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The History of Wrongful Execution

BRUCE P. SMITH*

In recent years, concern that innocent persons¹ have been convicted, and, more troublingly, *executed* has spurred extensive commentary by scholars,² practitioners,³ activists,⁴ legislators,⁵ judges,⁶ and members of

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1. As used in this Article, the terms “innocent” or “actually innocent” describe persons who did not commit either the crime(s) for which they were convicted or any related crime(s). The term “wrongfully convicted” describes persons convicted in proceedings in which prejudicial legal error occurred and, as such, includes persons who were not actually innocent of the crimes for which they were convicted. The term “wrongful execution” refers to the execution of innocent persons. For elaboration of these definitional distinctions, see Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971 (2002); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1346 n.92 (1997); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003).

2. See, e.g., JIM DWYER, ET. AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); DAVID PROFFER & ROB WARDEN, *A PROMISE OF JUSTICE: THE EIGHTEEN-YEAR FIGHT TO SAVE FOUR INNOCENT MEN* (1998); Alan W. Clarke et al., *Executing the Innocent: The Next Step in the Marshall Hypotheses*, 26 N.Y.U. REV. L. & SOC. CHANGE 309 (2000); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1 (2002); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125 (1998); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003* (Apr. 19, 2004), at www.law.umich.edu/newsandinfo/exonerations-in-us.pdf.

3. A.B.A. House of Delegates, *Death Penalty Moratorium Implementation Project* (Feb. 3, 1997), available at <http://www.abanet.org/moratorium/resolution.html> (calling for a moratorium on the death penalty until jurisdictions can adequately address the risk that wrongful executions may occur).

4. See, e.g., RICHARD DIETER, DEATH PENALTY INFORMATION CENTER, *INNOCENCE AND THE DEATH PENALTY: THE INCREASING DANGER OF EXECUTING THE INNOCENT* (July 1997), at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=292> (identifying twenty-one persons sentenced to death as of 1997 “for whom there is now convincing evidence of their innocence”);

the press.⁷ This concern has contributed to a series of high-profile legal developments: a state-wide moratorium on the death penalty in Illinois;⁸ the establishment in several states of commissions dedicated to the prevention of wrongful conviction and execution;⁹ the establishment of “innocence projects” at numerous American law schools designed to identify and litigate cases of wrongful conviction or actual innocence;¹⁰ and, in 2002, a short-lived decision by a federal district judge holding that the Federal Death Penalty Act (FDPA) violated the Due Process Clause of the U.S. Constitution because the administration of capital punishment under federal law risked the wrongful execution of innocent persons.¹¹

To activists opposed to the death penalty, the prospect that persons might be executed for crimes that they did not commit provides what is

National Coalition to Abolish the Death Penalty, Fact Sheet: Innocence, at http://www.ncadp.org/fact_sheet4.html (last visited Apr. 20, 2005) (identifying eight cases between 1992 and 2005 of alleged “mistaken execution”).

5. See, e.g., Death Penalty Information Center, Changes in Death Penalty Laws Around the U.S., 2000–2005, at <http://www.deathpenaltyinfo.org/article.php?did=236&scid=40> (last visited Apr. 20, 2005) (surveying legislative reforms).

6. See, e.g., *United States v. Sampson*, 275 F. Supp. 2d 49, 56 (D. Mass. 2003) (“[I]n the past decade substantial evidence has emerged to demonstrate that innocent individuals are sentenced to death, and undoubtedly executed, much more often than previously understood.”); Michael A. Ponsor, *Life, Death, and Uncertainty*, 14 FED. SENT. REP. 60 (July/Aug. 2001) (“[A] legal regime relying on the death penalty will inevitably execute innocent people—not too often, one hopes, but undoubtedly sometimes.”).

7. See, e.g., *Death Penalty Caught in Growing Cross Fire: Reportedly Error-Prone System Contends with Multiple Attacks*, CNN.COM (June 12, 2000), at <http://archives.cnn.com/2000/LAW/06/11/death.penalty/>.

8. Former Governor George Ryan instituted a moratorium on the death penalty in Illinois in January 2000. For background on the decision, see Report of the Commission on Capital Punishment (2002) [hereinafter *Illinois Commission Report*]. For scholarly reactions to Ryan’s decision, see Margareth Etienne, *Tinkering with Death in Illinois*, 2003 U. ILL. L. REV. 1073 (2003); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004). On the moratorium movement in America generally, see Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1 (2002).

9. See Jon B. Gould, *After Further Review: A New Wave of Innocence Commissions*, 88 JUDICATURE 126 (2004).

10. In 1992, Peter Neufeld and Barry Scheck founded the Innocence Project at the Benjamin N. Cardozo School of Law to handle cases “where DNA testing of evidence can yield conclusive proof of innocence.” Innocence Project, at <http://www.innocenceproject.org/about/faq.php>. Since that time, institutions devoted to identifying cases of wrongful conviction have been established at numerous American law schools, including Brooklyn Law School, Duke University School of Law, Hamline University School of Law, Northwestern University School of Law, the University of North Carolina School of Law, the Thomas M. Cooley School of Law, the University of Washington School of Law, and the University of Wisconsin School of Law. See generally Jan Stiglicz et al., *The Hurricane Meets the Paper Chase: Innocence Projects’ New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2002).

