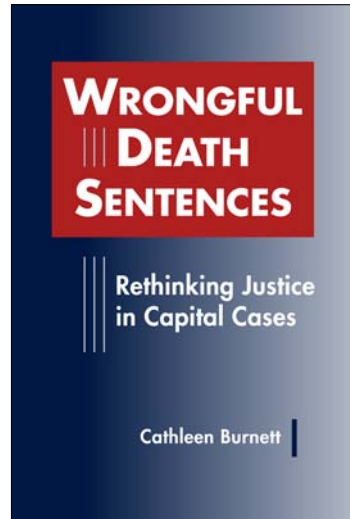


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Wrongful Death Sentences:
Rethinking Justice
in Capital Cases

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1

The Construction of Innocence: Introduction of a New Framework

The concept of “actual,” as distinct from “legal,” innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on capital offense.

—*Smith v. Murray*, 477 U.S. 527 at 537 (1986)

As of February 2010, there were 139 individuals in the United States who since 1973 had been released from death row and returned to the legal status of innocent by the legal system (Death Penalty Information Center 2010). These persons represent serious errors made in exacting upon them the most serious and irrevocable penalty. The magnitude of potential miscarriages of justice unfortunately is greater than usually recognized because, as will be developed, innocence is a much broader concept than usually understood. As the numbers of exonerated individuals continue to grow, it becomes increasingly difficult to ignore the systematic problems that are exposed throughout death penalty litigation. These personal witnesses to the reality of wrongful death sentences inspire a rethinking of justice in capital cases. It is the thesis of this book that it is necessary to modify the concept of innocence, to broaden the class of cases included within the rubric of innocence, and to account for the subjectivity of determining innocence in the death penalty context.

The purpose of this book is to explore the juxtaposition of three aspects of innocence that until now have not been compared with each other. The new framework presented will require readers to change their view of what has been the accepted wisdom about the concept of inno-

cence. The three concepts that will be used to modify and represent certain types of innocence are *actual*, *factual*, and *legal*. Actual innocence describes the most common understanding of innocence, indicating that the accused defendant did not perform the act, that is, kill the victim, and was not present. Factual innocence refers to those situations in which the defendant was an accomplice but *not the actual* killer. The term *legal innocence* refers specifically to those situations in which there are justifiable reasons or excuses for committing the killing: for example, the killer acted in self-defense or lacked the mental capacity to understand the act, or the killing was an accident.

Although the dictionary defines the word *innocence* as “the absence of guilt,” in the legal world where degrees of guilt exist, it might make sense then to consider that degrees of innocence also exist.¹ In fact, the terms *factual* and *legal* innocence are familiar to the legal profession, but the use that will be made of them in this book will be decidedly different. Instead of degrees of innocence, the focus is on categories of innocence. In the framework to be outlined, no facet of innocence is lesser than any other because such facets refer distinctly to categories of crime, not degrees of crime. Should anyone be tempted to think of these facets as first-degree (actual), second-degree (factual), and third-degree (legal) innocence, it will soon be clear that such ordering is not appropriate in the context of the death penalty. When the defendant claims any type of innocence, the desired outcome is the same legal status: not guilty of the capital crime and therefore not eligible for the death penalty sentence.

Organization of the Book

In addition to those actually innocent of the death penalty, people are on death row who might not be there if innocence were defined in the more expansive manner that is being developed through the following research questions:

1. Can the concept of innocence be legitimately expanded to expose substantially more errors in death penalty cases than are currently recognized?
2. How do certain legal doctrines and practices function in death penalty cases to otherwise suppress the determination of innocence?
3. If innocence is being systematically shortchanged, what changes in the system would be compelling to reform the death penalty system so as to reduce wrongful death sentences?

These questions will be addressed in the pages to come through a method of inquiry that draws from legal theories and evidentiary standards used to determine guilt in death penalty cases. I have focused my research on wrongful death sentences by examining organizational sources and identifying policies, statutes, and court decisions that combine to give structure to capital litigation and that create unintentional risks for miscarriages of justice. These sources will demonstrate that innocence in capital murder cases is variously constructed and will illustrate the fluidity of the concept of innocence that evolves into what might be called a spectrum. Each chapter introduces a new facet of the innocence framework and presents a case example to illustrate the pertinent issues.

After the introduction to the proposed innocence framework in this chapter, Chapter 2 explores the most familiar situation of actual innocence, in which the condemned prisoner was not at the scene of the crime and had nothing to do with it. The greater part of the chapter shows that there are many systematic barriers to recognizing those who are actually innocent and then concludes by offering some suggestions for restoring balance in the administration of justice.

Chapter 3 continues the discussion of actual innocence by investigating the special problems of false confessions and of plea bargaining—both of which utilize basic tools and commonly accepted investigative procedures that ironically frustrate the recognition of an actually innocent person and contribute to the development of increasing risks for miscarriages of justice. How this happens is discussed in light of case law and jury decisionmaking to unpack the complexity of negotiating guilt or innocence of the capital crime. The chapter concludes by offering some recommendations to reduce miscarriages of justice.

