniform Post-Conviction Procedure Act, which provides procedures by which an inmate can seek to have his conviction reexamined. UNIF. POST-CONVICTION PROC. ACT (2001). The Act provides a different set of postconviction relief procedures for death row inmates and includes a provision for appointed counsel for indigent inmates pursuing postconviction relief. *Id. See generally* David DeFoore, *Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted*, 33 TEX. TECH. L. REV. 491, 502-14 (2002) (explaining these two avenues for postconviction relief).

93. *See generally* ASSESSING THE DANGER, *supra* note 7 (explaining that the burden of proof after trial rests entirely on the inmate pursuing postconviction relief).

94. *Id.*

defendant to show that new evidence, which was "not reasonably discoverable at the time of trial" and which would have been conclusive at trial, is now available.[95] In addition, the inmate often must show a constitutional violation to obtain postconviction relief.[96] Even constitutional violations are permitted as long as they are "harmless."[97] Some states require a convicted defendant to show both that the new evidence would have changed the outcome of the case and that he exercised due diligence in attempting to obtain the evidence before trial.[98] It is difficult for a convicted defendant to prove that he diligently attempted to obtain DNA testing of forensic evidence before trial—especially if DNA analysis was not an option at the time of his trial.[99] In addition, because the denial of a motion for a new trial is only reversible for abuse of discretion, a convicted individual usually gets only one chance to meet this difficult burden of proof.[100]

Obtaining representation is another major hurdle to overturning a conviction. Indigent defendants have a constitutional right to effective counsel under the Sixth and Fourteenth Amendments.[101] If defendants are convicted, their options immediately become more limited. The Supreme Court has held that indigent inmates do not have the right to counsel in postconviction proceedings, because a postconviction proceeding is considered to be civil in nature rather than part of the criminal proceeding.[102] This

95. *See generally* DeFoore, *supra* note 92, at 493 (outlining the difficulties of obtaining postconviction relief).

96. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/122-1 (West 1992).

97. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 622-23 (1992) (relaxing the standard for what constitutes harmless error in federal habeas proceedings); Amadeo v. Zant, 486 U.S. 214, 221-22 (1988) (granting relief after prosecutorial misconduct in jury selection); *see also supra* note 85 and accompanying text.

98. Hart, *supra* note 36, at 632 (describing the standard for granting a new trial based on newly discovered evidence in Arkansas); *see also* DeFoore, *supra* note 92, at 502-06 (defining "newly discovered evidence" and explaining that all states allow motions for new trials based on newly discovered evidence but that their procedures for such motions vary widely).

99. Because of these heightened standards, motions for new trials based on newly discovered evidence are rarely granted. *But see, e.g.*, People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996) (granting a motion for new trial based on newly discovered evidence that someone else murdered the victim, even though such a claim of actual innocence would not be cognizable as a habeas petition); People v. Dabbs, 587 N.Y.S.2d 90 (N.Y. Sup. Ct. 1991) (allowing DNA testing nine years after the inmate's conviction and vacating tbe sentence when the evidence proved exculpatory).

100. Hart, *supra* note 36, at 632.

101. Gideon v. Washington, 372 U.S. 335, 339-340 (1963); Douglas v. California, 372 U.S. 353, 357-58 (1963).

102. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). "States have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." *Id.*

limitation on the constitutional right to counsel applies to both capital and noncapital defendants seeking postconviction review of their original trials.[103] Therefore, after one direct appeal, an indigent defendant is left without the assistance of counsel, even if new evidence or scientific tests are later made available.[104] An inmate in this position can only hope for the intervention of a volunteer lawyer or an advocacy group.

Some state statutes, however, do provide for the appointment and compensation of counsel for indigent inmates seeking postconviction review. Some of these statutes were enacted for the states to receive federal benefits under the AEDPA rather than to provide benefits to indigent criminal defendants.[105] In addition, if the initial court-appointed counsel negligently failed to prevent the defendant's wrongful conviction, it is unlikely that that same court will appoint more capable counsel in the postconviction context.[106] Many death row inmates therefore have no attorney or an inadequate attorney, limiting their opportunities to discover new evidence and comply with time limits for filing a motion for a new trial.[107] Inadequate or nonexistent representation is particularly problematic for an inmate seeking DNA testing, since it is unlikely that the inmate has funds available to pay for the testing.[108] Inadequate

103. Murray v. Giarratano, 492 U.S. 1, 10 (1989) (describing and upholding Virginia's system of providing death row inmates seeking habeas corpus review with law books rather than lawyers).

104. The problematic lack of guaranteed postconviction counsel is illustrated by those individuals convicted in cases involving forensic evidence prior to the advent of DNA analysis technology. These individuals, without representation, do not necessarily have the means to obtain the same type of testing of crime scene evidence that would occur if they were under investigation today. In addition, these individuals will be unable to benefit from any future scientific advances which may increase the accuracy of DNA tests or allow such tests to be performed on smaller samples of biological evidence.

105. Murray, *supra* note 104 (providing examples of state statutes enacted immediately after the AEDPA to take advantage of federal benefits); *see also* 28 U.S.C. §§ 2241, 2261 (2000). The fact that the AEDPA is the motivation behind many of these state statutes is relevant for at least two reasons. First, even though defense counsel is made more available regardless of the motivation for enacting the statutes, it would be more laudable, in terms of abstract justice, for states to enact such legislation to address the problem of inadequate postconviction representation rather than to buy into a federal carrot-and-stick scheme. Second, state statutes enacted to gain federal benefits from a relatively unrelated statutory scheme are more vulnerable than those enacted by state legislatures for more legitimate, directly related reasons. If the AEDPA were significantly amended or even repealed, the benefits would disappear, leaving states back at their starting point.

106. *See* Di Guilio, *supra* note 66. Requiring appointed defense counsel to meet strict competency standards, especially in capital cases and postconviction proceedings, would help to alleviate this problem.

107. *See* ASSESSING THE DANGER, *supra* note 7 (noting that many death row inmates in leading death penalty states, including Texas and California, have no legal representation).

108. *See, e.g.*, discussion *infra* Part III (Kirk Bloodsworth Case Study).

representation at the trial and appellate levels can lead to wrongful convictions, and a lack of representation at the postconviction stage then allows those wrongful convictions to remain undetected. Capital defendants who had ineffective defense counsel at trial and who are seeking to prove their innocence in a state with no provision for postconviction representation are denied the protections of the system not once, but twice.

In addition to the heightened burdens of proof that an inmate must overcome to overturn her conviction, there are restrictive time limits for filing a motion for a new trial based on newly discovered evidence.[109] Many states have time limits of thirty or sixty days, and only nine states have no time limits.[110] Because DNA testing of evidence has only recently become available, many defendants convicted long ago are procedurally barred under these statutes from taking advantage of new technology.

Several states and the federal government have recognized the problems posed by these restrictive statutes and sought to provide for, or even compel, DNA testing of old evidence.[111] Many state courts consider motions for a new trial based on newly discovered evidence to be a means for defendants to overcome injustices committed at trial.[112] However, it is doubtful that the motions can effectively serve such a purpose given the restrictive time limits and prohibitive burdens of proof involved.[113]

Because of the states' strict time limits on motions for a new trial based on newly discovered evidence, inmates may choose to pursue postconviction review in federal court through the writ of habeas corpus.[114] This option is especially relevant when DNA

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109. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/22-1202(C) (West 1992) (providing a thirty-day time limit for claiming newly discovered evidence in a motion for a new trial). Virginia had the shortest time limit for making a motion for a new trial based on newly discovered evidence—twenty-one days—until it recently changed the law. Va. Sup. Ct. R. 3A:15(b) (2001); *see also* DeFoore, *supra* note 92, at 503 (noting that most states require motions for a new trial based on newly discovered evidence to be made within two years, but that many others have a time limit of sixty days after conviction); discussion *infra* Part IV.C (Earl Washington case study).

110. *See also* Hart, *supra* note 36, at 635 (describing Arkansas' thirty-day limit on motions for new trial based on newly discovered evidence and the difficulties of meeting it).

111. *See* discussion *infra* Part IV.

112. Hart, *supra* note 36, at 636-37.

113. In addition, the original impetus behind the restrictive time limits on motions for newly discovered evidence, which involved the fear of evidence deterioration, are simply not applicable to evidence from DNA testing. DeFoore, *supra* note 92, at 505-06.

114. The "Great Writ" is provided for in the United States Constitution. U.S. CONST. art. I, § 9, cl. 2. The purpose of the writ of habeas corpus is to remedy wrongful incarcerations. Phaedra Tanner, Note, Herrera v. Collins: *Assuming the Constitution Prohibits the Execution of an Innocent Person, Is the Needle Worth the Search?*, 1994 UTAH L. REV. 1283, 1286. Since the Constitution does not actually define the substance of the writ, however, legislatures and courts

evidence has been obtained and analyzed long after statutory limits have passed. However, a state prisoner attempting to obtain habeas corpus review of an innocence claim will have at least as many problems as one seeking to move for a new trial based on newly discovered evidence.[115]

In *Herrera v. Collins*, the Supreme Court interpreted the already narrow right to habeas corpus relief even more restrictively in the context of claims of actual innocence.[116] In *Herrera*, the Court held that a claim of actual innocence based on newly discovered evidence, absent a claim of a procedural or constitutional error, cannot be raised in a habeas corpus petition.[117] The Court justified its holding by pointing to the disruptive effects of placing federal courts in a position to correct errors of fact.[118] According to the Court, such a prohibition does not implicate either the Eighth Amendment prohibition of cruel and unusual punishment or the Fourteenth Amendment Due Process Clause.[119] Although the Court rejected the defendant's claim, it did not

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have struggled to interpret its meaning. *Id.* Because of its constitutional basis, Congress and the Court cannot "suspend" the right to habeas corpus review; however, the Court has traditionally interpreted its scope quite narrowly. *Id.*

115. For criticisms of and recommendations concerning current federal habeas procedures, see, e.g., MICHAEL MELLO, DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT 260 (1997) (criticizing the procedural difficulties of federal habeas corpus law); Lugosi, *supra* note 56, at 234-35 (urging the unfettered allowance of federal habeas corpus review to any petitioner asserting an actual innocence claim).