11. See *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002) (declaring Federal Death Penalty Act of 1994 to be unconstitutional), *rev’d*, 313 F.3d 49 (2d Cir. 2002), *reh’g denied*, 317 F.3d 86 (2d Cir. 2003).

probably the most compelling argument in favor of abolishing capital punishment.¹² In early 2005, for example, America's most prominent and impassioned critic of capital punishment—Sister Helen Prejean—published an account of two alleged “wrongful executions” as part of her campaign to secure a nationwide moratorium on the death penalty in America.¹³ Even President George Bush, a long-time supporter of the death penalty, who had previously asserted that none of the 152 executions that occurred in Texas during his governorship had been wrongful, has implicitly acknowledged the potential for fatal error in capital cases. In his State of the Union Address in February 2005, the President urged that criminal defendants not “pay the price” for crimes that they had not committed—a brief statement to be sure, but one hailed by critics of the death penalty as an important acknowledgment of the risks of irreversible mistakes in the administration of capital cases.¹⁴

Although the problem of wrongful execution has generated considerable public commentary, it remains, as yet, unclear whether contemporary anxiety concerning “the death of innocents” will catalyze significant change in the administration of the death penalty in America.¹⁵ On the one hand, some prominent defenders of capital punishment have expressed doubts that verifiable cases of wrongful execution in the modern era can really be identified.¹⁶ On the other hand, procedural bars, the posthumous destruction of biological evidence, and the competing demands on those engaged in representing persons on death row make it difficult for lawyers, journalists, and activists to

12. As U.S. District Judge Paul Cassell has observed, “[p]erhaps the most successful rhetorical attack on the death penalty has been the claim that innocent persons have been convicted of, and even executed for, capital offenses.” Paul G. Cassell, *In Defense of the Death Penalty*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?* 183, 205 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) [hereinafter Cassell, *Defense*].

13. HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* (2005). For further information on Sister Helen's efforts, see www.prejean.org, www.moratoriumcampaign.org, and www.deathofinnocents.com.

14. George W. Bush, State of the Union Address (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html> (“In America we must make doubly sure no person is held to account for a crime he or she did not commit—so we are dramatically expanding the use of DNA evidence to prevent wrongful conviction.”). For reactions to the President's comments, see Peter Baker, *Behind Bush's Bid to Save the Innocent: State of the Union Remarks Were the Culmination of Complicated Maneuvering*, WASH. POST, Feb. 4, 2005, at A9 (“As governor of Texas, George W. Bush presided over 152 executions, more than any governor in any state in modern U.S. history. He commuted just one capital sentence and harbored no doubts in the system. ‘I'm confident we have not put to death anyone who has been innocent,’ he once said.”), available at <http://www.washingtonpost.com/wp-dyn/articles/A62273-2005Feb3.html>; and National Association of Criminal Defense Lawyers, Statement of President Barry Scheck On President Bush's State of the Union Address (Feb. 3, 2005), at <http://www.nacdl.org/public.nsf/newsreleases/2005mn004> (asserting that the President's decision to “raise[] these issues in his State of the Union speech speaks volumes as to the size of the problem of wrongful convictions and wrongful executions”).

15. See *supra* note 13.

16. See *infra* Part III.A.

identify clear cases of wrongful execution.¹⁷ Also, when actual cases of alleged wrongful execution are identified and chronicled, their narrators invariably encounter competing “counter-narratives” in the opinions of the state and federal appellate courts that affirmed the underlying convictions and, not infrequently, in the statements of interested victims’ rights organizations and prosecutors.¹⁸ Moreover, in recent years, federal and state courts have overwhelmingly rejected arguments advanced by lawyers engaged in capital defense that the *risk* that persons will be wrongfully executed renders capital punishment an unconstitutional violation of due process.¹⁹ Finally, some supporters of the death penalty continue to view fatal error as the inevitable cost of any human endeavor and, indeed, one that is tolerable based on the death penalty’s alleged value in deterring crime and, thus, in protecting other innocent persons from death.²⁰

Despite the prominence of wrongful execution in contemporary debates about the death penalty, scholars continue to know very little about the phenomenon’s history. This Article represents the first attempt to reconstruct that history. In seeking to chart the phenomenon’s broad legal-historical contours, I do not seek to take sides in the acrid and, in many instances, irresolvable debates about the guilt or innocence of particular historical figures. Nor is it my goal to attempt to tally the number of persons who have (or may have) been wrongfully executed in the past—a task that itself has generated considerable heated debate. Rather, my aim is to examine how the distinctive problem of wrongful execution has been perceived and addressed over time by Anglo-American legal commentators, jurists, lawyers, academics, and activists. By assessing what the problem of wrongful execution meant to these individuals, I hope to suggest some of the ways that the specter of wrongful execution has influenced the administration of criminal justice over time—and how it might continue to do so today.

This Article proceeds in three parts. Part I examines the history of wrongful execution in England from roughly 1640 to 1790. As we shall see, certain notorious instances of wrongful execution—including, most glaringly, several executions of innocent persons for crimes that had never even *occurred*—generated widespread anxiety among Anglo-American legal commentators from the seventeenth through the early nineteenth centuries. During this period, influential treatise writers and public officials such as Matthew Hale, William Blackstone, and Samuel March Phillipps urged that courts adopt stricter evidentiary safeguards in

17. See *infra* Part III.B.

18. See *infra* Part III.C.

19. See *infra* Part III.D.

20. See *infra* Part III.E.

capital cases, including rigorous application of the *corpus delicti* doctrine (the requirement that the prosecution prove, as a threshold matter, that a crime had actually been committed), as well as other protections concerning the treatment of circumstantial evidence.

Part II shifts the focus to America and demonstrates the ways that American criminal justice administrators responded to the problem of wrongful execution from roughly 1790 to 1900. Confronted with the English experience of wrongful execution, American criminal justice administrators in the nineteenth century sought to preserve the legitimacy of the death penalty by denying the existence of a “wrongful execution problem” and by selectively instituting certain safeguards designed to prevent wrongful executions from occurring.

Building upon the legal-historical discussion in Parts I and II, Part III examines the issue of wrongful execution in modern-day America and the challenges of identifying, litigating, and publicizing cases of wrongful execution despite the “DNA revolution” of the 1980s. In recent decades, several factors—ranging from the posthumous destruction of biological evidence, to the difficulties of narrating compelling instances of wrongful execution, to the tolerance for error evinced by certain supporters of the death penalty—have created challenges for those who seek to rely on the phenomenon of wrongful execution as a means by which to secure either abolition of the death penalty or profound change in its administration.

