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RATES OF REVERSIBLE ERROR AND THE RISK OF WRONGFUL EXECUTION

A method developed by a multidisciplinary team at Columbia indicates that there is a substantial risk of innocent fatalities in the operation of the death penalty, and reveals a need for ongoing risk assessment in the process of administering the penalty.

BY JAMES S. LIEBMAN

Innocent fatalities are a concern of all social activity with a capacity to kill. This is especially true when the social activity is the death penalty since an innocent person's execution is not simply a tragic collateral consequence of activity with a non-fatal objective. Instead, the taking of life is the *goal* of the enterprise, and the killing is the *intended* act of the state.

There is another difference between accidental fatalities in other social activities and those that occur when the capital system miscarries. Typically, the former fatalities are easy to spot and quantify; the latter are not. Precisely because operating a railroad is not designed to kill, the fact that passengers died when a train went off the rails is conclusive proof

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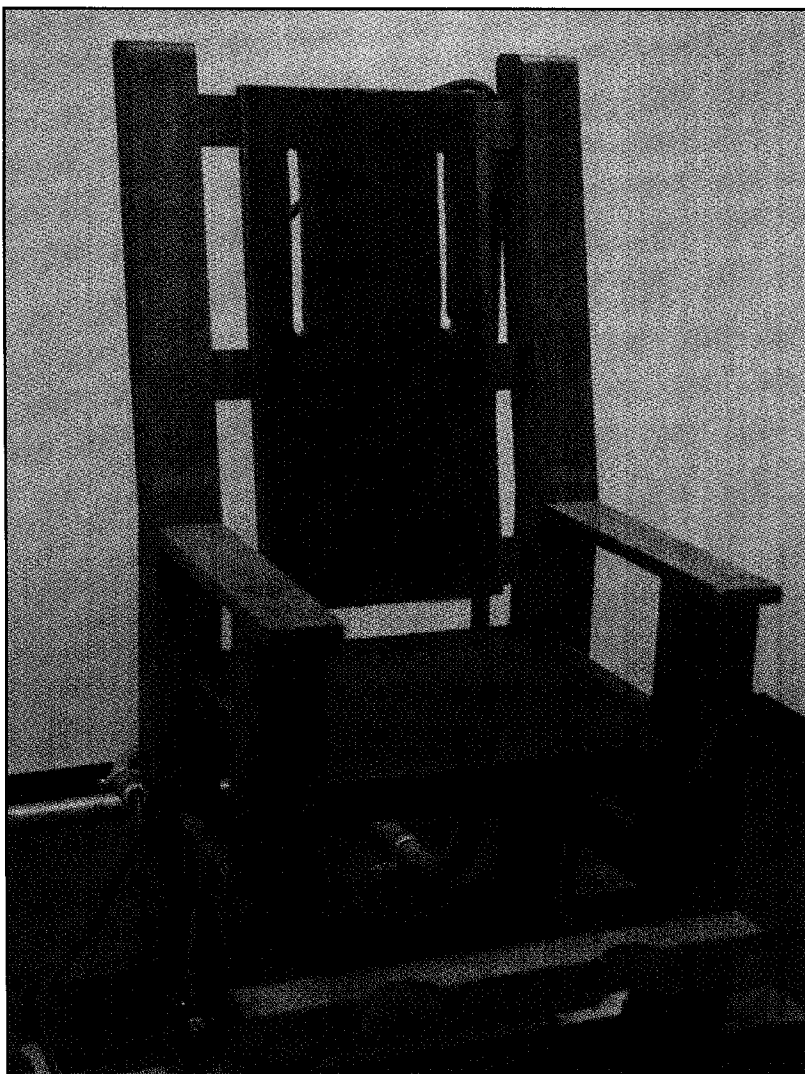
that a serious mistake occurred. When the number of victims is determined—usually without too much difficulty—the extent of the tragedy is clear. All that remains is to figure out what went wrong, to compensate the victims' families, and to take steps to keep the fatal error from occurring again.