116. 506 U.S. 390 (1993); *see also* Joseph L. Hoffman, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 832-33 (1993) (explaining that the Supreme Court has responded to a recent proliferation of habeas cases by imposing procedural restrictions to federal review). In 1992, Roger Coleman, who had ineffective assistance of counsel at trial claimed on appeal that he was innocent and that no court would review his evidence. Coleman v. Thompson, 501 U.S. 722, 755-56 (1991). Because of a late filing, the state court refused to review his claim, and a federal court also refused to hear his claim because of his procedural default at the state level. *Id.* at 729-30. The Supreme Court held that he could not complain about his attorney's mistakes since he was not entitled to an attorney in the first place and allowed his execution to proceed without reviewing his innocence claims. *Id.* at 752.

In addition to the restrictions on federal habeas review imposed by *Herrera* and its progeny, the AEDPA further curtails the right. *See supra* note 35 and accompanying text.

117. *Herrera*, 506 U.S. at 397-98. In other words, a new claim of actual innocence, even with evidence, does not necessarily entitle the inmate to federal habeas corpus review. *Id.*; *see also* Tara L. Swafford, Note, *Responding to* Herrera v. Collins: *Ensuring that Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603 (1995) (demonstrating that innocents are executed in the United States and proposing solutions to the problem, including providing habeas corpus review for claims of actual innocence based on new facts).

In *Herrera*, however, the death row inmate's newly discovered evidence was an allegation that his deceased brother had committed the crimes. 506 U.S. at 397-98. It is unclear whether DNA evidence excluding the death row inmate from culpability would be distinguishable based on its scientific certainty.

118. *Herrera*, 506 U.S. at 400.

119. *Id.* at 397-98.

address the question of whether or not executing an innocent person violated the Eighth Amendment—a question that seems to have an obvious answer, even to proponents of capital punishment.[120] The concurring and dissenting opinions in *Herrera*, however, indicated a willingness to address claims of actual innocence under habeas corpus review.[121]

Instead of allowing the defendant's claim of actual innocence to proceed, the Court in *Herrera* ruled that the "fail-safe" clemency process was the inmate's only opportunity to present his claims of innocence.[122] Grants of clemency are extremely rare in death penalty cases, however, and the procedures required for clemency vary in each state.[123] In addition, both the gubernatorial and presidential clemency processes necessarily implicate political considerations which can delay and taint the process.[124] Because the clemency process is discretionary, there is no guarantee that an innocent inmate will have his claim heard at all.[125] The process is therefore not an adequate safeguard against executing the innocent.

There are additional obstacles to obtaining habeas corpus review for those death row inmates whose trials were arguably constitutionally defective because of ineffective assistance of counsel.[126] For a capital petitioner to obtain federal habeas corpus review, counsel must have raised all possible claims in state court and complied with all state procedural rules.[127] Ineffective assistance of counsel at the trial stage therefore can lead to both erroneous convictions and to a procedural dead end after conviction. In addition, similar to the situation in a new trial based on newly discovered

120. *See, e.g.*, Gross, *supra* note 21, at 469-70 (describing the significant difference between the imposition of the death penalty and any other form of punishment and noting that even those who support capital punishment do not support its imposition against the innocent); Furman v. Georgia, 408 U.S. 238, 346 (1972) (Marshall, J., concurring).

121. *Herrera*, 506 U.S. at 446 (Blackmun, J., dissenting).

122. *Id.* at 415.

123. *See* ASSESSING THE DANGER, *supra* note 7.

124. *See id.* (explaining that the impact of politics on clemency requests leads to most commutations being granted as a governor or the President is leaving office); *see also* Hart, *supra* note 36, at 641. Clemency petitions are often subject to arbitrary procedures, and governors usually do not have the time to investigate or consider them fully. *See* DeFoore, *supra* note 92, at 493 (mentioning the impact of politics on the clemency process, as well as governors' doubts about the propriety of the clemency power). *But see* Associated Press, *supra* note 17 (noting former Illinois Governor George Ryan's recent commutation of all 156 death sentences being served in that state).

125. Hart, *supra* note 36, at 641.

126. *See* discussion *supra* Part II.C.

127. McFarland v. Scott, 512 U.S. 1256, 1261 (1994) (Blackmun, J., dissenting).

evidence, the petitioner has a high postconviction standard to meet to overturn his conviction in a federal habeas proceeding.[128]

As a result of these barriers to innocence claims, inmates pursuing federal habeas corpus relief may be more likely to rely upon procedural mistakes creating due process violations at trial to attempt to overturn their convictions. Arguably, then, those death row inmates whose trials were constitutionally defective in the procedural sense may be in a better position to have their convictions and sentences reviewed. Like the recent exemption of mentally incompetent individuals from the death penalty,[129] allowing inmates to pursue claims of innocence poses problems of cost, delay, and finality. Such an allowance would encourage most, if not all, death row defendants to pursue claims of actual innocence, which could risk clogging the judiciary with potentially meritless claims. The increasing evidence that the criminal justice system has executed innocent individuals and will continue to do so, however, justifies extensive change because the risks of continuing to execute the innocent outweigh the possible associated costs.[130]

IV. CASE STUDIES—INNOCENTS CONVICTED AND RELEASED

Three case studies shed light on particular problems inmates face when trying to procure DNA testing and postconviction relief and those faced later by released innocents trying to readjust to normal life.[131] These stories reveal that the recent increase in exonerations is a result of the persistent advocacy of private individuals and groups rather than an indication that the appellate system is working properly. In addition, these case studies indicate that those

128. *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333, 348-49 (1992) (denying federal habeas corpus relief because petitioner inmate failed to show by clear and convincing evidence that but for the constitutional error at the sentencing hearing, no reasonable juror would have found him eligible for the death penalty under applicable state law).

129. Atkins v. Virginia, 536 U.S. 304, 350 (2002).

130. These costs include the purported loss of an effective deterrent, the expense of increasing inmates' access to counsel and to DNA testing, and the risk of delegitimizing the judicial system through increased ex post scrutiny of its convictions. Yet numerous commentators have noted that capital punishment is more expensive for the State than life imprisonment. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 358 (1972) (Marshall, J., concurring) (explaining that the procedural strictures and complicated appeals that accompany death sentences make capital punishment more expensive per inmate than sentences of life imprisonment); *see also Costs of the Death Penalty*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Jan. 24, 2003) (providing the costs of the death penalty), *at* http://www.deathpenaltyinfo-.org/costs2.html (last visited Feb. 25, 2003).

131. For further examples of innocents convicted and later exonerated, see, e.g., DWYER ET AL., *supra* note 6; MICHAEL MELLO, THE WRONG MAN: A TRUE STORY OF INNOCENCE ON DEATH ROW (2001).

individuals whose convictions are overturned due to evidence of actual innocence usually receive nothing to compensate them for their lost years. The system that failed them by wrongfully convicting them thus fails them a second time by not acting to remedy its identified mistakes.

A. Kirk Bloodsworth

In 1993, Kirk Bloodsworth became the first person in the nation to be released from death row pursuant to exculpatory DNA evidence.[132] Bloodsworth was thirty-nine years old at the time and had been in prison for eight years for the 1984 rape and murder of a young girl.[133] He had spent two of those years on death row before his sentence was commuted to life.[134] The case against Bloodsworth rested on a questionable identification—five individuals, two of whom were children, thought he might have been the man that they saw with the victim prior to her death.[135] At the time of the trial, Bloodsworth had no criminal record.[136] Because a judge ruled that the prosecution had wrongfully withheld evidence about another suspect, Bloodsworth was fortunate enough to obtain a new trial, at which he received a life sentence.[137] Bloodsworth continued to maintain his innocence and sought to prove it while in prison.[138]

Although tests were conducted on forensic evidence from the crime scene at the time of Bloodsworth's trial, the tests were not yet sophisticated enough to detect and identify DNA from the criminal.[139] A volunteer lawyer helped Bloodsworth have the evidence tested again in 1993, using new DNA analysis techniques that had not been available at the time of his trial.[140] Bloodsworth's attorney paid the $10,000 testing fee himself.[141] The DNA tests showed that Bloodsworth could not have committed the crime, and further FBI

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132. *Costs of the Death Penalty*, *supra* note 130; *see also* DWYER ET AL., *supra* note 6, at 216-17.

133. DWYER ET AL., *supra* note 6, at, 222.

134. *Id.*

135. ASSESSING THE DANGER, *supra* note 7.

136. *Life After Death Row: Picking up the Pieces After Being Wrongfully Convicted*, ABCNEWS.COM, Aug. 29, 2001, *at* http://www.abcnews.go.com/sections/Downtown/2020/-Downtown_010829_nightshift.feature.htm (last visited Feb. 28, 2003).