This Article concludes by suggesting that, despite important differences in the meaning of wrongful execution across historical eras, the history of wrongful execution remains relevant to modern times. For example, viewed in the light of history, recent evidentiary proposals designed to reduce the risk of wrongful executions no longer appear novel, but instead reflect a return to evidentiary concerns prominent at the time of America’s founding.

I. THE SPECTER OF WRONGFUL EXECUTION IN ENGLAND, 1640–1790

[T]he conviction of a man for an *imaginary* offense is a scandal to the administration of justice, and an injury to society, infinitely greater than an erroneous conviction for an offense really committed.²¹

By some accounts, legal observers only discovered the problem of wrongful execution in the past two decades, when the increased availability and accuracy of DNA testing brought the problem of wrongful conviction—and the even more shocking prospect of wrongful execution—to public attention.²² In truth, wrongful execution cast a

21. 2 W.M. BEST, *THE PRINCIPLES OF THE LAW OF EVIDENCE; WITH ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES* 785 (6th ed. 1875).

22. See, e.g., Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 62 (2003) (“Historically, we operated our capital punishment systems in this nation as if there were no real likelihood that we

specter over Anglo-American criminal justice administration from the seventeenth through the early nineteenth centuries. During this period, English and American legal commentators confronted the sobering possibility not only that persons might be executed wrongfully, but that they undeniably *had* been—at times for committing offenses that had never occurred at all.

A. “THE CAMPDEN WONDER” AND THE PROBLEM OF THE MISSING BODY

On August 16, 1660, William Harrison, the steward of Lady Campden, left his home in Gloucestershire, England, for a nearby town to collect some rents.²³ By eight or nine o'clock that night, the seventy-year-old Harrison still had not returned from his rounds. Harrison's wife sent her servant, a fourteen-year-old boy named John Perry, to look for her husband—but to no avail. The following morning, Harrison's son Edward took up the search. After meeting up with the servant boy John, Edward discovered his father's hat and collar near a road in a “hackt,” “cut,” and “bloody” state. Although the townspeople of Campden “haste[ne]d . . . in multitudes to search for . . . [Harrison's] body,” they managed to turn up nothing.²⁴

would execute an innocent person.”).

23. In early modern England, stewards were typically responsible for various domestic duties, including supervising servants, maintaining accounts, soliciting charitable contributions, dispensing patronage, and collecting rents. *See generally* D.R. HAINSWORTH, *STEWARDS, LORDS, AND PEOPLE: THE ESTATE STEWARD AND HIS WORLD IN LATER STUART ENGLAND* (1992).

24. My account of Harrison's disappearance is largely drawn from the following source: A TRUE AND PERFECT ACCOUNT OF THE EXAMINATION, CONFESSION, TRIAL, CONDEMNATION, AND EXECUTION OF JOAN PERRY, AND HER TWO SONS, JOHN AND RICHARD PERRY, FOR THE SUPPOSED MURDER OF WILLIAM HARRISON, GENT. (London, 1676), reprinted in 14 T.B. HOWELL, *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND ILLUSTRATIONS*, cols. 1312–24 (London, 1816) [hereinafter *TRUE AND PERFECT ACCOUNT*].

The rendition of events in the State Trials series reprints the account of a seventeenth-century chronicler, Thomas Overbury. *See* THOMAS OVERBURY, *A TRUE AND PERFECT ACCOUNT OF THE EXAMINATION, CONFESSION, TRIAL, CONDEMNATION AND EXECUTION OF JOAN PERRY, AND HER TWO SONS, JOHN AND RICHARD PERRY, FOR THE SUPPOSED MURDER OF WILL. HARRISON, GENT BEING ONE OF THE MOST REMARKABLE OCCURRENCES WHICH HATH HAPPENED IN THE MEMORY OF MAN. SENT IN A LETTER (BY SIR THOMAS OVERBURY, OF BURTON, IN THE COUNTY OF GLOUCESTER, KNT. AND ONE OF HIS MAJESTY'S JUSTICES OF THE PEACE) TO THOMAS SHIRLY, DOCTOR OF PHYSICK, IN LONDON. ALSO MR. HARRISON'S OWN ACCOUNT HOW HE WAS CONVEYED TO TURK[E]Y, AND THERE MADE A SLAVE ABOVE 2 YEARS, WHEN HIS MASTER (WHO BOUGHT HIM THERE) DYING, HE RETURN'D TO ENGLAND; IN THE MEAN WHILE, SUPPOSED TO BE MURDERED BY HIS MAN-SERVANT, WHO FALSLY ACCUSED HIS OWN MOTHER AND BROTHER AS GUILTY OF THE SAME, AND WERE ALL THREE EXECUTED FOR IT ON BROADWAY-HILLS, IN GLOUCESTERSHIRE* (LONDON 1676).

See also *THE CAMPDEN WONDER* (Sir George Clark ed., 1959); S.M. PHILLIPPS, *FAMOUS CASES OF CIRCUMSTANTIAL EVIDENCE WITH AN INTRODUCTION ON THE THEORY OF PRESUMPTIVE PROOF* 50–52 (1875) [hereinafter *PHILLIPPS, FAMOUS CASES*]. What has come to be known as “the Campden Wonder” has also been the subject of several plays and other fictional treatments. A website devoted to the subject (www.campdenwonder.plus.com) provides useful links to many of the relevant seventeenth-century sources.

