Wrongful Death Sentences

Rethinking Justice in Capital Cases

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Preface

The presumption of innocence is not just a legal concept. In commonplace terms, it rests on that generosity of spirit which assumes the best, not the worst, in the stranger.

—President Kingman Brewster,
Yale University (in Kabaservic 2004, p. 458)

In teaching criminal justice, I find it impossible not to communicate that our legal system is full of contradictions and inequities. I have found this becoming particularly clear in my work with the death penalty. Missouri, the state where I live and work, is ranked fifth in executions in the United States since reinstatement of the death penalty. Through connections with the sixty-seven men condemned and executed in Missouri since 1989, I have come to learn that the cases are rarely as simple as they are portrayed in the media. There the focus is primarily on the spectacle of the crime and on execution as a means of retribution and vindication for the victims. When reading the clemency petitions of each of the condemned men, however, a more challenging story emerges. In all cases that ended in execution, I have found that the condemned have received inadequate trial defense. The cases of the three persons who received exoneration from their death sentences in Missouri were no different from most of the others, except for chance circumstances such as someone having doggedly pursued the case. Even so, none of the exonerations came easily.

Convincing background information from each death penalty case has led me to the conclusion that many more errors have been made in determining who gets a death sentence than are officially acknowledged. As a result, I have felt the need to explore the language used in talking about innocence, reassessing the distinctions made between guilt and

innocence. From this study I have been able to create a new framework for conceptualizing the idea of innocence. This framework provides the anatomy of this book, shared as a way of changing the manner in which we think about innocence and guilt in capital litigation—with implication for the broader criminal justice system. To demonstrate the usefulness of this framework, I have incorporated data about former death row inmates Joe Amrine, Bruce Kilgore, Roy Roberts, Lloyd Schlup, Ralph Feltrop, and Samuel McDonald, among others.

People have every right to be worried about the implications of the growing number of exonerees, because wrongful death sentence cases expose problems that go directly to the root of our criminal justice system. As of February 2010, there were 139 individuals in the United States who had been exonerated of responsibility for the crime that put them on death row (Death Penalty Information Center 2010). These persons have been returned to the legal status of innocent by the legal system, despite having been subjected to the most serious and irrevocable penalty. It is appropriate to ask what happened in these situations and to propose how problems found in the death penalty system could be fixed in order to prevent such miscarriages of justice.

This book is concerned with more than these actually innocent former death row exonerees. In it I begin by rethinking the concept of innocence and thereafter suggest a new framework that identifies varied conceptions of innocence, demonstrating their significance for reforming the structures in the capital justice system that have led to known and unknown wrongful death sentences.

Current events keep changing the environment within which this book is situated. Since I began this project, two states have repealed the death penalty (New Jersey and New Mexico), and New York has not reinstated its death penalty after a court declared the statute unconstitutional. During each term, the Supreme Court confronts new issues that develop across the nation. Increasing national media attention and abolition efforts have brought death penalty issues onto the public agenda in ways that have not dented the consciousness of the public before. These trends suggest that the death penalty is on the wane; nevertheless, the urgency of the repeal cause remains as the nation continues to execute.

* * *

This work would not have been possible had not my generous colleagues at the University of Missouri–Kansas City graciously agreed to

cover my teaching responsibilities so that I could have a research leave. I am thankful for their kindness.

I must point out the awesome dedication to the rule of law and the common good shown by the attorneys who did the extraordinary work of preparing postconviction appeals and clemency petitions—despite lack of support from the public or from the state—most especially, Gardiner B. Davis, Leonard J. Frankel, Michael E. Gross, Jerilyn Lipe, Bruce Livingston, Antonio Manansala, Sean O'Brien, Burton Shostak, Richard H. Sindel, Mark Thornhill, and John Tucci.

Writing is not easy. It is important to get the details right and to communicate clearly. I am so appreciative of my friends Paul and Neil, as well as the editors at Lynne Rienner and the anonymous reviewers, who gave significantly of their time to make insightful comments, suggestions, and criticisms, making my manuscript much better than it was before their involvement. Of course, any errors are certainly my own responsibility.

And to my dear friends Paul, Martha, and Sally, who encouraged me throughout this writing process, keeping my fingers to the keyboard and my use of time accountable, I am indebted for your support. Thank you.

—Cathleen Burnett

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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