137. Raju Chebium, *Kirk Bloodsworth, Twice Convicted of Rape and Murder, Exonerated by DNA Evidence*, CNN.COM, June 20, 2000, *available at* http://www7.cnn.com/2000/LAW/06/02/-bloodsworth.profile (last visited Feb. 25, 2003).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

tests confirmed the results.[142] The murder for which Bloodsworth was wrongfully convicted remains unsolved to this day.[143] The prosecution from Bloodsworth's case is still unsure whether or not he is actually innocent of the crime.[144]

Unlike most released innocents,[145] Bloodsworth did receive $300,000 in compensation for lost wages pursuant to a Maryland wrongful imprisonment statute.[146] This amount was based on a rough estimate of his lost wages—$30,000 a year for each year between his arrest and release.[147] As another part of the arrangement, Bloodsworth had to sign an agreement not to sue the state.[148] Although Bloodsworth's attorney advised him not to accept the amount because it was too low and did not take into account pain and suffering or emotional distress damages, Bloodsworth was tired of fighting the system and ready to resume a normal life.[149] He accepted the money, purchased a boat, and now spends his time as a commercial crab fisherman in the Chesapeake Bay.[150] He got married soon after his release and is now living the life he dreamed of during his time in prison.[151] Bloodsworth also works as an advocate for prisoners' rights and has voiced his support for the proposed Innocence Protection Act.[152]

The discovery of Bloodsworth's innocence and his subsequent release was due more to persistence and generous volunteers than to the workings of the criminal justice system.[153] Because Maryland's time limit for asserting new evidence is one year after the time at which the judgment becomes final, only the fortuitous combination of scientific advances and an attorney's persistence led to Bloodsworth's release after nine years on death row.[154] Most death row inmates lack the legal and financial resources to pursue claims of actual innocence

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* discussion *infra* Part IV.B-C.

146. Chebium, *supra* note 137; *see also* DWYER ET AL., *supra* note 6, at 220.

147. Chebium, *supra* note 137.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See* Lugosi, *supra* note 56, at 265, 268-69 (describing Bloodsworth's testimony to the Crime Subcommittee of the House Judiciary Committee about his story and his belief in the need for compensation for exonerated innocents); *see also* discussion *infra* Part V.C (mentioning Bloodsworth's testimony in support of the Innocence Protection Act).

153. *See* ASSESSING THE DANGER, *supra* note 7.

154. *Id.*

on their own.[155] In addition, even with volunteer attorneys and innocence projects assuming substantial caseloads, demand for these services remains greater than supply.[156] Most death row inmates are therefore unlikely to benefit from the factors that led to exoneration for Bloodsworth.[157]

B. Charles Fain

Charles Fain, a Vietnam veteran, was wrongfully imprisoned on death row in Idaho for more than eighteen years as a result of false testimony and incorrect hair analysis evidence.[158] He had been convicted and sentenced to death for the 1982 kidnapping, sexual assault, and drowning of nine-year-old Daralyn Johnson.[159] The girl's brutal murder shocked the small community where it occurred.[160] After investigating the case for seven months, the police were at an impasse—until they found Fain and called him for questioning.[161] Fain was considered a suspect because of his light brown hair, because his residence was a block from the girl's house, and because he had difficulty holding a job.[162] Although a state polygraph examiner concluded that Fain was telling the truth when he denied involvement in the rape and murder, the prosecution successfully objected to introduction of the test as evidence.[163] The case against Fain rested on two questionable sources of evidence. First, an FBI forensic scientist testified that a microscopic analysis of the hairs found on the victim's clothing revealed that they might have belonged to Fain.[164] Second, two jailhouse informers claimed that Fain had confessed to the crime in graphic detail.[165]

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155. *See* Chebium, *supra* note 5 (stating that the demand for Innocence Project services far exceeds the supply).

156. *Id.*

157. *Id.*

158. Raymond Bonner, *Death Row Inmate Is Freed After DNA Test Clears Him*, N.Y. TIMES, Aug. 24, 2001, at A11.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Many men had given hair samples, and apparently Fain's hair sample resembled those found on the victim the most closely. *Id.; see also Innocence: Freed from Death Row*, *supra* note 4 (recounting Charles Fain's story).

165. Bonner, *supra* note 158. It is unclear why the informers in Fain's case gave false testimony, but jailhouse informers often manipulate the system by cooperating with the authorities to gain favor with them. *Id.*

During his time in prison, Fain consistently maintained his innocence, claiming that he was in Oregon at the time of the murder.[166] In March 2000, a federal district court judge ordered that additional forensic testing be conducted on the hairs.[167] While microscopic hair analysis was the most advanced type of forensic testing available at the time of his conviction, DNA testing had since become a possibility. The DNA tests revealed that the hairs had not come from Fain, and his conviction was set aside.[168] Fain, who is now fifty-four years old, was released with all charges dismissed in 2001.[169] His release ultimately was the result of one persistent attorney's work on the case for more than a decade and a federal judge's willingness to order DNA testing and authorize the funds to pay for it.[170] Both the original prosecutor in Fain's case and the trial judge remain unconvinced of his innocence, however, in spite of the DNA tests that fully exonerated him.[171] During his eighteen years in prison, Fain's parents both passed away.[172] At the time of his release, he was unsure what he would do for work or where he would live.[173]

C. Earl Washington

In 1983, Earl Washington was arrested for breaking into the home of an elderly woman, stealing a gun and money from her, and beating her.[174] He pled guilty to statutory burglary and malicious wrongdoing and was sentenced to thirty years in prison for those crimes.[175] While Washington was in custody, the police questioned him about five other crimes.[176] Washington confessed to all five of the other crimes, but in four of them, his confession was so inconsistent with the

166. *Id.*

167. *Id.*; *see also Innocence: Freed from Death Row*, *supra* note 4.

168. Bonner, *supra* note 158.

169. *Id.; see also American Released from Death Row*, BBC NEWS (telling the story of Charles Fain's conviction and release), *available at* http://news.bbc.co.uk/2/hi/americas/1508636.stm (last visited Feb. 25, 2003).

170. Bonner, *supra* note 158.

171. *Id.*

172. *Id.*

173. *Id.*

174. Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1103 (2001) (citing Press Release, Commonwealth of Virginia, Office of the Governor, Statement of Governor Gilmore Regarding Earl Washington (June 1, 2000)).

175. *Id.*

176. *Id.* at 1091.

crime reported that his confessions were rejected by the State.[177] Washington, who has an I.Q. of sixty-nine and the mental age of a ten-year-old, apparently had confessed to the crimes to please the police officers who questioned him.[178] In the interrogation, police failed to account for the fact that Washington's normal method of coping with the world was to agree with those around him.[179]

Surprisingly, the State pursued Washington's "confession" to the 1982 rape and murder of Rebecca Williams, even though it rejected the other four confessions obtained from him.[180] The police pursued the interrogation in spite of Washington's inconsistencies on important points surrounding the Williams murder.[181] In fact, when the police drove Washington to the scene of the crime, he mistakenly identified an apartment on the other side of the complex as the location of the rape and murder.[182]

This confession to the crime eventually led to a capital murder charge and conviction, even though no forensic evidence tied Washington to the crime scene.[183] In addition to this "confession," several factors contributed to Washington's conviction. Washington's mental state and the questionable quality of the assistance provided by his defense counsel made conviction almost a forgone conclusion at trial.[184] At the sentencing phase, one aggravating factor, that "the offense was outrageously or wantonly vile, horrible or inhuman," led to the imposition of the death penalty.[185] Washington's direct appeal, which was handled by his trial lawyer, was denied.[186] Although the next step in the postconviction process was the filing of a state habeas corpus petition, Washington had no representation after his direct appeal.[187]

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177. *Id.* at 1091-92. For example, Washington apparently originally told police that the victim in one of the crimes to which he confessed was black, but then said that she was white after the police indicated that his first answer was incorrect.

178. Frances X. Clines, *New DNA Tests Are Seen as Key to Virginia Case*, N.Y. TIMES, Sept. 7, 2000.

179. Freedman, *supra* note 174, at 1095.

180. Clines, *supra* note 178.

181. Freedman, *supra* note 174 at 1092-93.

182. *Id.* at 1094.

183. *Id.* at 1094-95.

184. *Id.* at 1095-96.

185. *Id.* 1096-97. The application of this aggravating factor in this case seems intuitively illogical, since the gravity of the underlying offense should only be relevant when culpability for that offense is absolutely certain.

186. *Id.* at 1097.

187. *Id.* Virginia, like most states, did not appoint counsel for postconviction proceedings. This has now changed as a result of recent statutory amendments. *See* Kathryn Roe Eldridge & Matthew L. Engle, Case Note, *Va. Code Ann. § 19.2-270.4:1, Va. Code Ann. §§ 19.2-237.1 to 19.2-*

In Washington's case, it was only the advocacy of another inmate and the subsequent intervention of private attorneys that finally led to reversal.[188] These attorneys quickly compiled a state habeas corpus petition, and the local federal judge granted his stay of execution.[189] With only nine days before Washington's scheduled execution, even after the stay was granted, a team of volunteer lawyers took over the case.[190] One of them discovered exculpatory semen stain evidence that had been in government custody since Washington's initial trial ten years earlier.[191] In spite of the evidence of ineffective assistance of counsel, however, the state habeas petition was not granted, since the court found the errors to be nonprejudicial in light of Washington's confession to the crime.[192]

Because DNA testing had become available, Washington's team of volunteer lawyers arranged to have the semen stain tested.[193] The exculpatory results were included in a pardon petition to the governor of Virginia.[194] However, because DNA test results were not accepted as undeniably accurate in 1994, the governor simply commuted Washington's sentence to life without fully exonerating him.[195] The improvements in DNA technology between 1994 and 2000 led to a reexamination of the case.[196] In October 2001, after intense media pressure, Governor Jim Gilmore of Virginia granted Washington an absolute pardon after DNA testing completely exonerated him.[197] As an example of the extraordinary efficacy and utility of DNA testing, the sample which exonerated Washington simultaneously pegged the killer.[198] Washington was finally released from prison in February 2001 after serving time on another conviction.[199] Washington, who was forty years old at the time of his release, had served eighteen years in

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237.6 (Michie Supp. 2001), 14 CAP. DEF. J. 217, 217 (2001) (describing the 2001 statutory changes, including the creation of a "writ of actual innocence," which provides death row inmates with the right to obtain representation and to file a petition claiming actual innocence to the Virginia Supreme Court).