Suspicion soon fell upon John, who was brought before a justice of the peace (JP) the following day.²⁵ The boy claimed that, on the night of Harrison's disappearance, he had begun his search in earnest but had been "afraid to go forwards" because of the "dark" and, instead, had returned to rest in his master's "hen-roost." At around midnight, John had ventured forth once again but had "lost his way" in a "great mist" and "so lay the rest of the night under a hedge." When he awoke the next day, he went to a neighboring town, spoke to some people there, and later met up with Edward. Four other persons who appeared before the JP corroborated John's story. Nonetheless, the JP committed John to custody.²⁶

Once confined, the young boy began to talk. He claimed to some of his interlocutors that a "tinker" had killed Harrison, to others that "a gentleman's servant . . . had robbed and murdered him," and to "others again . . . that [Harrison] was murdered, and hid in a bean-rick." As these stories proliferated, John was once again brought before the JP, a week after his initial commitment. This time, he told a more chilling story. He now claimed that his mother, Joan, and brother, Richard, had lain in wait for Harrison on the night of Harrison's disappearance, strangled him, and robbed him of his money bags. John also claimed to have heard his mother and brother discuss throwing Harrison's body "into the great sink"—a bog near a local mill. Additional searches, however, failed to turn up Harrison's body.²⁷

When the JP interrogated Joan and Richard, both denied any wrongdoing. But at the next meeting of the Gloucestershire assizes in September 1660, a pair of indictments were brought against the three Perrys: the first, for breaking into Harrison's house the previous year, a crime in which John—in his apparent mania to confess—had also implicated the whole family; and the second, for robbing and murdering Harrison on the night of his disappearance. The Perrys pleaded guilty to the first charge, begged for a pardon, and received it. The presiding judge refused to send the second charge to the jury because the body of Harrison still had not been found.

Unfortunately, the Perrys' troubles did not end—for John continued

25. Under statutes dating from the 1550s, JPs were required to take the examinations of complainants, suspects, and material witnesses for the prosecution. On the pre-trial committal process in early modern England, see generally JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* (1974).

26. TRUE AND PERFECT ACCOUNT, *supra* note 24, at col. 1315.

27. "Upon this confession and accusation, the justice of the [peace] gave order . . . for searching the sink where Mr. Harrison's body was said to be thrown, which was accordingly done, but nothing of him could be there found: the fish-pools likewise (in Campden) were drawn and searched, but nothing could be there found neither; so that some were of opinion, the body might be hid in the ruins of Campden-house, burnt in the late wars, and not unfit for such a concealment; where was likewise search made, but all in vain." TRUE AND PERFECT ACCOUNT, *supra* note 24, at col. 1317.

to talk. Not only did he persist in swearing that his mother and brother had killed Harrison, but he now claimed that the two had “attempted to poison *him* in . . . jail, so that he durst neither eat nor drink with them.” At the Gloucestershire assizes in Spring 1661, a second indictment for murder was brought against the three Perrys. Suddenly John—apparently coming to his senses—insisted that, at the time of his previous confessions, he was “mad, and knew not what he said.” Joan and Robert, for their part, desperately continued to protest their innocence. Although Harrison’s body still had not been found—in “the great sink” or anywhere else—a new assize judge, Sir Robert Hyde, permitted the case to go to a jury. The jury duly pronounced all three members of the family guilty and Joan, Richard, and John Perry were promptly hanged and gibbeted on Broadway Hill near Campden.²⁸

So ended the lives of the three Perrys. But two years after their executions, a “wondrous” event occurred: William Harrison returned to Gloucestershire, claiming to have been attacked on the night of his disappearance by an unknown man on horseback, pressed to serve on a sailing ship, sold into slavery in Turkey, and ultimately spirited back to England by way of Lisbon.²⁹

B. ENGLISH RESPONSES TO WRONGFUL EXECUTION

How did English observers respond to the return of Harrison and the executions of the unfortunate Perrys for a murder that they had not committed and, indeed, that had not been committed at all? Not surprisingly, some interpreted the events as signs of Satan’s evil designs and of God’s overwhelming mercy. For example, the author of a pamphlet published in 1662 entitled *The Power of Witchcraft* claimed that the elder Harrison had been “bewitched away” by the “Widow Perry,” who had used “wicked Conjurat[i]on” to knock him down and throw him into a pit. After coming to his senses, Harrison had gamely struggled out of the hole but was “in a moment conveyed to the Sea side”—how, we are not told—and “from thence in a very short time . . . to a rock . . . on the coast of Turk[e]y,” where he was ultimately taken in by a Turkish ship and sold into slavery.³⁰ Likewise, a ballad circulated

28. Gibbeting involved hanging the bodies of executed persons in iron cages measured to fit them, typically after coating the condemned with pitch or a mixture of tallow and fat. The cage was usually suspended from a wooden gibbet, located in a prominent and visible place. For an account of an early eighteenth-century gibbeting, see JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 158 (2003) (describing the reactions of the Frenchman César de Saussure to an English gibbeting).

29. On the abduction of English citizens during the seventeenth and eighteenth centuries and their ensuing captivity in Islamic states, see LINDA COLLEY, *CAPTIVES* (2002).

30. *THE POWER OF WITCHCRAFT BEING A MOST STRANGE BUT TRUE RELATION OF THE MOST MIRACULOUS AND WONDERFUL DELIVERANCE OF ONE MR. WILLIAM HARRISON, OF CAMBDEN, IN THE COUNTY OF GLOCESTER, STEWARD TO THE LADY NOWEL . . .* (London, 1662), Bodleian Library,

shortly after Harrison's return—adorned with pictures of gibbet-hanging Perrys and an England-bound ship under full sail—portrayed Joan as “[a] wicked wretch who brought strange things to pass” and Harrison as a visible sign of God's great “mercy” and “power.”³¹

Seventeenth-century *legal* commentators viewed the events with a more jaundiced eye. Truth be told, the wrongful convictions of the Perrys were not the first such cases—nor the last—to trouble such writers. As early as 1644, Sir Edward Coke had discussed in his influential *Institutes of the Laws of England* a case arising in Warwickshire in 1611 in which an uncle had been executed for allegedly murdering his niece, who had gone missing. Committed by a JP upon suspicion of murder and later warned to produce the child, the uncle furnished another girl “very like his own niece” and “appareled . . . like the true child” in an effort to prove that his “true” niece was, in fact, still alive. Unfortunately, the ruse was detected and the uncle was convicted and executed—only to have the “true” niece return at some later time, stating that she had been beaten, had run away, and had now returned to claim her inheritance.³²

To prominent Restoration-era legal writers like John Hawles and Matthew Hale, the fate of the Perrys, Coke's “Warwickshire uncle,” and other individuals deemed to have been wrongfully executed provided cause for sober reflection concerning the acceptable evidentiary foundations for capital convictions.³³ In particular, such incidents prompted leading English legal commentators to issue strong cautions about the dangers and limitations of so-called “presumptive” (i.e., circumstantial) evidence and to insist that prosecutors be required to prove that a crime had indeed been committed before permitting a jury to decide on a capital defendant's fate.³⁴ In 1688, for example, Hawles

University of Oxford [hereinafter Bodleian Lib.], shelfmark Douce W 35.