Chapter 4 explores the circumstance of factual innocence, in which the prisoner was in some way involved with the actual killer and is considered an accomplice—although not the actual killer. The question before the jury in these cases is how to weigh the facts of the case to determine the degree of guilt. Here prisoners make the claim of being not guilty (and therefore factually innocent) of first-degree capital murder because of their lesser involvement in the crime. Drawing from what is learned in Chapter 3, that the organizational system generally rewards those who plead guilty and punishes more severely those who insist on their factual innocence, significant issues of proportionality are revealed that pertain to the interrelations of the roles of the accomplice and the codefendant. These disproportionalities are examined in light of the felony murder situation, where it will be shown that the elements of the crime are insufficient and proof beyond a reasonable doubt is limited.

Chapters 5 and 6 present material that deals explicitly with the intentionality element of capital murder and explains that legal innocence applies to persons who have killed but as a matter of social policy do not deserve the ultimate penalty. These defendants make an affirmative defense that puts the burden on them to prove their explanations to the juries. Chapter 5 discusses the situation in which the defendant admits to killing the victim but offers a *self-defense* justification to negate the deliberateness and intentionality (elements of first-degree murder) of the action. This is the chapter in which the obstacles of ineffective assistance of counsel and jury biases are introduced even though they are relevant in all types of criminal cases. Presented in Chapter 5, this material emphasizes the special tenuousness of the self-defense claim, which is especially vulnerable to these factors. Chapter 6 examines the situation in which the defendant admits to killing the victim but offers the excuse that his or her *state of mind* negates the deliberateness and intentionality (elements of first-degree murder) of the action. Through these two chapters, confusion between the mens rea (guilty mind) element of the crime and the affirmative defense of legal insanity is dispelled and thereby demonstrates that these wrongful death sentences are in themselves arbitrary, subjective, and easy to generate by simply changing the rules.

Finally, Chapter 7 concludes by exploring the consequences of adopting this broader understanding of the spectrum of innocence for the administration of justice. The public's assumption is that what is involved in handling death penalty cases is simply a binary issue of guilt or actual innocence: either the person did the crime or did not—yes or no. Further, the public assumes that the process of ascertaining this actual innocence is assured by the legal process involved, complete with an appeal process that promises to catch and correct any mistakes that might be made. The careful exploration of the whole process disclosed in these pages concludes that not only are the trial and appeal processes deeply flawed but also the whole idea of actual innocence on which this jurisprudence rests masks the complexity of the very idea of innocence. Through the understanding gained in this endeavor, that the concept of innocence functions as a spectrum, it is my hope that the significant lack of fundamental fairness and equality in the rules currently in place for handling death penalty litigation is unequivocally documented. Without such exposure, the public and the courts will remain unsympathetic to the numerous claims of factual or legal innocence coming from the prisons. It is my hope that more of these complaints will be taken seriously as those with the power to

make a difference respond to reduce the inequities and contradictions that pervade the criminal justice system.

The Traditional Language of Innocence

Commonly understood, the terms *factual* (as in innocence) or *actual* have been used interchangeably in practice and in legal literature. To be factually innocent has meant the person was actually innocent of doing the criminal deed, and factually guilty has meant the person did the crime.² The term *legal innocence* has referred to a determination after trial wherein the defendant was adjudged not responsible for the crime, despite being factually guilty of it. In the 1968 classic, *The Limits of the Criminal Sanction*, Herbert Packer recognized this possibility, that because the defendant has opportunities to claim various defenses it could occur that the defendant is both factually guilty and legally innocent, that is, found to be not guilty for some good reason despite committing the crime. This would likely happen, according to Packer, when “various rules designed to protect the defendant and to safeguard the integrity of the process are given effect” (Packer 1968, p. 166). Because of this possibility, whenever there is an acquittal, questions always remain about the basis for the decision. Is the defendant actually innocent or simply escaping punishment? Although most of the “rules” that Packer mentioned are courtroom matters (such as jurisdiction, venue, statute of limitations, double jeopardy) that apply to all defendants and should not undermine the prosecution’s case, other rules of evidence have developed over the years to ensure the fairness of the courtroom competition that could frustrate the prosecution.³ These rules reflect a compromise between two problems: how to get to the truth and what is the truth about guilt and innocence. That said, the misgivings about the category of legal innocence illustrate the “battle” between two models of criminal control and due process that Packer (1968) famously portrayed as ideal types and whose undercurrents impact the extent of concern for miscarriages of justice.⁴

The Models

The crime control model views the prevention of crime as the best means for protecting the public order and maintaining social freedom. This approach encourages efficiency in screening suspects and in deter-

mining guilt and punishment in order to achieve its goals for public safety. Given this orientation, it is understandable that the police adopt a presumption of guilt toward their suspects and focus on obtaining guilty pleas to move the investigatory process along quickly. Get tough law-and-order programs that give police more freedom to detain and search suspects and to make arrests are all consistent with the values of this model. In fact, Packer described the crime control model as an administrative model that takes on the characteristics of an assembly line conveyor belt. Regular, routine, and speedy handling of antisocial people is what will convince people that crime does not pay. Because its major concern is to suppress criminal conduct, proponents of this model are less concerned with how this happens than with the results, clearly trusting the police for their expertise in investigations and fact-finding. The crime control model, which emphasizes locking up “the bad guys,” is most disturbed about those who are wrongfully acquitted.