But when the state executes even hundreds of people, those deaths provide no convincing evidence that

the system did or did not miscarry or that innocent people did or did not die. This is principally because the execution of the innocent is notoriously difficult to prove.

Once an execution for murder occurs (all American executions are for murder), both the victim of the offense and the person convicted of

committing it are dead. The most important sources of information are unavailable. Nor (surprisingly to most lay persons) do appellate and post-conviction decisions directly shed light on the subject. Those proceedings typically do not address the question of guilt or innocence but, instead, the sufficiency of the evi-



MIKAEL KARLSSON

dence (an eyewitness identification will always suffice, though the risk of error may be very high) and the legality of the procedures used to determine guilt and sentence. As a result, it is not infrequently the case that a man or woman will be *legally* and *procedurally* approved by the courts for execution despite serious *factual* questions about his or her *substantive* guilt.¹

Nor is there any systematic effort to determine whether executed individuals were innocent—even where guilt was not at all clear. Although it would be unthinkable for a train wreck in which people may have died to pass without a meticulous effort to find innocent victims, there is no effort at all to distinguish the innocent executed from the guilty. It is, to begin with, a first principle of triage among understaffed capital defense lawyers to let the state bury the executed, regardless of doubts about their guilt, and to attend to the thousands of con-

demned who are still alive. Unlike Canada and Great Britain, no American jurisdiction provides for formal inquests into potential miscarriages once appellate proceedings have ended.²

Even more troubling, in my opinion, the states' attorneys with custody over the best evidence of the guilt or innocence of the executed—the confidential file in the case that may, for example, include potentially conclusive biological evidence of the identity of the killer—have almost all refused to release the evidence. Recently, in fact, prosecutors have enlisted the assistance of state legislatures and courts to require the *destruction* of this best evidence of the guilt or innocence of executed individuals for the stated reason that, if DNA tests on evidence in the state's confidential file invalidated a verdict, "it would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man."³

Indicative of the difficulty of proving that an executed person is innocent, and of the high burden of proof that applies, is an exchange between Bedau and Radelet and Markman and Cassell.⁴ Bedau and Radelet marshaled strong evidence that American jurisdictions have executed a number of innocent individuals. In response, Markman and Cassell declared a stalemate based on the burden of proof. Without saying that *they* had proven, even by a preponderance of the evidence, that the executed individuals were guilty, Markman and Cassell argued that since judicial determinations of guilt preceded each execution, Bedau and Radelet bore the burden of proving the defendant's innocence beyond *any* doubt, then pronounced the burden unmet because the historical record was imperfect.

Another peculiarity of the capital context is the reaction to this stalemate, which is resignation rather than precautionary risk analysis. Even though the number of fatalities from the errant operation of railways, the unsafe packing of meat, or inadequate security inspections at airports can be, and are, documented, it

would be the height of irresponsibility to await conclusive proof of past fatalities before taking determined steps to assess and diminish the risk that deaths will occur in the future. Amtrak, Hormel, and the FAA simply have no immunity from safety concerns on the ground that "no one has died yet, and until we're sure someone has, we don't have to assess the reliability *in fact* of activities we have designed *in theory* to provide safe travel and hamburgers." Post-accident body counts and resulting inquests are always complemented—and in the best of worlds are avoided entirely—by efforts to assess and lower the risk of flaws that could kill innocent people in the future.