31. TRUTH BROUGHT TO LIGHT: OR, WONDERFUL STRANGE AND TRUE NEWS FROM GLOUCESTER SHIRE, CONCERNING ONE MR. WILLIAM HARRISON, FORMERLY STEWAR[D] TO THE LADY NOWELL OF CAMBDEN, WHO WAS SUPPOSED TO BE MURDERED BY THE WIDOW PERRY AND TWO OF HER SONS, ONE OF WHICH WAS SERVANT TO THE SAID GENTLEMAN (London, 1662), Bodleian Lib., shelfmark Wood 401 (fol. 191). This broadside is bound with other publications collected and assembled by the antiquarian Anthony Wood, some of which chronicle other “marvelous” events of the age. See, e.g., Abraham Miles, A WONDER OF WONDERS; BEING A TRUE RELATION OF THE STRANGE AND INVISIBLE BEATING OF A DRUM . . . (London 1662), Bodleian Lib., shelfmark Wood 401 (fols. 193–94) (capitalization in original). For a discussion of the treatment of such “wondrous” events in early modern English broadside literature, see DAVID CRESSY, TRAVESTIES AND TRANSGRESSIONS IN TUDOR AND STUART ENGLAND (2000).

32. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINALL CAUSES 232 (London, 1644); see also 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 299 (P.R. Glazebrook gen. ed., Professional Books, 1971) (1736).

33. Hawles (1645–1716) served as Solicitor General (1695–1702) and a Member of Parliament (1695–1710). Hale (1609–1676) served as Lord Chief Justice of England (1670–1676). For biographical details, see BIOGRAPHICAL DICTIONARY OF THE COMMON LAW (A.W.B. Simpson ed., 1984).

34. For incisive treatments of the status of circumstantial evidence in early modern English

alluded to “some instances of many” in which wrongful convictions had been secured, recalling “in [his] time where persons were convicted of the murder of a person absent, but not dead, barely by inferences upon the evidence of foolish words and actions”—a reference, quite likely, to the case of the three Perrys. Alluding, as well, to the 1611 case from Warwickshire, Hawles urged that English juries should convict only “upon direct and manifest proof, not upon probable conjectural presumptions, or inferences, or strains of wit.” To Hawles, these notorious instances of wrongful execution demonstrated clearly that “it [was] a most dangerous and unwarrantable thing for a jury, in capital matters, . . . to convict a person upon the evidence of probabilities.”³⁵

Like Hawles, Hale also expressed considerable reservations about the use of circumstantial evidence in capital cases. In his highly influential *Pleas of the Crown*, written in the 1670s though published roughly a half-century later, Hale warned that “[he] would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead.” In support of his rule, Hale pointed to the case from Warwickshire originally cited by Coke, as well as another case from Staffordshire in which a man had been convicted of killing and burning a “victim,” who later returned to the scene unscathed.³⁶ Deeply troubled by these events, Hale urged that prosecutors in cases of murder and manslaughter be required to prove that a wrongful homicide had indeed occurred. For good measure, Hale extended his caution to the offense of larceny as well, warning that “[he] would *never* convict any person for stealing the goods *cujusdam ignoti* [i.e., of an unknown person] merely because [the defendant] would not give an account of how he came by them, unless there were due proof made, that a felony was committed of these goods.”³⁷

The most influential treatise on eighteenth-century English law, William Blackstone’s *Commentaries on the Laws of England*, echoed Hale’s precepts. In his *Commentaries*, Blackstone specifically praised the “two rules” identified by Hale as “most prudent and necessary to be

criminal law, see BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 200–16, 229–41 (1991) [hereinafter SHAPIRO, “BEYOND REASONABLE DOUBT”]; BARBARA J. SHAPIRO, A CULTURE OF FACT: ENGLAND, 1550–1720, at 21–22 (2000).

35. Hawles, ironically, is best known for his pro-jury tracts written several years earlier in the wake of the seditious libel controversies of the previous decade. On Hawles’s role in such matters, see THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 252–60 (1985).

36. 2 HALE, *supra* note 32, at 299. With respect to the case that Hale believed to have arisen in Staffordshire, he supplied only the initials “A” and “B.” For additional discussion of the cases to which Hale alluded, see JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA 417 (3d ed. 1940).

37. 2 HALE, *supra* note 32, at 290.

observed”:

1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account of how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances [Hale] mentions, where persons were executed for the murder of others, who were then alive, but missing.³⁸

Notably, it was at this important juncture of the *Commentaries* that Blackstone expressed the maxim that has managed to survive in contemporary legal discourse only in part: “[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”³⁹

How can we summarize the views of these prominent English legal commentators concerning the problem of wrongful execution? First, both Hale and Blackstone articulated what would come, over time, to be known as the *corpus delicti* rule—the rule, applicable in modern Anglo-American jurisdictions, that the prosecution must carry the burden of proving that a crime has actually been committed before a jury may decide on a defendant’s guilt or innocence.⁴⁰ The rule, to be sure, is likely to strike twenty-first-century readers as a curious vestige; not surprisingly, perhaps, few legal scholars have devoted sustained attention to the doctrine’s historical origins.⁴¹ When discussed at all, the rule is associated with the significant, but relatively narrow, risk of false confession: in the words of one recent decision, “the English *corpus delicti* rule . . . served the limited function of ensuring that a defendant could not be convicted of a crime to which he had *confessed* if that crime never occurred.”⁴²

In truth, Hale, Blackstone, and subsequent Anglo-American treatise writers who echoed their views intended that the *corpus delicti* doctrine should apply more broadly. Rather than limiting their concerns to the prospect of false confessions, they urged that prosecutors be required to prove the actual commission of a felony in all instances in which prosecutors in capital cases sought to rely upon certain unreliable forms of circumstantial evidence. Their insistence that prosecutors be required

38. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 359 (Univ. of Chicago Press, 2002) (1769).