188. *Id.* at 1098.

189. *Id.*

190. *Id.*

191. *Id.* at 1099.

192. *Id.* (citing Washington v. Murray, 952 F.2d 1472, 1475 (4th Cir. 1991)).

193. *Id.* at 1100.

194. *Id.*

195. Press Release, *supra* note 174. At the time, Governor Douglas Wilder was seeking a seat in the Senate and issued the commutation hours before the end of his term in office. *Id.*

196. *Id.*

197. Frances X. Clines, *Furor Anew with Release of Man Who Was Innocent*, N.Y. TIMES, Feb. 11, 2001, at A23.

198. Freedman, *supra* note 174, at 1103.

199. Clines, *supra* note 197, at A23.

prison—almost ten of them on death row.[200] He is the only prisoner from Virginia's death row who has ever been exonerated.[201]

The volunteer legal services which led to Washington's release were worth an estimated ten million dollars.[202] Since his release from prison, he has been living in an apartment in Virginia Beach.[203] The state has done nothing to compensate him for his wrongful imprisonment or to compensate the individuals who worked for his release.[204] Washington initially said that he was only interested in an apology from the state.[205] However, he recently instituted legal action against the deputies, sheriff, and the county involved in his conviction alleging that the deputies and investigators involved in his case coerced a confession from him and ignored or concealed evidence pointing to the real killer.[206]

V. PROPOSED SYSTEMIC CHANGES TO PREVENT WRONGFUL CONVICTIONS

At both the state and the federal level, private groups and public advocates are working to prevent future wrongful convictions.[207] While the innocence projects may be the most heavily publicized of these efforts, state governments have also begun to address the problem, both by conducting fairness studies and by improving inmates' access to DNA testing of forensic evidence.[208] Although there is now increasing focus on the fairness of the death penalty as administered, states have yet to address the problem of wrongful convictions from the other side. No states have renewed their

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200. *Id.*

201. Maria Glod, *Those Who Felt Injustice Call for a Fairer System: Ex-Convicts Testify Before Senate Panel to Support Standards for Lawyers in Capital Cases*, WASH. POST, June 28, 2001, at B02.

202. Clines, *supra* note 197, at A23.

203. Associated Press, *DNA Testing Frees Virginia Death Row Inmate*, CNN.COM, Feb. 11, 2001, *available at* http://www.cnn.com/2001/LAW/02/11/virginia.death.penalty/index.html (last visited Feb. 25, 2003).

204. *Id.* Washington's release did lead to considerable reform of Virginia law on postconviction proceedings and the preservation of biological evidence. *See generally* Eldridge & Engle, *supra* note 187.

205. Associated Press, *supra* note 203.

206. Scott Shenk, *Earl Washington Sues: Former Deputies, Sheriff and County Are Defendants*, FAUQUIER CITIZEN (Fauquier, Virginia), Oct. 10, 2002, *available at* http://www.-citizenet.com/news/articles/101002/law-order1.shtml (last visited Feb. 26, 2003). According to the complaint, Washington's conviction was "the result of a concerted effort by law enforcement officers . . . to convict him . . . ." *Id.* The lawsuit does not seek a specified dollar amount of damages. *Id.*

207. *See* discussion *infra* Parts V.A-C.

208. *Id.*

wrongful imprisonment statutes to address the problems of the increased numbers of released innocents or to provide them with restitution or assistance, although the proposed Innocence Protection Act would address that problem to some extent.[209]

A. Death Penalty Reform in the States

Several states have recently enacted or proposed moratoria on capital punishment pending studies of the fairness of death penalty statutes and their application.[210] Following thirteen exonerations of death row inmates, Illinois placed a moratorium on capital punishment in January 2000.[211] A commission was then established to study the efficacy and fairness of the death penalty as administered in that state.[212] Last spring the commission issued a report providing eighty-five changes which could lead to the prevention of wrongful executions but concluding that "[n]o system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."[213] Maryland also enacted a moratorium, based in part on the public reaction to Kirk Bloodsworth's story, but the state's new governor recently rescinded the moratorium.[214] The Kansas Supreme Court overturned all four death row inmates' sentences after holding that the state's death penalty statute was

209. *See, e.g.*, *Key Facts at a Glance: Executions*, *supra* note 12.

210. *Id.*

211. *See* discussion *supra* Part I (describing recent events in Illinois); *Interview: Scott Turow Talks About His Experience on Illinois' Commission for Death Penalty Review* (NPR radio broadcast, Dec. 31, 2002) [hereinafter *NPR Interview*].

212. *NPR Interview*, *supra* note 211. Only four members of the fourteen-person commission initially opposed capital punishment, but the group recently voted eight-to-six against the death penalty. *Id.*

213. Jodi Wilgoren, *Panel in Illinois Seeks to Reform Death Sentence*, N.Y. TIMES, Apr. 15, 2002, at A1 (noting that the proposed reforms include requiring videotaping of all interrogations in capital cases, creating a state DNA database, and creating an independent state forensics lab). The report also recommended disallowing capital punishment in cases in which conviction is obtained by a single eyewitness's testimony. *Id.*

214. *Maryland Death Penalty Moratorium*, CBSNEWS.COM, May 9, 2002 (noting that Governor Parris Glendening declared a temporary death penalty moratorium citing "reasonable questions" about the application of capital punishment in Maryland and throughout the United States), *available at* http://www.cbsnews.com/stories/2002/05/09/politics/main508491.shtml (last visited Mar. 18, 2003). There were thirteen men awaiting execution in Maryland when the moratorium was imposed. *Id.*; *cf.* Lori Montgomery, *Death Penalty Study Now Has Ehrlich's Attention*, WASH. POST, Feb. 2, 2003, at SM05 (noting that the new governor, after rescinding the moratorium, was alerted to a study on disparities in the imposition of the death penalty by Lieutenant Governor Michael S. Steele, an African-American death penalty opponent).

impermissibly flawed.[215] Six other states have initiated capital punishment studies which are examining the competence of defense counsel and the fairness of the application of the death penalty.[216] These studies were prompted by increasing evidence of wrongful convictions in those states.[217] Even in states which have not initiated death penalty studies, private groups and lawmakers are increasingly calling for such studies or for the outright abolition of capital punishment.[218] Legislation calling for moratoria or the abolition of capital punishment was introduced in eighteen states and the federal government in 2001, and those measures nearly passed in several of those states.[219]

An area of recent state reform activity involves the disproportionate number of mentally impaired individuals on death row nationwide.[220] A relatively high percentage of the death row inmates who have been exonerated in recent years are mentally impaired individuals.[221] Many states were considering statutes to prohibit the execution of the mentally retarded, and eighteen states had already done so when the Supreme Court recently decided *Atkins*

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215. *What's New*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Jan. 24, 2003), *at* http://www.deathpenaltyinfo.org/whatsnew.html (last visited Mar. 18, 2003) (on file with author).

216. Associated Press, *supra* note 203. In addition to Illinois, the states studying the fairness of capital punishment include Arizona, Indiana, Maryland, Nebraska, and North Carolina.

217. *Key Facts at a Glance: Executions*, *supra* note 12.

218. *See, e.g.*, Herman J. Hoying, *A Positive First Step: The Joint Legislative Audit Review Committee's Review of Virginia's System of Capital Punishment*, 14 CAP. DEF. J. 349 (2002); *Key Facts at a Glance: Executions*, *supra* note 12.

219. *Key Facts at a Glance: Executions*, *supra* note 12.

220. About ten percent of the prisoners on death row are mentally retarded, which means they have I.Q. scores of less than seventy. Cowan, *supra* note 34, at 12. Since 1976, thirty-five mentally retarded individuals have been executed. *Id.*; *see also* discussion *infra* Part IV.C (Earl Washington case study). In many states, for example, inmates pursuing postconviction relief are provided with law books but not lawyers. *See* McFarland v. Scott, 512 U.S. 1256, 1261 (Blackmun, J., dissenting) (citing Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985) (providing an example of a case in which a defendant's inadequate counsel and his mental incompetence rendered his trial unfair but in which his counsel was nevertheless found effective, and his conviction was upheld)).

221. *See, e.g.*, Steven M. Pincus, *It's Good to Be Free: An Essay About the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27, 33-34 (2001) (explaining that prosecutors concealed evidence of Burrell's history of mental retardation and mental illness at trial). Other factors which contributed to Burrell's wrongful conviction included further undisclosed evidence, undisclosed inconsistent witness statements, and false incriminating testimony. *Id.* at 34-47. Burrell is currently seeking compensation for his wrongful imprisonment, but he has not been successful on those claims. Tom Guarisco, *Compensation Sought for Ex-inmate; Sister Says Freed Man Needs Help*, ADVOC. (Baton Rouge, La.), May 23, 2001, at B1. Burrell has been attempting to readapt to freedom since his release, but he has been unable to find employment and has not been compensated by the state for the time he spent wrongfully imprisoned. *Id.*; *see also* discussion *infra* Part IV.C (Earl Washington case study).

v. Virginia.[222] In *Atkins*, the Court reversed its prior holding in *Penry v. Lynaugh* and found that the execution of a mentally incompetent individual violates the Eighth Amendment prohibition of cruel and unusual punishment.[223] The *Atkins* decision immediately halted the upcoming executions of an estimated 160 inmates on death rows nationwide.[224]

Other recent state actions to improve the fairness of capital punishment include the prohibition of the execution of juveniles, the elimination of methods of capital punishment other than lethal injection, and improvement of access to defense counsel for death row inmates.[225]

B. Improved Access to DNA Testing and the Creation of DNA Databases

Many states are improving access to DNA testing for inmates and the accused.[226] Such improved access may encompass the right to DNA testing for all incarcerated and accused individuals or provide longer statutes of limitations for introducing newly discovered evidence.[227] All fifty states currently have statutes requiring the collection of DNA samples from certain classes of criminals and the

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222. *See* Atkins v. Virginia, 536 U.S. 304, 350 (2002); David Firestone, *Georgia Will Not Execute Mentally Ill Killer*, N.Y. TIMES, Feb. 26, 2002, *available at* http://www.nytimes-.com/2002/02/26/national/26EXEC.btml (last visited Feb. 27, 2003); *Key Facts at a Glance: Executions*, *supra* note 12 (describing the death penalty reforms initiated and enacted nationwide in 2001).

223. Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (rejecting, by plurality, defendant's claim that executing a mentally retarded individual was a violation of the Eighth Amendment); *Atkins*, 536 U.S. at 350 (overturning *Penry* and banning the execution of the mentally retarded as contrary to the "evolving standards of decency" embodied in the Eighth Amendment's prohibition of "cruel and unusual punishment"). *See generally* Oliver Kaufman, Note, Atkins v. Virginia: *Is Executing the Mentally Retarded Constitutional?*, 85 MARQ. L. REV. 579 (2001).

224. *Crime and Punishment: The Death Penalty Becomes a High-Profile Issue*, *supra* note 9, at 36.

225. *Changes in the Death Penalty Around the U.S., 2000-01; Changes in the Death Penalty Around the U.S., 2001-02; Changes in the Death Penalty Around the U.S., 2002-03*, DPIC (Death Penalty Info. Ctr., Washington, D.C., Jan. 24, 2003), *at* http://www.deathpenaltyinfo.org (last visited Jan. 5, 2003); *see also* Tabak, *supra* note 6, at 739 (describing recent state actions concerning capital punishment, including moratoria in Illinois and Nebraska); Death Penalty Information Center, *2001 Year End Report*, *supra* note 12 (describing state efforts to improve access to defense counsel in capital cases in 2001).

226. In 2001, seventeen states enacted legislation providing inmates with greater access to postconviction DNA testing. *Key Facts at a Glance: Executions*, *supra* note 12; *see, e.g.*, IND. CODE ANN. § 10-1-9-10 (Michie 2001); WASH. REV. CODE ANN. § 10.73.170 (West 2001); 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2001). However, some of these statutes retain fairly high limits as to when exactly DNA testing is available and when the results of the testing may be introduced at trial or in a postconviction proceeding.

227. Death Penalty Information Center, *Year End Report 2001*, *supra* note 12.

maintenance of DNA databases using these samples.[228] Such databases have been effective both for identifying criminals and for exonerating the innocent.[229] Law enforcement officers can access these databases to match DNA profiles from crime scenes with those of known offenders in the state databases, often resulting in "cold hits," when the criminal's identity is determined without any other evidence.

Critics of DNA and DNA databases point to the invasion of privacy involved and to the possibility of their use for discriminatory genetic profiling.[230] There are also those who argue the contrary position—that a nationwide DNA database would be the most effective means of combating the possibility of law enforcement discrimination based on race or ethnicity.[231] The Supreme Court has yet to address the issue, but state courts have upheld the constitutionality of DNA collection and DNA databases.[232] Although privacy concerns are legitimate, such fears are outweighed by the need to curtail the obvious and already realized risk of convicting and even executing the innocent.

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228. *See, e.g.*, WASH. REV. CODE ANN. § 10.73.170 (West 2001) (providing for DNA testing requests by current prisoners, but the issue of DNA testing must be raised at trial after 2002); ARIZ. REV. STAT. § 13-4240 (2000) (allowing for postconviction DNA testing for prisoners meeting fairly strict requirements); ILL. COMP. STAT. ANN. 5/116-3 (West 2001) (providing inmates the right to DNA testing where the results will potentially be materially relevant); *see also* Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 767 (1999).

229. Smialik et al., *supra* note 90, at 18.

230. *See* Hibbert, *supra* note 228, at 767 (arguing that misplaced reliance on DNA testing in certain cases can lead to erroneous exonerations and proposing limits to decrease the possibility of DNA databases being used for invasions of privacy and genetic profiling); David M. Halbfinger, *Police Dragnets for DNA Tests Draw Criticism*, N.Y. TIMES, Jan. 4, 2003, at A1 (discussing criticism of broad DNA dragnets, including their Fourth Amendment search and Fifth Amendment coercion and self-incrimination implications, as well as their supposedly limited utility and high expense). *Compare* David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 BROOK. L. REV. 179, 183-84 (2001) (advocating the creation of DNA databanks, but noting serious constitutional and privacy concerns implicated by such databanks), *with* Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127 (2001) (outlining necessary procedural safeguards to accompany the creation of DNA databanks).

231. David H. Kaye et al., *Is a DNA Identification Database in Your Future?*, 16 CRIM. JUST. 4 (2001) (advocating the creation of a nationwide DNA database in order to aid crime prevention by identification and deterrence). Both of these competing positions implicitly acknowledge that an all-or-nothing approach to gathering DNA evidence from the accused is necessary to avoid discrimination.

232. *See* Patterson v. State, 742 N.E.2d 4, 11 (Ind. Ct. App. 2000) (holding that states have a compelling Fourth Amendment interest in promoting DNA testing and creating state DNA databases). In *Patterson*, the court found that states have an interest in exonerating the innocent that outweighs the right to privacy. *Id.* Thus, the court stated that a search warrant is not required for officers to reuse a validly obtained DNA sample. *Id.*

In addition to these efforts at the state level, recently enacted federal statutes provide for mandatory DNA testing of all federal inmates, including those on parole.[233] These DNA samples are then compiled into a federal database—the Combined DNA Index System ("CODIS").[234] State and local forensic laboratories maintain their collections of DNA profiles on a computer database.[235] This database includes DNA samples from both convicted felons and unsolved crimes.[236] Crime scene investigators then can test DNA evidence against the profiles in the database, even in cases in which they have no other evidence of the criminal.[237] The databases reduce the time and expense associated with a normal investigation of the crime.[238]

These databases could be even more effective were it not for a substantial backlog in DNA testing and in updating the database.[239] There have been recent federal efforts to eliminate this backlog.[240] Attorney General John Ashcroft announced that the Department of Justice will provide grants to state crime labs to reduce their DNA testing and compilation backlogs.[241] The problem is enormous, with hundreds of thousands of DNA samples waiting to be tested in crime labs across the country.[242] Ashcroft's recent initiative will likely help

233. 42 U.S.C. § 14135a(a) (2000). An inmate who fails to cooperate with the statutory collection procedure is guilty of a misdemeanor. § 14135a(a)(5).

234. § 14135a(b). Another provision gives the Federal Bureau of Investigation the authority to appoint an advisory board to develop and implement quality standards for DNA testing, forensic laboratories, and forensic scientists. § 14131 ("Quality Assurance and Proficiency Testing Standards"). A similar statute provides for federal grants to state DNA laboratories meeting the federal standards. 42 U.S.C. § 3796kk-2 (2000).

235. Smialik et al., *supra* note 90, at 18.

236. *Id.*

237. *Id.*

238. *See id.* (providing several examples of "cold hits" in cases in which there was no evidence other than the forensic evidence which provided DNA samples); *see also* Kaye et al., *supra* note 231 (advocating a population-wide DNA database and rebutting anticipated arguments against such a system). The authors argue that a blanket collection of DNA from the entire population, beginning with infants, would prevent potential discriminatory collection and would significantly improve criminal investigations. *Id.* at 5-6.

239. *Demand for DNA Testing Creating National Backlog*, CNN.COM, Aug. 30, 2001, *available at* http://www.cnn.com/2001/LAW/08/29/dna.hacklog/index.html (last visited Jan. 5, 2003). The Justice Department estimates that there are more than 750,000 samples collected from convicts throughout the country that are waiting to be tested. *Id.* The average sample is not tested for six months, and such a delay often surpasses the statute of limitations for prosecuting the case. *Id.*

240. *Ashcroft Announces Grants to Eliminate State's DNA Testing Backlog*, BULL. FRONTRUNNER, Aug. 2, 2001. Ashcroft said that the delay in testing samples leads to the dual problems of offenders being released and innocent people remaining in prison. *Id.*

241. *Id.*

242. *Id.*

to reduce the backlog, and the federal Innocence Protection Act, if passed, would address the problem even more rapidly.

C. *The Innocence Protection Act*

The federal government is more generally assessing the fairness of the death penalty and the usefulness of DNA testing of forensic evidence in criminal investigations and the postconviction context.[243] In October 2000, Senator Patrick Leahy of Vermont introduced the Innocence Protection Act to the Senate ("the Act").[244] The Act would ensure greater access to competent defense counsel for death row inmates, improve inmates' access to postconviction DNA testing, and increase state incentives to preserve DNA evidence.[245] To improve representation of capital defendants, the Act also calls for a national commission of prosecutors, lawyers, and judges to develop standards to ensure adequate legal services.[246] It would shift the authority for appointing defense counsel in capital cases from state judges to an independent authority.[247] In addition, the Act would provide for the maintenance of this DNA in a system of linked state and federal DNA databases and would withhold funding from states that do not comply with its requirements.[248] Although both the state

243. *See, e.g.*, U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) (2000) (examining apparent patterns of racial discrimination in the application of the federal death penalty), *available at* http://www.justice.policy.net-/studies/pdf/dpsurvey.pdf (last visited Apr. 11, 2003).