Until now, however, criminal justice officials have declined to accept any similar responsibility to systematically assess and diminish the risk of flaws and innocent fatalities in the operation of the death penalty. Their view has been precisely that until we are 100 percent sure that innocent people have been executed, there is no reason to assess the reliability *in fact* of procedures that have been designed *in theory* to make accurate decisions about who deserves to die.⁵

Evidence of the risk

This is not because there is no evidence of a risk of innocent fatalities in the operation of the death penalty. In addition to the troubling cases identified by Bedau and Radelet, consider that 101 individuals sentenced to die during the modern death-sentencing era have subsequently been acquitted of the capital offense and released, including dozens about whom there is no doubt that they were innocent.⁶ Moreover, many of these individuals were *approved* for execution by reviewing courts, leaving the discovery of their innocence to entirely unpredictable fortuities—a film makers' doggedness in one case, a college journalism project in another, a burglary of a prosecutor's office in a third case, and a posthumous DNA analysis (after, and because, the inmate had died of cancer while awaiting execution) in a fourth case.⁷

1. See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993); *Wiggins v. Corcoran*, 288 F.3d 629, 643 (2002) (Wilkinson, C.J., concurring). See generally Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771 (2000).

2. See Lockyer, "Guilt Revisited: A Comparative Perspective on Canada, the United Kingdom and the United States," talk delivered at DNA and Human Rights: An International Conference, University of California, Berkeley (April 27, 2001).

3. Enzinna, *Afraid of a Shadow of a Doubt* (Op-ed), Wash. Post, May 7, 2000, at B8. See Masters, *Va. Evidence Destroyed Despite Warnings to Clerk*, Wash. Post, Oct. 18, 2001, at B3. Bradley, *DNA Testing in Crime Cases Causing Distrust in Criminal Justice System*, NPR Morning Edition, Aug. 29, 2000, transcript available at 2000 WL 21481402; Farrell, *DNA Scrutiny Tests Judicial System*, Boston Globe, June 26, 2001, at A1; Green, *DNA Tests Not Likely After an Execution: Virginia Opposing Third Request of its Kind*, Richmond Times-Dispatch, March 26, 2001, at A1.

4. Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Markman and Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); Bedau and Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

5. See, e.g., Statement of William G. Otis before the Committee on the Judiciary, United States Senate, Concerning "Protecting the Innocent: Proposals to Reform the Death Penalty," June 18, 2002.

6. See *United States v. Quinones*, No. S3 00 Cr. 761 (JSR) (July 1, 2002), at 21-22 & n.11 (listing relevant cases).

7. See, e.g., Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2048-51 n.84 (2000) (collecting sources).

DNA is itself a fortuity. The flaws it reveals are potentially characteristic of *all* criminal cases—mistaken eyewitness identifications, perjury by jailhouse informants, incompetent defense lawyering, and prosecutorial suppression of evidence. But DNA can make these flaws apparent in only the small proportion of cases that fortuitously have biological evidence to test.

Additional circumstantial evidence of the capital system's inability to generate confidence in the accuracy of its outcomes is the *lack* of confidence that capital prosecutors typically display when asked to permit DNA testing to confirm or disprove the guilt of executed individuals. Prosecutors are well placed to estimate the accuracy of verdicts they obtain that subsequently were carried out. The fact that they usually refuse to permit tests that, at no fiscal cost to the state, could categorically confirm the reliability of their work *if it was reliable* is explicable only if they have some reason to worry that their work was not reliable.

Evidence of this sort recently led Supreme Court Justice Sandra Day O'Connor to acknowledge "serious questions about whether the death penalty is being fairly administered in the United States." In a speech last summer, Justice O'Connor—who voted to reinstate the death penalty in Arizona in 1973 when she was a leader of the state legislature, and who has approved numerous executions while on the bench—stated that "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed."⁸ A year to the day later, United States District Judge Jed S. Rakoff, a former federal prosecutor with a reputation as a conservative on criminal justice issues, reached a similar conclusion:

[T]he best available evidence indicates that . . . innocent people are sentenced to death with materially greater frequency than was previously supposed and that . . . convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of inno-

cent people will be executed who otherwise would eventually be able to prove their innocence.⁹

Despite this evidence, no American jurisdiction has a method for assessing the risk of flaws in its death penalty system with potentially fatal consequences for innocent defendants. The kernel of such a method has been developed, however, by a multidisciplinary team of Columbia researchers, of which I am a member.¹⁰