39. *Id.* at 358–59. For further discussion of Blackstone’s pronouncement in the context of shifting notions of the presumption of innocence, see Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 LAW & HIST. REV. 133, 145 (2005) [hereinafter Smith, *Presumption of Guilt*].

40. “This requirement is widely if not universally recognized in modern law and is quite frequently embodied in statutes.” MCCORMICK ON EVIDENCE 365 (Edward Cleary ed., 3d ed. 1984).

41. *But see* David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003); Note, *Proof of the Corpus Delicti Aliunde the Defendant’s Confession*, 103 U. PA. L. REV. 638 (1955).

42. *United States v. Bryce*, 208 F.3d 346, 354 (2d Cir. 1999) (emphasis added).

to establish the commission of an underlying felony derived not so much from a concern with false confessions per se, but with a more general suspicion of circumstantial evidence—the brand of evidence considered especially likely to generate wrongful convictions and, in a system that relied overwhelmingly on the death penalty for the punishment of convicted felons, wrongful executions.

In practice, magistrates and judges in England do not appear to have demonstrated the degree of evidentiary scruple insisted upon by Hawles, Hale, and Blackstone. In cases of suspected theft, as I have argued elsewhere, English magistrates frequently convicted criminal suspects in circumstances where the *corpus delicti* had not been strictly proven and, indeed, where no victim had come forward to complain at all.⁴³ Even in certain cases of clandestine crimes in which defendants' lives were at stake, English judges urged juries to rely upon circumstantial proof. For instance, Barbara Shapiro has observed that some judges in the eighteenth century actually instructed juries about the *reliability* of circumstantial evidence.⁴⁴ During the trial of the alleged poisoner Mary Blandy in 1752, the trial judge charged the jury that “[a] slight or probable presumption only has little or no weight, but a violent presumption amounts in law to full proof, that is, where circumstances speak so strongly that to suppose the contrary would be absurd.”⁴⁵ In the case of Blandy, who was accused of poisoning her father by mixing arsenic with the tea and “water gruel” that she had prepared for him, the trial judge actually instructed the jury that the presumptions that arose from circumstantial evidence “are more convincing and satisfactory than any other kind of evidence, *because facts cannot lie*.”⁴⁶

Similar praise for the reliability of circumstantial evidence was offered by the judge who presided at the trial of John Donnellan in 1781.⁴⁷ Donnellan had been indicted for allegedly poisoning his brother-in-law, one Theodosius Boughton, who stood in the way of Donnellan's succession to the family's landed estate. After Boughton supposedly had

43. See Smith, *Presumption of Guilt*, *supra* note 39 (discussing convictions of persons suspected of theft who failed to “account” satisfactorily for goods found in their possession); Bruce P. Smith, *Did the Presumption of Innocence Exist in Summary Proceedings?*, 23 *LAW & HIST. REV.* 191 (2005); Bruce P. Smith, *The Origins of Public Prosecution in England, 1790–1850*, 18 *YALE J.L. & HUMAN.* (forthcoming 2006).

44. See SHAPIRO, “BEYOND REASONABLE DOUBT,” *supra* note 34, at 217–18.

45. TRIAL OF MARY BLANDY 132 (William Roughhead ed., 1914); *see also* Susan Sage Heinzelman, *Guilty in Law, Implausible in Fiction: Jurisprudential and Literary Narratives in the Case of Mary Blandy, Parricide 1752*, in *REPRESENTING WOMEN: LAW, LITERATURE AND FEMINISM* 309–36 (Susan Sage Heinzelman & Zipporah Batshaw Wiseman eds., 1994); SHAPIRO, “BEYOND REASONABLE DOUBT,” *supra* note 34, at 217.

46. TRIAL OF MARY BLANDY, *supra* note 45, at 132 (emphasis added).

47. For details, see JOHN DONNELLAN, A DEFENCE AND SUBSTANCE OF THE TRIAL OF JOHN DONNELLAN, ESQ; WHO WAS CONVICTED FOR THE MURDER OF SIR THEODOSIUS BOUGHTON, BART. AT THE ASSIZES HELD AT WARWICK, ON FRIDAY THE 30TH OF MARCH 1781, . . . (London, 1781).

consumed the contents of a vial purchased from the local apothecary, he had convulsed, foamed at the mouth, and died. At trial, four medical experts claimed that Boughton had died from poisoning, basing their opinions on the circumstances of his death and the testimony of Boughton's wife that she had smelled an "almond" scent, which the prosecution's experts believed to be consistent with the smell of laurel water.⁴⁸ Charging the jury at the Warwick Assizes, Mr. Justice Buller observed that

the presumption which necessarily arise[s] from circumstances is very often more convincing, and more satisfactory, than any other kind of evidence, because it is not in the reach and compass of human abilities, to invent a train of circumstances which shall so be connected together as to amount to a proof of guilt, without affording opportunities for contradicting a great part, if not all, of these circumstances.⁴⁹

After being instructed in this manner, the jury convicted Donnellan, who was executed shortly thereafter.