244. S. 486, 107th Cong. (2001). On October 26, 2000, Senator Leahy's nonbinding resolution calling for states to improve legal representation in capital cases and to provide greater access to postconviction DNA testing passed as part of Senate Bill 3045, the Paul Coverdell National Forensic Sciences Improvement Act of 2000, Pub. L. No. 106-561, 114 Stat. 2787 (2000). For the House of Representatives version of the Innocence Protection Act, see H.R. 912. In addition to this development, Senator Russ Feingold recently introduced a bill which would place a moratorium on the federal death penalty and encourage states to do the same while a National Commission reviews the fairness of the death penalty. *See* The National Death Penalty Moratorium Act of 2001, S. 233, 107th Cong. (2001). Although that measure did not pass, its introduction demonstrates the recent shift in the death penalty debate. *See also* Patrick Leahy, *Symposium: Serenity Now or Insanity Later?: The Impact of Post-Conviction DNA Testing on the Criminal Justice System: Introduction*, 35 NEW ENG. L. REV. 605, 606 (2001) (describing the purposes behind and goals of the Innocence Protection Act).

245. *See* Leahy, *supra* note 244, at 606-07; *see also* Masters, *supra* note 12, at A1 (describing the major systemic changes proposed in the Innocence Protection Act). Under the Act, it would be a due process violation to deny prisoners the right to DNA testing of forensic evidence. S. 486; *see also* Patrick Leahy, *Symposium on the Death Penalty: Reforming a Process Fraught With Error, The Innocence Protection Act of 2001*, 29 HOFSTRA L. REV. 1113, 1113-17 (2001) (providing Senator Leahy's comments on the introduction of the Innocence Protection Act of 2001 in the U.S. Senate).

246. *See* Glod, *supra* note 201.

247. *Id.*

248. *See* S. 486, § 101(a)(11).

and federal systems provide at least some access to DNA testing and maintain various DNA databases, there is currently no integrated system combining the DNA data from both state and federal inmates.[249]

VI. RESTORING THE WRONGLY CONVICTED UNDER THE CURRENT SYSTEM

While the proposed federal Innocence Protection Act is a starting point for reducing the occurrence of wrongful convictions, it addresses only one aspect of the problem—that of prevention.[250] The Act and other proposed statutes aimed at reducing the risk of wrongful convictions do little for those innocents who have been rightfully released. To be more effective, any federal statutory scheme addressing the problem of wrongful convictions should also seek to increase the availability of restitution for those released—by providing a comprehensive system to restore exonerated innocents to their preconviction position in society.

There is currently little in the way of available remedies for those individuals who have been wrongly convicted and released.[251] Current possibilities for individuals seeking restitution for wrongful incarceration fall into three general categories: (1) actions against the state pursuant to statutes providing for governmental compensation for individuals wrongly convicted of and imprisoned for crimes;[252] (2) wrongful conviction actions brought as claims of violations of state and

249. *See id.*; *see also* Glod, *supra* note 201. Earl Washington and Kirk Bloodsworth were both present last June to testify before the Senate Judiciary Committee, which was considering the provisions of the Act which would ensure more competent counsel for capital defendants. *Id.* The men testified about the years they spent wrongfully imprisoned on death row and the role that ineffective assistance of counsel played in their convictions. *Id.*

250. The Act does recommend greater compensation for federal and state inmates who are wrongfully convicted and sentenced—especially for wrongful convictions in death penalty cases. However, the amounts provided in the Act are not necessarily adequate and do not take into account pain and suffering, emotional distress damages, or exonerated individuals' housing, rehabilitation, and psychological assistance needs. *See* S. 486, §§ 301-302.

251. *See, e.g.*, Guarisco, *supra* note 217, at B1 (explaining Albert Burrell's struggle to adapt to normal life and to gain compensation for his thirteen years of wrongful imprisonment on death row). Burrell is mildly mentally retarded and cannot read. *Id.* Upon his release from prison, the prison staff gave him ten dollars so that he could get a ride into town. *Id.*

252. *See, e.g.*, Annotation, *Construction and Application of State Statute Providing Compensation for Wrongful Conviction and Incarceration,* 34 A.L.R. 4th 648, 649 (West 2001) (listing examples of state and federal cases applying state statutes providing compensation to those wrongly convicted).

federal constitutions;[253] and (3) actions against states based on tort liability for false imprisonment.[254]

A. Compensation for Wrongful Conviction and Imprisonment

Some former inmates have prevailed on wrongful conviction and incarceration claims brought under state statutes, recovering damages in the form of lost earnings for the period of their incarceration.[255] Although most states have some form of wrongful imprisonment or incarceration statute providing the wrongly convicted with the right to seek restitution, these statutes vary dramatically.[256] Most do not guarantee restitution but instead impose substantial barriers to recovery. First, most of these statutes require that an inmate's original conviction be either overturned or vacated to recover for wrongful imprisonment.[257] To prevail on a claim for compensation for wrongful imprisonment or incarceration, the inmate usually must prove that either: (1) the crime alleged did not occur at all; or (2) that, if the crime did occur, it was committed by someone else.[258] In some states, a governor's pardon is necessary to overcome this burden.[259] Cases in which the claimant was later found not guilty by reason of insanity do not satisfy this requirement.[260] Acquittal from

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253. *See* 42 U.S.C. § 1983 (2000).

254. *See, e.g.*, Hoffner v. New York, 142 N.Y.S.2d 630, 631-32 (N.Y. Ct. Cl. 1955) (holding that an apology is insufficient restitution for a man who was wrongly imprisoned for twelve years due to prosecutorial misconduct and awarding him $112,290 in compensatory damages for false imprisonment). In *Hoffner*, the court applied a balancing test, taking into account that the petitioner's earnings would have probably been low, to determine the amount of compensation. *Id.* at 632.

255. *See* Annotation, *supra* 252, at 649. At least half of the states have statutes providing for damages for wrongful or false imprisonment, although the statutory requirements vary dramatically, as do the nature and the extent of relief available upon a successful showing of wrongful or false imprisonment. *See, e.g.*, OHIO REV. CODE ANN. § 2305.02 (Anderson 2001) (requiring that a defendant prove innocence by a preponderance of the evidence and that a wrongful imprisonment action can only be instituted after the original conviction is reversed or vacated); IOWA CODE § 663A.1 (2001) (requiring that a defendant prove by clear and convincing evidence that he did not commit the offense or that the offense did not occur and limiting lost wages recovery to $25,000 per year of wrongful imprisonment); *see also* Todd Richissin, *Austin Might Face Struggle for Redress; Wrongly Imprisoned Rarely Compensated, Even in Glaring Cases*, BALT. SUN, Jan. 8, 2002, at A1 (discussing the case of Michael Austin, who was recently released from a Maryland prison after twenty-seven years of wrongful imprisonment and who is now attempting to obtain restitution). Kirk Bloodsworth is apparently the rare example of a wrongfully imprisoned individual gaining restitution in Maryland. Richissin, *supra*, at A1.

256. *See supra* note 255 and accompanying text.

257. *See supra* note 255 and accompanying text.

258. *See supra* note 255 and accompanying text.

259. *See supra* note 255 and accompanying text.

260. *See, e.g.*, Annotation, *supra* note 252, at 651 (citing Ebberts v. State Bd. of Control, 84 Cal. App. 3d 329, 332 (Cal. Ct. App. 1978)). In *Ebberts*, the California Court of Appeals found:

a homicide conviction based on justifiable self-defense, on the other hand, generally satisfies the requirement that the crime did not occur, allowing a wrongful imprisonment claim to proceed.[261]

In addition, the presumption of innocence applied to the accused during trial is no longer applicable in postconviction proceedings, even if the inmate has been fully acquitted of the crime for which he was imprisoned.[262] A released inmate whose conviction has been either reversed or vacated may still be required to prove his innocence either by a preponderance of the evidence or by clear and convincing evidence.[263] Additional obstacles faced by a former inmate seeking wrongful imprisonment compensation include obtaining effective assistance of counsel, paying attorneys' fees and costs, and overcoming a justifiable distrust and avoidance of the entire judicial system.[264] In light of the recent increase in exonerations based on DNA evidence, several states are reconsidering their wrongful imprisonment statutes, making it easier for the wrongfully convicted to obtain restitution after release.[265]

> [T]he claimant's mere denial of the commission of the crime for which he was convicted, reversal of the judgment of conviction on appeal, acquittal of the claimant on retrial, or, the failure of the prosecuting authority to retry the claimant for the crime, may be considered . . . but will not be deemed sufficient evidence [of wrongful conviction] . . . [absent] substantial independent corroborating evidence that the claimant is innocent of the crime charged.

84 Cal. App. 3d at 333; *see also* Reed v. State, 574 N.E.2d 433, 435 (N.Y. 1991) (holding that a wrongful conviction claim could not stand where conviction was reversed for insufficient evidence without a showing of claimant's innocence).

261. *See, e.g.*, Diola v. State Bd. of Control, 135 Cal. App. 3d 580, 588 (Cal. Ct. App. 1982).

262. *See, e.g.*, LeFevre v. Goodland, 19 N.W.2d 884, 885 (Wis. 1945):

> Neither the presumption of innocence applicable on and during the course of the trial of every person accused of crime, nor the fact that there was an acquittal of [the prisoner] upon the reversal on appeal of the judgment of conviction, based on the verdict of guilty approved by the trial court, can be considered sufficient to establish or to compel a finding . . . that "it is clear beyond a reasonable doubt that the petitioner was innocent of the crime."

In *LeFevre*, the Wisconsin Supreme Court also held that if the former inmate was not found innocent beyond a reasonable doubt, he was then prevented from pursuing other possible remedies for wrongful conviction. *See id.* at 885-86.