The due process model, on the other hand, views the best means for maintaining social freedom as keeping the power of the government in check, because from this perspective it is the abuse of governmental authority that is a greater threat to individual freedom than is street crime. This approach gives priority to preserving the presumption of innocence and the rules for legal fairness guaranteed in the Constitution. Through formal, neutral, and adversarial methods, the due process model attempts to ensure reliability in fact-finding, a process that emphasizes that the means justify the ends.⁵ Sometimes referred to as an obstacle course, this model’s concern for quality control is metaphorically described by Packer as a factory with reduced output. It follows from this description that the due process model is most concerned with those who are wrongfully convicted, believing them to be victims of a fallible and heavy-handed system.

These two models highlight the two types of errors that constitute miscarriages of justice. Brian Forst (2004) describes them as errors of impunity (applying to those who are wrongfully acquitted) and errors of due process (applying to those who are wrongfully convicted). The relative costs of these errors are not known, although some researchers offer estimates of their prevalence. To make the point that too many guilty persons are walking the streets, the crime control advocates look at the disparity between arrests and convictions as proof that the system is unable to protect its citizens from criminals. When just 41 percent of felony arrests lead to felony convictions (Walker 2006, p. 51), those advocating the crime control perspective draw the conclusion that more than 50 percent of felony arrests are “slipping” through the system, no

doubt because of technicalities and loopholes. Of course, these critics—reflecting the crime control orientation—assume that those who are arrested are guilty and deserve to be punished, and since so many are not receiving felony convictions, the conclusion must be that the system is unable to handle a significant amount of the criminal behavior plaguing society. Taking this concern one step further, Ronald Allen and Larry Laudan (2008) focus on the likely continued criminal activity of the wrongfully acquitted and suggest that increased victimization rates are a greater cost to society than are wrongful convictions. Consistent with this perspective is the lament that only a symbolic few are given the death penalty, 111 in 2008 (Bureau of Justice Statistics 2009, Table 5), despite the more than 10,000 homicides that occur in a year.

Those concerned for the wrongfully convicted interpret the statistics from the opposite side, seeing punitiveness rather than leniency reflected in the statistics and observing that of those arrested, 90 percent are punished (Walker 2006, p. 50). Likewise, those opposed to the death penalty think that any wrongful death sentence is one too many, but given the system in place, researchers estimate that wrongful death sentences occur in 2.3 to 5 percent of the capital cases (Radelet 2008, p. 203). As Brian Forst points out, these numbers are only speculative, since if the truth in cases were absolutely known, there would not be a need for the legal system to try to determine guilt or innocence (Forst 2004).

Theoretically, the legal system is intended to prevent the punishment of the innocent while punishing the guilty (Dripps 2003, p. 102), with emphasis on preventing wrongful punishment. As can be imagined, these are difficult decisions to make, and it is anticipated that some risk of wrongfully convicting the innocent exists. What, then, is an acceptable risk of error? Donald Dripps (2003, p. 102) maintains that “only the abolition of punishment could preclude unjustified punishment with certainty. The degree of the risk that is justified cannot be specified with arithmetic precision, although Blackstone put the acceptable ratio of false acquittals to false convictions at ten to one.” Recognizing the potential for two types of miscarriages of justice, our legal system is designed to tolerate releasing as many as ten guilty persons in exchange for the assurance that only one (or no) innocent person is convicted in error. Others have suggested ratios for this risk of wrongful acquittals to convictions that range from one to one up to 5,000 to one (Volokh 1997). Whatever ratio is invoked, the fact of having such a ratio reflects the legal system’s priority given to preventing wrongful convictions. The adversarial process of determining guilt or innocence reinforces this value by creating various procedures and

protections to limit the occurrence of wrongful convictions, one of which is the principle of the presumption of innocence.

The Presumption of Innocence

The presumption of innocence is a fundamental element of our adversarial system of justice.