Reflecting on the particular challenges of proving clandestine crimes, certain English treatise writers agreed that resort to circumstantial evidence in such cases not only might be necessary but might, on balance, prove even more reliable than eyewitness testimony. In 1803, Edward Hyde East observed in his *Treatise of the Pleas of the Crown* that, in cases of clandestine crime, "strong circumstantial evidence . . . is the most satisfactory of any from whence to draw the conclusion of guilt." Noting that persons claiming to be eyewitnesses could be "seduced to perjury by many base motives," East opined that it would be rare for "many circumstances, . . . over which the accuser could have no control" to convincingly form the "links of a transaction" that "wrongly fix[ed] the presumption of guilt on an individual."⁵⁰

Although certain English judges and legal commentators defended circumstantial evidence as an acceptable basis upon which to ground convictions in capital cases, others—prompted by additional instances of wrongful convictions and executions during the eighteenth century—instituted measures designed to improve evidentiary reliability and to avoid miscarriages of justice. Such reforms did not focus so much on the

48. Laurel water is distilled from cherry laurel, an evergreen shrub, and contains prussic acid—a potent, rapidly acting poison. In the nineteenth century, laurel water was used in Europe (in appropriate doses) as a medicinal narcotic. At Donnellan's trial, John Hunter (1728–1793), England's leading surgeon in the 1780s, expressed the view that Boughton had died from natural causes. The Hunterian Museum of the Royal College of Surgeons of England bears Hunter's name and that of his brother William (1718–1783), also a leading eighteenth-century physician. See THE ROYAL COLLEGE OF SURGEONS OF ENGLAND, HISTORY OF THE COLLEGE MUSEUMS, at http://www.icseng.ac.uk/services/museums/collections_html#hunter (last visited June 17, 2005).

49. DONNELLAN, *supra* note 47; see also SHAPIRO, "BEYOND REASONABLE DOUBT," *supra* note 34, at 219.

50. 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 223–24 (1803).

problem of circumstantial evidence, but were instead based on the potential unreliability of statements made by accomplices and defendants. As John Langbein has noted, a series of scandals at London's Old Bailey in the 1720s and early 1730s involving wrongful convictions "loomed large . . . among the concerns that contributed to the judges' decision to allow defendants to have the assistance of counsel" capable of disclosing perjured testimony through vigorous cross-examination.⁵¹ A decade later, "the danger of perjured crown witness testimony" prompted judges at the Old Bailey to adopt the "corroboration rule," which excluded the uncorroborated testimony of persons who had turned "state's evidence."⁵² In the 1770s, English judges began to apply more rigidly the "confession rule," which "disapproved evidence that the defendant had confessed the crime, unless that confession had been voluntary"—an inquiry that could result in the exclusion of confessions deemed to have been secured by either improper threats or promised concessions.⁵³ And, in the 1790s, British judges increasingly instructed jurors concerning what came to be known as the "beyond-reasonable-doubt" standard of proof—initially, it appears, by instructing jurors to acquit if they had "any rational doubt" as to a defendant's guilt.⁵⁴

In short, although concerns about the risk of wrongful execution had not, by 1800, led to the abolition of capital punishment in England, they had provoked prominent English legal commentators to call for strict application of evidentiary safeguards and had encouraged English judges to implement significant evidentiary initiatives designed to reduce the possibility of wrongful conviction and execution. It would remain to be seen how the substantial attention devoted to the problem of wrongful execution by English commentators and jurists affected American criminal justice administrators in the early decades of the Republic and beyond.

II. RESPONSES TO WRONGFUL EXECUTION IN AMERICA, 1790–1900

By the time the United States Constitution and the Bill of Rights were ratified in the last two decades of the eighteenth century, the troubling problem of wrongful execution had been recognized and commented upon in England for roughly 150 years. As in England, however, constitutional drafters and legislators continued to contemplate that capital punishment would be used to punish the most serious felony offenses.⁵⁵

51. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 157 (2003).

52. *Id.* at 203.

53. *Id.* at 233.

54. SHAPIRO, *A CULTURE OF FACT*, *supra* note 34, at 22–23 (emphasis added).

55. Although the most important source of contemporary due process protections, the Fifth

During the early decades of the nineteenth century, criminal justice administrators in America pursued a dual strategy with respect to the problem of wrongful execution. On the one hand, certain American commentators sought to buttress the legitimacy of the death penalty by downplaying the risk that fatal errors might occur on this side of the Atlantic. On the other hand, like their counterparts in England, American criminal justice administrators adopted certain safeguards designed to reduce the risk of wrongful execution. These strategies were the product of complementary motivations: maintaining the legitimacy of capital punishment while reducing the possibility of catastrophic error. As we shall see, they characterized, in important ways, the American response to wrongful execution during the early decades of the nation's existence.

A. THE CHALLENGE OF WRONGFUL EXECUTION

In 1816, Samuel March Phillipps, an English lawyer, treatise writer, and future official at the Home Office, published in America his *Theory of Presumptive Proof*. The 106-page tract, which had been published two years earlier in England, was bound as an appendix to Phillipps's comprehensive and influential *Treatise on the Law of Evidence*.⁵⁶ The *Treatise*, which went through numerous English and American editions during the course of the nineteenth century, capably surveyed the evidentiary rules governing competency, disqualification for interest, and hearsay. The *Theory of Presumptive Proof*, by contrast, offered a radically different perspective: studded with examples of wrongful convictions and executions, it presented a searing indictment of the dangers of circumstantial evidence in capital cases.

Phillipps started his *Theory of Presumptive Proof* by noting that "[t]he nature of circumstantial evidence, ha[d] never . . . formed the subject of any disquisition in the English language."⁵⁷ He then proceeded to portray, in dire terms, the dangers of excessive reliance on circumstantial evidence in capital cases. Phillipps first noted that, although

Amendment also expressly contemplates—on three occasions—the use of capital punishment. See U.S. CONST. amend. V ("No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of *life* or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of *life*, liberty, or property, without due process of law . . .") (emphases added). On the status of capital punishment in America in the late eighteenth century, see STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 24–111 (2002); LOUIS P. MASUR, *RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865*, at 25–70 (1989).