263. *See, e.g.*, OHIO REV. CODE ANN. § 2305.2 (Anderson 2001) (providing that a released inmate must have had his original conviction vacated or reversed and must still prove innocence by a preponderance of the evidence); *see also*, Annotation, *supra* note 252, at 653 (outlining courts' application of state statutes providing compensation for wrongful conviction and incarceration).

264. *See, e.g.*, discussion *supra* Part IV.A (Kirk Bloodsworth case study).

265. *See generally Changes in Death Penalty Laws Around the U.S.—2000-2003*, BUREAU OF JUSTICE STAT. (U.S. Dep't of Justice, Washington, D.C., Jan. 8, 2003), *at* http://www.-deathpenaltyinfo.org/article.php?did=236&scid=40 (last visited Apr. 11, 2003). Such statutes are applicable to anyone who has been wrongfully convicted and then released. Cowan, *supra* note 34. However, in cases of DNA exoneration, the former inmate is in a substantially better position to overcome the burden of proving his innocence by clear and convincing evidence or by a

B. Federal Causes of Action

Absent a state statute providing a cause of action for wrongful imprisonment, inmates may bring a federal cause of action for violations of constitutional due process or equal protection guarantees. However, federal causes of action also present significant problems for the newly released inmate. First, the statutes of limitations on such claims often prevent inmates from pursuing causes of action based on convictions that occurred many years earlier.[266] The longer the inmate has been wrongfully imprisoned on death row, the more unlikely it is that he will be able to bring a claim under § 1983 or another federal statute.[267] Several recent cases have alleviated this problem by providing that the statute of limitations for a § 1983 claim can equitably "toll" during the time that the innocent is in prison, preventing the duration of wrongful imprisonment from disadvantaging an inmate's right to such a cause of action.[268] In addition, bringing a cause of action for wrongful conviction compensation under federal law generally bars the possibility of recovering for wrongful imprisonment under a state statute.[269] Bringing a federal habeas claim may also thwart a future claim against the state for wrongful imprisonment.[270] A released innocent often must make a difficult legal choice between recovery under state or federal law before proceeding with a wrongful imprisonment claim.

Finally, once an inmate is proven innocent according to state statutory standards for wrongful conviction or for the purposes of federal civil rights statutes, it is still necessary to determine the

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preponderance of tbe evidence. Alabama is considering a proposal to pay wrongfully convicted individuals $50,000 for each year that they were in prison. *Id.* Likewise, Florida may compensate the estate of a death row inmate who died of cancer before being exonerated. *Id.*

266. *See* Daniel E. Feld, Annotation, *What Statute of Limitations is Applicable to Civil Rights Action Brought Under 42 U.S.C. § 1983?*, 45 A.L.R. FED. 548, 555 (1979) (stating that federal courts ordinarily look to the period of limitations applicable to the most closely analogous state cause of action to determine when a § 1983 suit is time barred).

267. *Id.*

268. *See* 42 U.S.C. § 1983 (2000); Mitchell v. City of Boston, 130 F. Supp. 2d 201, 209, 216 (D. Mass. 2001) (holding that the statute of limitations on defendant's § 1983 claim tolled until the favorable termination of the criminal proceedings). In *Mitchell*, the state civil rights violation claim did not toll during the defendant's imprisonment. *Id.* at 209. The defendant also failed to prove the elements of a malicious prosecution claim. *Id.* at 215.

269. *See, e.g.*, Carter v. State, 546 N.Y.S.2d 648, 650 (N.Y. App. Div. 1989) (holding that a wrongfully convicted man who had received full compensation under federal statute could not also recover under state statute).

270. *See, e.g.*, Gilbert v. State, 437 S.W.2d 444, 446 (Tex. App. 1969) (holding that a plaintiff who had been granted federal habeas corpus relief was not eligible for wrongful imprisonment compensation under a state statute).

amount of damages recoverable under the statute.[271] State statutes provide varying methods for calculating damages for wrongful conviction and incarceration.[272] Some states set strict limits on the amount of damages recoverable, regardless of the amount of time spent wrongfully imprisoned.[273] The amount of damages recoverable in a wrongful imprisonment action against the federal government is currently limited to $5,000 per year—even in capital cases.[274]

C. *Why These Remedies Are Inadequate*

The available remedies for restoring innocence after wrongful conviction are inadequate—both procedurally as applied to those who are wrongfully convicted and substantively as applied to those wrongfully sentenced to death row. First, because of the virtually insurmountable procedural barriers that they impose and because of their limits on recovery, state wrongful imprisonment statutes are often a significant obstacle to compensation rather than a sufficient means of redress. The difficulties imposed by these statutes force the wrongfully convicted to undergo additional trouble if they wish to obtain compensation. Because of these hurdles, released innocents may avoid seeking recovery.[275] They choose instead to ignore a legal system that has failed them once. This decision further weakens the legitimacy of the entire criminal justice system.[276]

Second, the current methods of obtaining compensation for wrongful conviction, including the proposed Innocence Protection Act, do not adequately address the substantive differences between convictions.[277] Because of the fundamental difference between a death sentence and any other punishment passed down by the criminal justice system, current methods of compensating the wrongly

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271. *See* Annotation, *supra* note 252, at 655-56 (providing examples of various state statutory methods for calculating wrongful imprisonment damages).

272. *See id.*

273. *See, e.g.*, Ciancanelli v. Cal. State Bd. of Control, 248 Cal. App. 2d 705, 707-08 (Cal. Ct. App. 1967) (holding that $5,000 was the limitation for recovery for a wrongful felony conviction even though the claimant had sustained greater losses). *But see Florida Pays Men $500,000 Each for Wrongful Convictions*, CNN.COM, July 13, 1998, *available at* http://www.cnn.com/US/9807/13/deathrow.restitution/ (last visited Feb. 25, 2003) (relating the story of two men who had been wrongfully imprisoned on death row for twelve years and then finally had received compensation thirty years after their convictions).

274. 28 U.S.C. § 2513(e) (2000).

275. *See, e.g.*, discussion *supra* Part IV.A (Kirk Bloodsworth case study).

276. Although the legal system maintains these entities as separate and distinct components of the criminal justice system, capital defendants and convicted inmates are more likely to view them as interconnected or even indistinguishable.

277. *See* S. 486, 107th Cong. (2001); H.R. 912, 107th Cong. (2001).

imprisoned prove particularly inadequate when applied to innocent individuals who have spent years on death row.[278] Because of the severity of the punishment wrongfully imposed and its accompanying psychological burdens, these individuals are entitled to greater wrongful conviction damages than other released innocents. The fact that they were previously denied the heightened procedural safeguards supposedly present in the American capital punishment system strengthens the case for this entitlement.[279]

The Supreme Court has recognized the fundamental difference between capital punishment and any other sentence.[280] Providing easier access to increased wrongful imprisonment compensation would be consistent with the traditional attempt to distinguish the death penalty from other forms of punishment. This distinction holds true regardless of whether or not the system moves toward a moratorium on or the abolition of the death penalty.

VII. RECOMMENDATIONS

The legal system has been slow to keep up with recent shifts in public opinion against the death penalty.[281] If federal and state governments are not required to compensate innocents harmed by a flawed judicial system adequately, there will be little governmental incentive to improve the prosecutorial and judicial processes. If there is no governmental incentive to improve the process from the inside, innocent inmates on death row will be forced to wait for the relatively slow shift of public opinion, relying upon their own persistence and the work of private advocacy groups to lead to their exoneration. In addition, without systemic change to the capital punishment system, the government may be able to justify its inaction by pointing to increases in DNA exonerations as evidence that the system is working. Such governmental free riding on the efforts of private

278. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, Powell & Stevens, JJ., concurring) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

279. For an analogy that demonstrates the practical lack of comparable situations: in a classic torts case providing damages for the intentional infliction of emotional distress, a woman incorrectly told that her husband was near death after an accident recovered damages for her ensuing emotional and psychological distress. Such a sbock to a person's emotions and psyche, however traumatic, certainly pales in comparison to the prospect of enduring years in prison for a crime that one did not commit.

280. *See Woodson*, 428 U.S. at 305.

281. *See* discussion *supra* Part I; *see also supra* note 8 and accompanying text (refuting the arguments of death penalty supporters by pointing to the demonstrated relationship between support for capital punishment and ignorance of the problems in the system).

citizens represents an acknowledgement of the abdication of the criminal justice system's central mission of finding the truth.

The state and federal governments must take responsibility for their mistakes to maintain the legitimacy of the criminal justice system and its goal of enforcing individual accountability. Reforming the capital punishment system by working to prevent the initial occurrence of wrongful convictions is the obvious first step. But the less obvious second step, reforming the system of compensating those wrongfully sentenced to death, is just as integral to true systemic reform. The criminal justice system should consider the advent of DNA testing and its utility for both exoneration and investigation as an opportunity to improve the system.[282]

The recent improvements in and increased access to DNA testing provide a unique window of opportunity. Because of the accuracy of DNA testing and the certainty with which it can exonerate wrongfully convicted individuals, providing restitution for those exonerated from death row is more necessary than ever. Preventing wrongful convictions and restoring preconviction status to the wrongfully convicted are the most practical and least difficult means by which the system can regain its legitimacy and efficacy. Reform therefore should proceed with the dual motives of prevention and restitution. By coordinating a plan of restitution with an increase in inmates' access to DNA testing, the government may channel the current shift in public opinion into support for improvements in the criminal justice system. The government may first concentrate on the problem of imprisoned innocents, then work to restore those released innocents, and finally, address the systemic defects that lead to the high incidence of wrongful convictions.