In *Coffin* (1895), the Court considered whether a presumption of innocence instruction should be given upon request in addition to a jury instruction addressing the government's burden to prove guilt beyond a reasonable doubt. The Court unanimously decided that a separate presumption of innocence instruction should be given. Writing for the Court, Justice White demonstrated the necessity of a separate instruction by tracing the lineage of the presumption of innocence from the Bible, to Sparta, to Roman law, to England, and finally to the colonies that became the United States. (Kohlmann 1996, p. 406)

Reinforcing this significance, the Supreme Court observed in *Estelle v. William* (1976) that the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Two years later, in *Taylor v. Kentucky* (1978), the Court identified the due process clause as the specific constitutional basis for the presumption of innocence (Newman 1993, p. 980). Thus, under law the accused holds a legal status that is supposed to be no different than those called for jury duty. Herbert Packer (1968, p. 161) explained that

presumption of innocence means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question. The presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome.

This presumption is critical to all defendants and reinforces the adversarial principle that the burden is on the prosecution to prove guilt beyond a reasonable doubt. Although the presumption of innocence is a key component in the fundamental fairness of our adversarial system of justice, in practice the trial process is ironically inclined to turn this presumption inside out: the defendant is presumed "guilty until proved

innocent” (Huff, Rattner, and Sagarin 2000). In fact, this presumption of guilt is well recognized by court observers who are aware that police norms presume the guilt of their arrestees (Crank and Caldero 2000; Stevenson 2006, p. 345) and that jurors are inclined to believe that because the defendants are in court they are most likely to be guilty (Friedman 2000). This response is a self-fulfilling prophecy that predicts that persons often see what they expect to see. Jurors interpret the defendants’ body language and facial expressions as indicators of guilt. When the defendants look sad, unemotional, or remorseless, they are presumed to be guilty. The standard courtroom protocol of bringing the defendant into court wearing visible shackles during the sentencing phase of a capital trial has been prohibited (in *Deck v. Missouri* 2005) because such apparel biases jurors’ judgments against the defendant, suggesting to them that the authorities consider the defendant to be dangerous. Court rules can also promote an inference of guilt toward the defendant when, for example, the evidentiary rules permit special protection for certain witnesses (such as children) from encountering the defendant in the courtroom (Kohlmann 1996, p. 393).

The presumption of guilt is a very difficult hurdle to overcome in capital cases. The process of jury selection, known as *voir dire*, chooses jurors who are willing to consider imposing the death penalty. These jurors are known as “death qualified” because those who do not approve of the death penalty are usually excluded from service. Research on these chosen jurors demonstrates that they are more likely to convict (Bowers, Sandys, and Steiner 1998) than those not “death qualified.” It is also well established that capital juries are willing to convict on less information and to settle on the death penalty as the appropriate punishment even before the penalty phase deliberation (Bowers and Steiner 1998, p. 325). Evidence is clear that there are occasions in which juries compromise on the decision rather than give an outright acquittal because they believe that the defendant must be guilty of something or that the crime is so terrible that someone must pay for it (Turow 2003, p. 36). In such situations, concern for the victim(s) tends to outweigh concern for the defendant(s) (Bowers, Sandys, and Steiner 1998, p. 1529). Given these trends, the determination of who is innocent appears to depend as much on the particular decisionmakers as on the particular details of the crime.

The task of preserving the presumption of innocence is made more difficult as the criminal court itself avoids the term *innocent* by accepting a not guilty plea from the accused rather than a plea of innocence. Although guilty pleas are the most common outcome in charged criminal cases, not guilty pleas that go to trial are also very likely to result in

conviction (Bohm and Haley 2005, p. 291). Such high conviction rates are made possible by the opportunity juries have to find defendants guilty of lesser included offenses. A defendant who is not guilty of first-degree murder still may be judged guilty of second-degree murder because the elements in the proof of guilt of those lesser crimes are embedded in the greater offense. So even though the accused may not be guilty of the original charge, he or she may not be completely innocent either. On the other hand, a person may be acquitted of the charged offense either because the jury believes the defendant did not commit the crime or the jury is not convinced beyond a reasonable doubt that the person is guilty of the crime charged. Such a result does not mean necessarily that the person is actually innocent but perhaps only that the prosecutor did not prove the case to the jury beyond a reasonable doubt. Hence the jury finds the defendant not guilty rather than innocent. The result is that without an official statement such as a certificate of innocence, the public is left to believe that the defendant might be guilty of something, even if it is not capital murder.

Although the presumption of innocence is a difficult principle to preserve in practice and pleading innocent is replaced with not guilty language, another complexity with the recognition of the range of possibilities identified with innocence is the specific term itself. The connotation of the word *innocence* evokes the image of a blameless individual, such as a newborn baby. But the human condition is such that anyone who has lived any length of time is guilty of something. It is our human nature to mess up, to make mistakes, to hurt others. Therefore, absolute innocence is humanly impossible. So whether one's actions rise to the level of being a legal issue may have more to do with criminal definitions and getting caught than anything else. For example, the President's Crime Commission in 1967 cited a survey showing "that in a sample of 1,700 persons of all social levels, 91 percent admitted committing acts for which they might have been imprisoned, but were never caught" (cited in Morris 1976, p. 39, n62). Thus the legal status of innocence (not guilty) is different than the behavioral status of innocence (untainted, pure).