Assessing the risk

To see the logic of our approach, consider that most social activity includes a method for inspecting the reliability of products and services, with *two* important goals. One goal is to keep *each* flawed product or service from harming anyone by getting it out of circulation while the flaw is cured or the item is scrapped. A second goal is to analyze the frequency and pattern of *all* flaws in order to assess the risk of future harm and devise prophylactic measures. Inspections thus may reveal systemic problems (*e.g.*, poor management or oversight) that are associated both with a high rate of modest flaws (*e.g.*, blemishes in paint jobs and grinding transmissions) and with rare but serious accidents (*e.g.*, fatalities when steering wheels disengage). Evidence of the former problems then can be used to signal the need for remedial steps before the latter tragedy occurs.¹¹

The capital system also uses inspections—appeals and post-conviction review—but only for the *first* of these purposes. The sole reason for identifying flaws is to remove the *particular* verdict from circulation and require it to be retried or replaced with a lesser outcome. Reviewing courts almost never consider whether the reversible error is part of a pattern of flaws in cases involving, for example, the same trial judge, prosecutor, defense lawyer, type of evidence, theory of liability, or procedure. Nor do reviewing courts even keep track of capital verdicts' overall rates of success or failure on appeal. Far less do they pub-

lish the results of such inquiries so the relevant actors, disciplinary officials, the press and the public can take warranted adulatory or remedial steps. And no significance of any sort is attached to the largest category of errors—those that are recognized but ruled non-reversible because they are harmless, non-prejudicial, or waived. No account thus is taken of the insight from other contexts that patterns of even minor errors can signal the need for remedial action to lower the risk of potentially tragic flaws.

A systematic analysis

Based on a retrospective study of the sort that other activities embed in their routine inspection and risk-assessment procedures, our Columbia University team concluded that information of great value to the relevant actors, regulators, and the public can be extracted from a systematic analysis of the results of capital appeals. Chief among that information is important evidence that the risk of executing the innocent is well above the "extremely" low level that is widely acknowledged to be necessary if the death penalty's integrity and penological value is to be maintained.¹²

Our study reviewed the outcomes on judicial review of the more than 5,800 death verdicts that were imposed by the 34 active death-sentencing states and 1,004 active death-sentencing counties between 1973 and 1995. During that period, more than 4,500 of the verdicts were finally reviewed on direct appeal, of which 41 percent had reversible flaws. An additional 10 percent of the verdicts that survived direct review were reversed on state post-conviction review. And

8. AP, *O'Connor Questions Death Penalty*, New York Times, July 4, 2001, at 9.

9. *United States v. Quinones*, *supra* n. 6, at 2, 21.

10. My colleagues, to whom I am indebted for much of the analysis in this piece, are Jeffrey Fagan, Andrew Gelman, Valerie West, Alexander Kiss, and Garth Davies.

11. See, *e.g.*, Abernathy, et al., *A STITCH IN TIME: LEAN RETAILING AND THE TRANSFORMATION OF MANUFACTURING—LESSONS FROM THE APPAREL AND TEXTILE INDUSTRIES* (New York, N.Y.: Oxford University Press, 1999).

12. See, *e.g.*, Markman and Cassell, *supra* n. 4, at 159.

"The fully foreseeable execution of numerous innocent persons"

an excerpt from *U.S. v. Quinones*

United States of America v. Alan Quinones, et al.

S3 00 Cr. 761 (JSR)

United States District of New York, July 1, 2002

NOTE: In this opinion, U.S. District Judge Jed S. Rakoff found the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598 to be unconstitutional. Earlier, Judge Rakoff had declared his tentative decision to do so in *United States v. Quinones*, 196 F.Supp 2d 416 (S.D.N.Y. 2002). Below are some excerpts from the July 1, 2002 decision (footnotes omitted):

—Michael Radelet

[T]he best available evidence indicates that...innocent people are sentenced to death with materially greater frequency than was previously supposed and that...convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would be able to prove their innocence. It follows that implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process [*2]. ...