A. Nationwide Death Penalty Moratorium and Fairness Studies

Although recent actions, including the proposed Innocence Protection Act, are an admirable start, more legislation is necessary to guard against the possibility of convicting—and especially, of executing—the innocent. Capital punishment, due to its finality, differs more from life in prison than life imprisonment differs from a prison term of a year or two.[283] Given the increasing frequency of

282. *See generally supra* note 25 and accompanying text.

283. *Woodson*, 428 U.S. at 305; *see* Margaret Koosed, *Averting Mistaken Exectutions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 108-29 (2001) (advocating nationwide adoption of the Model Penal Code's exclusion of death in the presence of lingering doubt to avoid wrongful convictions); *see also* MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

innocents being exonerated and released, death penalty states should declare moratoria on capital punishment—at least until fairness studies take place. A federal moratorium should also be imposed.[284]

B. Procedural and Systemic Changes

If the capital punishment system remains in place, however, certain procedural and systemic changes should occur to ensure that the death penalty administration is as equitable as possible. The first step would be the passage of the Innocence Protection Act.[285] The Act would implement a system of DNA testing and DNA databases, while also increasing the availability of defense counsel in capital cases.[286] DNA testing should be required of all individuals accused of crimes as well as of all individuals currently on death row. In addition, the Act would provide minimum standards requiring both the federal government and the states to provide restitution to the wrongfully convicted who are later exonerated.[287]

Second, a higher standard of proof should be required in the sentencing phase of capital cases. The Model Penal Code provides an example of such a heightened standard, requiring that the evidence foreclose "all doubt respecting the defendant's guilt" before allowing the imposition of the death penalty.[288] In addition, effective assistance of counsel should be a right at all levels in capital cases, including in postconviction relief proceedings.[289] This right would be especially helpful to those individuals who were inadequately represented at trial or on appeal. Although none of these solutions would solve the

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284. In 2001, Senator Russ Feingold introduced a bill "to place a moratorium on executions by the Federal Government and urge the States to do the same, while a National Commission on the Death Penalty reviews the fairness of the imposition of the death penalty." S. 233, 107th Cong. (2001). The bill did not pass last year. *Id.* Most capital sentences are administered by the states, and federal executions are extremely rare. *See* Michael A. Cokley, Comment, *Whatever Happened to that Old Saying "Thou Shalt Not Kill"? A Plea for the Abolition of the Death Penalty*, 2 LOY. PUB. INT'L L.J. 67, 77-80 (2001). Timothy McVeigh's execution was the recent, notable exception of a federal capital sentence.

If nationwide moratoria are not possible at present, the allowance of posthumous testing of DNA evidence could provoke a debate forceful enough to overcome current obstacles. *See, e.g.*, Moyes, *supra* note 17, at 987; Gross, *supra* note 21, at 471 (noting that proof of execution of innocent prisoners contributed to successful abolition movements in both Michigan and England).

285. Innocence Protection Act, S. 486, 107th Cong. (2001); H.R. 912, 107th Cong. (2001).

286. § 201(b)-(c). The Act would make it a Fourteenth Amendment due process violation for states to deny death row inmates the right to DNA testing. *See* §§ 103-104.

287. §§ 301-302.

288. MODEL PENAL CODE § 210.6(1)(f) (Proposed Official Draft 1962).

289. The *Strickland* standard should be altered in the context of capital cases. *See supra* note 67 and accompanying text.

entire problem of wrongful convictions, implementing these changes while capital punishment moratoria were in place would allow the states and the federal government to assess their efficacy and reevaluate the problems in the capital punishment system, while simultaneously reducing the risk of executing the innocent. Imposing death penalty moratoria remains, however, the necessary first step to restoring innocence, because moratoria provide an opportunity for careful consideration of the errors in the system.

C. Restitution for the Wrongfully Convicted

To properly account for systemic injustices and to restore public confidence in the judicial system, changes must occur to ensure that the wrongly convicted will be made as whole as possible after their release. Other judicial systems can be instructive on this point. Many nations provide substantial restitution for the wrongfully convicted after their release.[290] For example, in England, an independent review commission works to identify and correct wrongful convictions.[291] The Criminal Cases Review Commission is an independent executive body that basically acts as a government-sponsored innocence project.[292] The commission has broad power to investigate inmates' applications claiming innocence and to refer the applications to the court of appeals for postconviction review.[293] The court then reviews newly discovered evidence and employs a fairly relaxed standard for overturning convictions.[294] A similar independent commission in the United States could relieve the privately funded innocence projects of some of their substantial caseloads while indirectly restoring legitimacy to the judicial system.

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290. *See, e.g.*, Duncan Gardham, *27-Year Ordeal Over for Prisoner*, DAILY TELEGRAPH (Austl.), Jan. 17, 2002, at § 27 (telling the story of a British man who was wrongfully imprisoned for twenty-seven years and who was compensated six million Australian dollars upon his recent release).

291. *See* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1246 (2001) (explaining the English system and recommending that a similar independent commission be created in the United States). Other nations tend to be more generous with wrongful conviction damages, in terms of their monetary amounts and the facility of the procedures of obtaining them. *See, e.g.*, Anne Baylin, *A Canadian Tragedy*, CBS NEWS ONLINE, (telling the story of David Milgaard, who was exonerated by DNA evidence after spending twenty-three years in prison and who was awarded ten million Canadian dollars in wrongful imprisonment damages upon his release), *at* http://www.truthinjustice.org-/canadian_tragedy.html (last visited Feb. 27, 2003).

292. *See* Griffin, *supra* note 291, at 1275-76.

293. *Id.* at 1246.

294. *Id.*

In addition, current standards for obtaining compensation after wrongful incarceration do not account for the distinction between a death sentence and any other sentence. They also do not address the obvious qualitative difference in proof between an exoneration based on random clemency or even errors at trial and one based on DNA evidence of actual innocence. Wrongful imprisonment statutes should be updated to reflect the recent innovations in DNA technology and the resulting exonerations. Imposing heavy burdens of proof on those who have already been exonerated pursuant to DNA evidence obviates the presumption of innocence that is a central tenet of the American criminal justice system. Once someone is proven innocent pursuant to DNA evidence, which leaves no reasonable doubt, he should be entitled to full compensation—for lost earnings, pain and suffering, and reintroduction assistance—from the state for the harms suffered as a result of wrongful incarceration, whether capital or not. The presumption of innocence until proven guilty should reattach to an individual as soon as it is shown by conclusive DNA evidence that he was wrongfully convicted.[295]

Both the state and federal systems need more accessible means by which the wrongly convicted can seek redress. Rather than requiring a separate cause of action to seek compensation for wrongful imprisonment, statutes should provide an automatic accounting of damages when an innocent person is released. This automatic damages calculation should take into account more than the obvious claim of lost wages following a wrongful incarceration.[296] Given the qualitative difference between a death penalty conviction and other sentences, economic restitution is not sufficient compensation for wrongful imprisonment on death row.[297] Pain and suffering damages should be available to the released innocent and could be calculated in a manner similar to that employed in false imprisonment and other tort contexts. Because the psychological impact of spending years on death row while innocent cannot be ignored, psychological assistance is a necessary component of restitution for those individuals

295. Related to this recommendation is the call for a strengthened "presumption of life" in capital sentencing, which would require the prosecution to prove beyond a reasonable doubt that the death penalty is the only appropriate penalty rather than the default presumption of life imprisonment for even the most heinous crimes. *See* Damien P. Delaney, *Better to Let Ten Guilty Men Live: The Presumption of Life—A Principle to Govern Capital Sentencing*, 14 CAP. DEF. J. 283, 283-84 (2002).

296. Although such an automatic accounting would seem at first blush to present insurmountable logistical and financial difficulties, wrongful death compensation in tort law and insurance calculations would provide useful analogies for setting up such a system.

297. *See* discussion *supra* Part IV (providing case studies that demonstrate that the problems faced by released innocents involve more than a lack of monetary assistance).

wrongfully sentenced to die. Reentry assistance, including assistance in finding housing and employment, should also be provided to help former inmates readjust to normal life.[298] Such remedies must be available without conditions attached and without statutory limits on the amounts recoverable. Although such a system would not allow wrongfully convicted individuals to regain the years lost, it would help to restore the legitimacy of the criminal justice system.

VIII. CONCLUSION

The development of DNA testing and its use to exonerate innocent inmates has provided the American public with a new glimpse into the workings of the criminal justice system, including its considerable defects. These problems are especially obvious in the administration of the death penalty, as the increase in the number of innocent individuals released from death row indicates. The frequency of recent DNA exonerations provides persuasive evidence that the American system of capital punishment is fundamentally flawed. Setting aside the usual arsenal of moral, economic, and practical arguments against the death penalty in and of itself, DNA exonerations reveal that the death penalty may be unconstitutional as applied.[299] Considering the number of innocents who have been wrongfully convicted under the current system, there is a strong argument that the continued application of this system of capital punishment is unconstitutionally cruel and unusual.

Preventing future wrongful convictions in the United States requires confronting the problem from both sides. In keeping with the dual functions of the American criminal justice system—protecting the innocent and convicting the guilty—a comprehensive plan of reform must be both preventive and compensatory. Only by working both to

298. For example, all individuals exonerated after lengthy imprisonment face the simple question of how to account for the missing years on a job application. Even though they are actually innocent of the crimes for which they were imprisoned, the tarnish of time spent in prison remains on their record as an affirmative obstacle to obtaining employment, while their lack of updated job market skills serves as the accompanying negative obstacle.

299. *But see, e.g.*, Cokley, *supra* note 284, at 77-80 (noting that eclipsing the question of whether capital punishment constitutes "cruel and unusual punishment" in violation of the Eighth Amendment is the question of whether the death penalty, as currently administered, permits the execution of the innocent).

decrease the risk of executing the innocent and to restore to innocence those who were wrongfully convicted will the judicial system regain its legitimacy.

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