The presumption of innocence, therefore, is critical to all defendants and reinforces the adversarial principle that the burden is on the prosecution to prove guilt beyond a reasonable doubt. It demands an openness by all the participants in a trial, an openness to the possibility that the defendant is not guilty of the crime charged. Beyond actual innocence, however, there are other types of innocence that are legitimate and also demanding of consideration. As such, just as one who is actually inno-

cent can be found to be wrongfully convicted, it is possible that these other types of innocence can experience wrongful death sentences.

The New Framework

In 1972, the United States Supreme Court overturned Georgia's death penalty statute, and that of virtually every other state, in a landmark case entitled *Furman v. Georgia*. From that time on, states have reinstated the death penalty with changes to address the Court's ruling and subsequent rulings. One of the primary changes in the post-*Furman* era has been to design death penalty trials that occur in two stages: the first stage is to determine guilt of the capital crime; then, if the defendant is found guilty of the capital crime, the second stage of the trial is to determine what punishment is appropriate. This book will focus on some of the most important systemic flaws that are relevant to the development of the concepts of innocence, examining how they contribute to the structures that create and maintain wrongful death sentences and pointing directly to those who "should not be guilty of capital murder." Rather than using the term *innocence* to reflect a legal status (as in, you are innocent until proven guilty), this book will present a classification of innocence that is based on behaviors (degree of participation and state of mind) that correspond to the basic elements of crime and in so doing will demonstrate that innocence is a concept more appropriately described as a spectrum. Susan Rozelle (2007, p. 48) concluded that to be guilty of a crime, "an actor must satisfy three elements: *actus reus*, *mens rea*, and a lack of defense." In order to establish guilt the prosecutor must prove beyond a reasonable doubt that (1) the act does harm, (2) the action by the defendant was intentional that caused the harm, and (3) there are no other affirmative defenses that are relevant. Following these elements, the framework of the spectrum uses the following innocence terms in these distinctly behavioral ways: *actual innocence* will describe the most common understanding of innocence, indicating that the accused defendant did not perform the act, that is, kill the victim, and was not present. *Factual innocence* will refer to those situations in which the defendant was an accomplice but not the actual killer. The accomplice may or may not be found guilty of the crime, but his or her factual situation is different than it is for those who are the actual killers. Chapter 4 will explain this circumstance further. As mentioned above, this behavioral distinction is lost if the two terms (*actual* and *factual*) are used synonymously. Likewise, the legal profession typically refers

to legal innocence as an official acquittal without specifying any of the conditions that brought about the result. Here the term *legal innocence* refers specifically to those situations in which there are justifiable reasons or excuses for committing the killing, for example, the killer acted in self-defense (see Chapter 5) or lacked the mental capacity to understand the act (see Chapter 6), or the killing was an accident.⁶

Because death as a punishment is unique, that is, it is irreversible and ultimate, the criminal justice system is expected to be most vigilant over its processes so as to properly identify those who are actually, factually, and legally innocent.⁷ The primary task here will be to analyze the concepts of innocence anew in criminal law generally and in death penalty cases in particular and, by doing so, to appreciate the existence of substantially more types of wrongful death sentences.

The import of wrongful death sentences in the context of this new framework happens most clearly in the postconviction appeals where investigation by new attorneys is more thorough and usually discovers new evidence. More often than not trial defense attorneys have bungled the case, missed defenses, or not effectively investigated the case. As a result, innocence claims often are developed only after the trial, when the burden of proof has shifted onto the prisoner, thus making it extremely difficult to be reconsidered (see Chapter 2). Michael Radelet pointed to some of these prisoners: “there are a number of death row inmates . . . who in fact, given fewer flaws in the criminal justice system, should not be guilty of capital murder” (2008, p. 207).

Actual Innocence

The estimated 139 individuals who have been released from death row, a list provided by the Death Penalty Information Center (DPIC) in 2010, is considered the most conservative compilation of persons who have been cleared of responsibility for the capital crime of which they were convicted.⁸ Identified as exonerees, the narrow criteria used to determine who is eligible to be included on this list allow for only two circumstances: (1) the prisoner’s original conviction was overturned *and* either he or she was acquitted at a retrial or all charges were dropped, or (2) the prisoner was given an absolute pardon by the governor based on new evidence of innocence.⁹