Regarding the DNA testing that has exonerated at least 12 death row

inmates since 1993 ... the Government argues that, since such testing is now available prior to trial in many cases, its effect, going forward, will actually be to reduce the risk of mistaken convictions. Govt. Mem. 25-26. This completely misses the point. What DNA testing has proved, beyond cavil, is the remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases. In each of the 12 cases of DNA-exoneration of death row inmates referenced in *Quinones*, the defendant had been found guilty by a unanimous jury that concluded there was proof of his guilt beyond a reasonable doubt; and in each of the 12 cases the conviction had been affirmed on appeal, and collateral challenges rejected, by numerous courts that had carefully scrutinized [*23] the evidence and the manner of conviction. Yet, for all this alleged "due process," the result, in each and every one of these cases, was the conviction of an innocent person who, because of the death penalty, would shortly have been executed (-some came within days of being so-) were it not for the fortuitous development of a new scientific technique that happened to be applicable to their particular cases.

DNA testing may help prevent some such near-tragedies in the future; but it can only be used in that minority of cases involving recover-

able, and relevant, DNA samples. Other scientific techniques may also emerge in the future that will likewise expose past mistakes and help prevent future ones, and in still other cases exoneration may be the result of less scientific and more case-specific developments, such as witness recantations or discovery of new evidence. But there is no way to know whether such exoneration will come prior to (or during) trial or, conversely, long after conviction. What is certain is that, for the foreseeable future, traditional trial methods and appellate review will not prevent the conviction of numerous innocent people. [*24]

Where proof of innocence is developed long after both the trial and the direct appeal are concluded, it is entirely appropriate that the defendant make a truly persuasive showing of innocence, as *Herrera* requires, before his case can be reopened. But given what DNA testing has exposed about the unreliability of the primary techniques developed by our system for the ascertainment of guilt, it is quite something else to arbitrarily eliminate, through execution, any possibility of exoneration after a certain point in time. The result can only be the [*25] fully foreseeable execution of numerous innocent persons. ❧

13. 47 = 41 reversed on direct review + 6 reversed on state post-conviction review (.10 x the 59 that survived direct review).

14. 68 = 47 reversed by the state courts + 21 reversed by federal courts (.40 x the 53 that survived state court review). See Liebman, Fagan, Gelman, West, Kiss and Davies, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, <http://www.law.columbia.edu/brokensystem2/> (Feb. 11, 2002), at 9, 19.

41 percent of the death verdicts that survived state court review and were fully inspected by federal courts were overturned. The upshot of this 23-year track record is that, for any given 100 fully reviewed verdicts, an average of 47 were reversed by the state

courts,¹³ and 68 of the 100 were reversed by either the state or federal courts.¹⁴

Indicating that these high reversal rates reflect badly on the accuracy of most capital verdicts are the following findings: (1) Verdicts with re-

versible flaws were more than twice as common as verdicts without such flaws. (2) Rates of reversible error were greater than 50 percent in 20 of the 23 study years and in 29 of the 34 study states. (3) Flaws usually are reversible only if they are shown to have a—or, often, a *strong*—capacity to change the outcome. (4) The decision makers who apply these standards and find so much reversible error have strong political incentives to *approve* capital verdicts absent clear flaws with a demonstrable capacity to skew the outcome. Ninety percent of the reversals were by judges subject to electoral discipline in jurisdictions with strong public support for the death penalty. More than half of the remaining reversals were by judges appointed by Republican presidents with strong law-and-order agendas. (5) At the (state post-conviction and federal habeas) review stages where we collected data, more than 75 percent of the reversals were for violations that greatly compromise the reliability of the outcome (egregiously incompetent lawyering, prosecutorial suppression of evidence of innocence or mitigation, faulty jury instructions, and biased judges or jurors). (6) And at the (state post-conviction) stage where we collected data, 82 percent of the retrials necessitated by reversals resulted in a different outcome after the error was cured, including 9 percent that ended in acquittals.¹⁵