Notice that the first criterion defining a prisoner as wrongfully convicted has two parts. Not only must the original conviction be overturned by a court, but it is also necessary that the defendant be acquitted at the retrial, meaning that persons who are convicted of a lesser offense

do not qualify for the official label of “exoneree” (Dieter 2004, p. 47). So just having the conviction overturned (or reversed) is not enough to be considered exonerated because the criminal litigation continues. But when the prosecutor drops all charges instead of going to trial, that decision means that in the state’s judgment going to trial will result in acquittal. Then the exoneree label attaches *only if* the prisoner would be released from prison for *that* crime.¹⁰ There are many other capital cases in which death sentences are overturned, but on retrial the defendants are convicted of some lesser degree of murder that would foreclose the imposition of the death penalty. James Liebman and his team of researchers (Liebman et al. 2000a, p. 1852) found that

overall, at least 68 of the original 100 [cases] were thrown out because of serious flaws, compared to only 32 (or less) that were found to have passed muster—after an average of 9–10 years had passed. And for each such 68 individuals whose death sentences were overturned for serious error, 82% (N = 56) were found on retrial *not* to have deserved the death penalty, including 7% (N = 5) who were *cleared of the capital offense*.

Taking the conservative approach, DPIC does not include any of these individuals (except for the five who were cleared) in the category of the actually innocent. Even so, their situations point to and merit attention to the reality of wrongful death sentences.

The second type of exoneration occurs when a governor pardons a death row prisoner based on new evidence of innocence. This is a relatively rare situation, occurring in only seven of the 139 exonerees.¹¹ This rarity of pardons in capital cases is most likely because there are powerful political considerations that inhibit governors from acting even where strong evidence of actual innocence exists (Burnett 2002b). It is noteworthy, for example, that four of these pardons were issued by Illinois governor George Ryan just as he was leaving office in 2003.

These 139 cases of those returned to innocence are widely recognized as examples of actual innocence and serve as the beginning point for this discussion about the spectrum of innocence, to be developed in Chapter 2. However, their status as exonerees is not without controversy, especially those for whom the prosecutor decides to drop the charges (N = 80). Those eighty are the types of cases that prosecutors draw on to cast doubt upon the prisoners’ claims of innocence. Instead of formally recognizing their innocence, prosecutors can say that they do not prosecute because

they “do not have enough evidence to pursue the case further” (see the case of Joe Amrine below), which sometimes supports their continued belief in the prisoner’s guilt. Many of these individuals are in a legal limbo, worried that the prosecutor might revive the charge against them and again take them back to court.

Joe Amrine—An Example of the Ambiguity of Exoneration

Questions about the definition of innocence become significant when it is discovered that 139 persons have been wrongfully convicted and sentenced to death. Do these persons represent serious breaks in the legal system charged with protecting the innocent from wrongful conviction, or do they reflect minor mistakes that fall within the range of acceptable risks in society’s efforts to protect against violence and chaos? As will be seen in Chapter 2, there is some debate as to whether these persons appropriately should be identified as exonerated, the argument made that because the prosecutors decide to drop the charges they are technically innocent, but may not be actually innocent. The prosecutor’s resistance to admitting error is illustrated here in the case of Joe Amrine.

Amrine was released from the Missouri Department of Corrections on July 28, 2003, after serving seventeen years on death row for a murder he consistently claimed he did not commit. His release came after the Missouri Supreme Court took the unusual step of hearing a second habeas corpus petition after all of his standard appeals had been exhausted. Amrine’s attorneys contended that there was no evidence to connect him with the crime and that there were at least two witnesses (who always had been available but were never called at trial) who would testify that Amrine was not the killer. The court’s majority found that Amrine’s new evidence met the clear and convincing evidence standard such that their confidence in the outcome of the first trial was sufficiently undermined. They concluded it would be a miscarriage of justice to execute an innocent person. In a four-to-three decision, the court ordered him released within thirty days unless the prosecutor wanted to retry the case (*Amrine v. Roper* 2003). Abolitionists around the state declared Amrine to be exonerated, innocent of the murder charge, but the prosecutor would not admit that the wrong person had been convicted. Instead, he gave the public excuse for finally releasing Joe Amrine that the DNA sample had degraded after seventeen years of storage to the point where it could not be clearly matched to DNA and was therefore “inconclusive.” In fact, testing of the sample established that the

blood did not belong to the victim. Without a DNA connection, it was not possible to prove that Amrine was guilty of the homicide. Even though there was a more likely suspect, the prosecutor acknowledged that he was not going to prosecute anyone else for the crime, leaving the impression that Amrine remained the person responsible for the crime. To say otherwise would be an admission to the public that the system had made a mistake. Predictably, the prosecutor never apologized to Amrine. Because the public did not know that the blood did not match that of the victim (which was known to the prosecutor), they were left with unresolved doubts about Amrine's innocence, leaving an official cloud that will always remain over his head. Was he actually innocent or possibly guilty? Not being able to prove guilt is quite different from saying that he is not guilty. Clearly, then, in the Joe Amrine case, the concept of innocence is a social, political, and legal construct with several layers of nuance.

Beyond the 139 exonerees, and still in the context of actual innocence, the Death Penalty Information Center (2010) registered fourteen persons (although admitting that this is not a comprehensive listing) now released from prison who once were on death row as *probably* innocent of capital murder but technically guilty of some degree of murder.¹² Five others were considered *possibly* innocent because they had their death sentences commuted because of recognizing doubts about their guilt. Such variations in the concept of actual innocence open the door to other potential miscarriages of justice.¹³

Factual Innocence

Official record keeping by the Death Penalty Information Center confirmed that only nine persons nationally have been executed who were not directly responsible for the murder.¹⁴ In all but two of those circumstances, the actual killer got punishment that was the same as or equal to that of the accomplice. This statistic is admittedly unreliable, however, since it only reported information for five out of the thirty-five death penalty states. Even more suspect, however, is the reliance on an official description of the crime to identify the accomplice. Given the upcoming discussion in Chapter 3 of the unfettered use of prosecutorial discretion, it could very possibly be that the real killer arranged a deal with the prosecutor, who then prosecuted the "accomplice" as the actual killer. This situation would be unknown to official record keeping. Nationally, the percentage of homicides involving multiple offenders rose from 11.5 percent in 1976 to 20.3 percent in 2005 (Bureau of Justice Statistics 2007).

Legal Innocence

As will be seen, this type of innocence (in which the accused did kill but offers a justification or an excuse that should acquit him or her from conviction) is extremely difficult to establish, especially if the person has already been convicted. The Death Penalty Information Center recorded only two individuals who were exonerated through ballistics testing that confirmed their self-defense claims (Death Penalty Information Center 2010). There were *no* persons listed who had been exonerated owing to insanity. There are two explanations for these low numbers. Either the system is doing a good job of detecting these cases and few to no wrongful death sentences are obtained. Or the system does a terrible job in detecting these cases, with the result that these wrongful death sentences are unsuccessful when appealed. After examining the legal requirements for two of these situations—self-defense and insanity—a discussion follows in Chapters 5 and 6 concerning how these rules and policies function to generate wrongful death sentences.

Wrongful death sentence cases are rightfully worrisome because they go to the root of our criminal justice system, based as it is on the ideology that it is better for a guilty person to go free than that an innocent person be wrongly convicted.¹⁵ In order to limit the risk of wrongful convictions, the justice system has historically required a high standard of proof in the courtroom to establish that an accused is guilty of a crime. The standard used to judge evidence in a criminal case (beyond a reasonable doubt) is higher than in civil court, where only a preponderance of the evidence is needed to find liability. In addition, the defendant is supposed to enter the courtroom protected by the presumption of innocence and by a myriad of evidentiary rules to safeguard against any abuse of power by the prosecutor, who is given the heavy burden of proving the defendant guilty.

The Spectrum of Innocence: Expanding the Magnitude of the Problem

Besides those actually innocent of the death penalty, people are on death row who should not be there if innocence is defined in the more expansive manner that is being developed in this book. These distinctions in legal terminology do not translate easily to a public whose legal knowledge is generally mediated through media coverage of gruesome crimes and sensational trials. It is not in the heat of the trial that public opinion

can be educated about legal technicalities, however. This book is an effort to shed light on the legal doctrines and theories that are often mysterious to the public because it is these legalities that create justice for all. It is hoped that such awareness opens a discussion beyond the professionals. To begin easing into this material, the first discussion focuses attention on the most commonly accepted claims of innocence, those claims of actual innocence.

Notes

1. The term *innocent* comes from a Latin root that means “not to injure or harm” (Heifetz and Linsky 2003, p. 18).

2. Herbert Packer used the term *factually guilty* in this way also (see Packer 1968, p. 210). In his 1968 classic, *The Limits of the Criminal Sanction*, Packer used the term *factual innocence* in two ways. First, factual has commonly been recognized to be the same as actually innocent, and second, factual referred to the accused’s legal status before conviction. In this second sense, Packer drew a distinction between *factual innocence* and *legal innocence*, using the terms to refer to legal status, not to behavior. In this second meaning, his observation was that until trial the defendant is considered factually innocent, but after trial the individual would be labeled either legally innocent or guilty. As such, to be factually innocent is not a prediction of outcome but instead is a guide to the authorities about how to treat the defendants up to and during trial, that is, as if they were actually innocent (Packer 1968, p. 167). Thus, all defendants should be treated as factually innocent in the pretrial and trial stages as a matter of procedure and legal status. Confusion is inescapable whenever it occurs that someone could be factually guilty (as in behavior) and factually innocent (as in pretrial legal status) at the same time.