Multiple regression analyses identify states, counties, and cases where the risk of capital error is especially high. (1) The more often states and counties use the death penalty per 1,000 homicides, the higher their capital error rates, and (for counties) the higher their rates of convicting people who are not guilty. (2) Among the strongest predictors of higher reversal rates are political pressures to use the death penalty not as a punishment for only the worst of the worst, but instead as a generalized response to fears about crime. High error rates thus are associated with ineffective crime-fighting policies (low rates of

apprehending and punishing serious criminals); frequent interactions between affluent white residents and African-Americans and welfare recipients; and high rates of homicide victimization in the white as compared to the black community. (3) States that require judges to stand for election frequently in contested races have higher capital error rates on direct appeal and federal habeas than states where judges face less or no electoral pressure. (4) States that spend less money on their court systems have higher capital error rates on direct appeal than states that provide average or better funding for their courts. Overall, Alabama, Arizona, Florida, Georgia, and Texas appear to have the highest overall risk of serious error. Colorado and Connecticut appear to have the lowest risk.¹⁶

Additional findings indicate a substantial risk that even the most serious of errors—including conviction of the innocent—will escape detection by existing capital review procedures. (1) More than 60 percent of the 101 people released from death row since 1973 because they were not guilty were initially approved for execution by one, two, or even a full complement of three levels of judicial review. (2) Case studies of innocent individuals who were approved for execution by all three levels of court review reveal a strong propensity on the part of state and federal judges to identify the errors that in retrospect are known to have led an innocent person to be convicted and condemned, but to affirm verdicts nonetheless on the ground that the errors were “harmless,” non-prejudicial or waived. (3) The 41 percent-10 percent-40 percent pattern of reversal rates at the three successive review stages does not exhibit the sharply downward trend of remaining flaws, dwindling to nearly zero, that one expects in a fully effective progression of inspections. (4) Multiple regression analyses reveal that, everything else equal, prisoners lucky enough to be represented by highly paid lawyers from well-staffed big-city law firms

are almost 70 percent more likely to obtain federal relief than are the majority of prisoners with less well-paid lawyers from more poorly staffed offices.¹⁷ (5) Outcomes of capital appeals appear to be affected by how politically controversial it is to reverse the verdicts, regardless of how flawed they may be.¹⁸

Limiting the risk

These findings prompted us to identify reforms for limiting the risk of capital error and execution of the innocent.¹⁹ Four additional conclusions are especially pertinent to this symposium. First, the obstacles that keep policy makers from directly measuring the frequency with which innocent people are executed should not keep them from systematically assessing the *risk* of such tragedies using all available evidence. This is especially so because the obstacles either are unavoidable or are imposed by officials with an incentive to obscure potential mistakes.

Second, all participants in the death penalty system should be under a strong obligation to make public all evidence in their control about the reliability of their operations. Third, the amount and pattern of reversible error provides important evidence of the risk of unreliability in capital verdicts. Appellate and post-conviction courts, justice officials, and state and local commissions should make it their business to study those patterns and to share the results with the relevant actors and the public. Finally, our initial study of those patterns of serious capital error indicates that the risk of executing the innocent is too high for comfort. ❧

15. *Id.* at 11-81.

16. *Id.* at 337-390.

17. *See id.* at 376-386.

18. For example, after controlling for other factors, state court reversal rates decrease if the verdict is from a rural community (where the smaller number of such verdicts make the reversal of any one of them more controversial than in urban communities) or the reviewing court has a large, potentially controversial backlog of capital verdicts awaiting inspection. *See id.* at 194, 218-219, 333-334, 354-356, 367-369.

19. *See id.* at 391-421.