3. Indeed, research does not support the notion that legal technicalities or loopholes subvert the crime control process. In 1968, a report by the President’s Commission on Law Enforcement and Administration of Justice became the classical referent to describe the flow of cases through the criminal justice system. Using national data for 1965, the Commission presented the information beginning with crimes committed and moving to punishment, portraying the reduction of persons in the system as a symbolic funnel. Charles Silberman’s recalculation of the Crime Commission’s funnel began instead with arrests and showed that of the 177,000 adult felony complaints, 160,000 (90 percent) were punished, and 17,000 (10 percent) were found not guilty (cited in Walker 2006, p. 50). Thus Silberman’s conclusion that the criminal justice system punishes most adults arrested for serious crimes contradicts the original interpretation of the crime funnel as being lenient and full of loopholes.

4. See Erik Luna (1999), Stuart Macdonald (2008), and Keith Findley (2008) for critiques of Packer’s models.

5. A third model has recently been proposed by Keith Findley (2008), which he calls the reliability model. Based on best practices, it focuses on

improving eyewitness identification evidence since it is present in 79 percent of the first 200 deoxyribonucleic acid (DNA) exonerations from 1989 through May 2007 (Garrett 2008a). This third model invites police to improve their practices and courts to revise admissibility standards to reflect scientific knowledge about human perception and memory. Findley suggests that this approach does not sacrifice public safety but rather improves interrogation methods, neutralizes false jailhouse informant testimony, and improves defense counsel so that a win-win situation develops, resulting in more reliable convictions and punishments.

6. This book highlights cases from Missouri to explain the different types of innocence. In Missouri, 60 (83 percent) out of the 72 clemency cases presented to the governor from 1989 to 2005 claim some sort of innocence. There are 19 claims of actual innocence, 8 claims of factual innocence, and 33 claims of legal innocence.

7. These three innocence categories are based in the behavior of the defendant. There are, however, always cases in which the adversarial system did not work effectively, hence leading to various charges that the state or court did not follow procedural safeguards as it obtained a conviction. Persons making these charges claim to be *procedurally innocent* of the crime. This is not an inconsequential group as James Liebman et al. (2000a) found that from 1973 to 1995 68 of 100 cases were reversed because of serious constitutional errors and 82 percent of those 68 were found on retrial not to deserve the death penalty. Supreme Court decisions can change the legal environment and have consequences for specific cases. For example, in *Ring v. Arizona* (2002), the Court ruled that juries, not judges, must make the death sentence decision. As a result, capital cases in five states were affected. Typically these procedural situations involve individual errors and are not discussed in terms of systemic issues that pervade litigation. If procedural problems exist in a case, the question still remains what, if any, type of innocence they claim.

8. Several data sets are available besides the DPIC (2010) list. “In 1992, Bedau, Constance Putnam and I expanded our inventory of erroneous convictions to nearly 420 homicide and rape cases. In 2000, Barry Scheck, Peter Neufeld, and Jim Dwyer added information on nearly 100 cases involving the exoneration of an innocent defendant by DNA evidence. Five years later, Professor Samuel Gross and his colleagues documented 340 felony exonerations in the fifteen-year period between 1989 and 2003. By October 2008, DNA had vindicated 233 inmates in the United States. . . . Currently, I am involved in a project that documents over 1,200 erroneous convictions in American history” (Radelet 2008, pp. 202–203). Westervelt and Cook (2008, p. 33) state that “the true number of exonerees is no doubt larger, but no system keeps an accurate count.”

9. “Exonerate means to clear, as of an accusation, and seems to come from the Latin ‘ex’ and ‘onus’ meaning to unburden” (Rodricks 2009).

10. Eight of the 139 exonerees were not released because of serving sentences for other crimes (Larry Fisher, Christopher McCrimmon, Shareef Cousin, Eric Clemmons, Lemuel Prion, Nicholas Yarris, Derrick Jamison, and Michael Blair).

11. The cases in which a pardon was issued were Wilbert Lee, Freddie Pitts, Aaron Patterson, Madison Hogley, Leroy Orange, Stanley Howard, and Earl Washington.

12. Four of the fourteen accepted a plea to escape the death penalty. Radelet and Bedau include these noncapital murderers in their conceptualization of innocence of capital murder (1998, pp. 226–228).

13. When some error or mistake happens and someone is judged to be guilty instead of innocent, not only does a wrongful conviction occur, but a miscarriage of justice also occurs. A wrongful conviction is just one type of miscarriage of justice, however. Others point out that a wrongful acquittal is also a miscarriage of justice. Again, there is no good way to know the prevalence of wrongful convictions or wrongful acquittals. Sam Gross and Barbara O'Brien estimated that at least 2.3 percent of those sentenced to death since 1973 have been exonerated (2008, p. 927). "After examining DNA exonerations in death penalty cases for murder-rapes between 1982 and 1989, Michael Risinger estimated that at least 3.3% of the capital-rape defendants were innocent and that the actual error rate may be closer to 5%" (Radelet 2008, p. 203).

14. An additional nine persons have been executed who ordered or contracted with another person to kill the victim (Death Penalty Information Center 2010).

15. See *In re Winship*, 397 U.S. 358, 372 (1970) where Justice Harlan concurs, stating the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."