56. S.M. PHILLIPPS, *A TREATISE ON THE LAW OF EVIDENCE WITH NOTES AND REFERENCES TO AMERICAN AUTHORITIES* BY JOHN A. DUNLAP (N.Y., Gould, Banks & Gould 1816) [hereinafter PHILLIPPS, *PRESUMPTIVE PROOF*]. Phillipps served as Permanent Under Secretary of State at the Home Office from 1827 to 1848.

57. *Id.* at i.

it had been popular in recent times to “descant upon the certainty of circumstantial evidence,”⁵⁸ he observed that “too many instances . . . [could] be produced of innocent persons having fallen victims to that species of proof.”⁵⁹ Reflecting on Justice Buller’s instruction to the jury in the *Donnellan* case that circumstantial evidence was “more satisfactory” than “any other kind of evidence,”⁶⁰ Phillipps criticized Buller’s charge as “repugnant to the received principles of jurisprudence,” “not warranted by experience,” “new to the practice of . . . English law,” “extra judicial,” and “of dangerous example.”⁶¹ Although trained in the common law, Phillipps praised the detailed rules governing the treatment of circumstantial proof developed by Roman and civilian authorities.⁶² And in a political and legal culture where commentators still lauded the jury as an important political safeguard, he criticized the logical leaps taken by English juries, drawing upon the philosophy of Francis Bacon in observing that the human mind “imagin[es] parallel correspondence and relations betwixt [events] which have no existence.”⁶³

Phillipps punctuated his critique of circumstantial evidence by relying on roughly a dozen cases from England, Scotland, and France—including the sad tale of the Perrys—in which persons had been convicted and, in some cases, executed wrongfully. Phillipps’s parade of innocents included James Crow, executed for burglary in 1727 after being mistakenly identified as one Thomas Geddeley, who himself was later identified, arrested, and executed in Dublin; John Jennings, hanged for highway robbery in 1742 before Jennings’s master confessed to having planted the stolen coins on the unfortunate Jennings; and John Miles, executed for the murder of William Ridley, who was later

58. *Id.* at 22.

59. *Id.* at i.

60. See *supra* note 49 and accompanying text.

61. PHILLIPPS, PRESUMPTIVE PROOF, *supra* note 56, at 24, 46.

62. Continental evidentiary regimes typically relied on elaborate gradations of proof, which distinguished between the strength of eyewitness, circumstantial, and other forms of evidence. See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

63. PHILLIPPS, PRESUMPTIVE PROOF, *supra* note 56, at 46. Anticipating modern writing in the area of cognitive psychology and the law, Phillipps conjectured that jurors’ desire for orderly narratives predisposed them to the prosecutor’s story:

In the general prejudice, which at present prevails for circumstantial evidence, the mind, I am afraid, is rather disposed to look out for analogies and resemblances, [rather] than for discrimination.

In almost every trial, it is in the interest of the accuser to accumulate his proofs, whilst the safety of the prisoner consists in considering these, separate and apart; this practice, therefore, has a tendency rather to convict than to acquit.

Id. at 49. For a modern analysis of juror cognition, see Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004). For a modern defense of legal “story telling,” see STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON’T, CAN’T, AND SHOULDN’T HAVE TO TELL THE WHOLE TRUTH* (2001) (defending legal narratives as an appropriate means of providing jurors with coherent theories of the case).

determined to have fallen into a privy after engaging in a drinking session with Miles.⁶⁴

Although such cases were, in Phillipps's view, "superior to all general argument and abstract theory,"⁶⁵ he nonetheless proposed a series of evidentiary rules designed to protect criminal defendants from being wrongfully convicted and executed. Not surprisingly, given the urgings of Hale and Blackstone and the fact patterns of several of the cases that he described, Phillipps first urged that "[t]he actual commission of the crime itself (the *corpus delicti*)... be clearly established" before a person could be convicted.⁶⁶ Although reluctant to set forth "a technical system for the belief or disbelief of facts," Phillipps nonetheless proposed twelve additional rules designed to reduce the risk that circumstantial evidence might lead to legal error. Phillipps's suggestions included requiring "distinct proof" of all circumstances in a chain of proof, recognizing the challenges faced by suspects in "proving the negative," permitting defense counsel "to object freely to the production of any evidence," and ensuring that the jury "shall be as fully convinced of the guilt of the prisoner, from the combination of the circumstances, as if direct proof had been brought."⁶⁷

At first blush, the cases of wrongful execution chronicled by Phillipps might appear to have been too idiosyncratic and too geographically scattered to have had much chance of encouraging American judges to adopt evidentiary protections in capital cases.⁶⁸ But although the European cases that he narrated undeniably possessed a certain picaresque quality,⁶⁹ criminal justice administrators in America

64. Crow (robbery, 1727), PHILLIPPS, PRESUMPTIVE PROOF, *supra* note 56, at 78–81; Jennings (highway robbery, 1742), *id.* at 65–69; and Miles (murder, n.d.), *id.* at 81–85. In the case of Crow/Geddeley, "the resemblance between the two men was so exceedingly great, that it was next to impossible for the nicest eye to have distinguished their persons asunder." *Id.* at 81. In the case of Ridley, "the floor of the necessary [i.e., privy] had been taken up the morning before the death" and "a couple of boards had been left up," apparently resulting in Ridley—who was "much in liquor"—falling into "the vault, which was uncommonly deep." *Id.* at 84. The other individuals alleged by Phillipps to have been wrongfully executed included Thomas Harris (murder, 1642) (witness provided false testimony); William Shaw (murder, 1721) (victim's suicide note later discovered); Jonathan Bradford (murder, 1736) ("true" killer later confessed); and an unnamed parricide (murder, n.d.) (daughter of victim later confessed).

65. PHILLIPPS, PRESUMPTIVE PROOF, *supra* note 56, at ii. Phillipps omitted several other cases because they had already been discussed in contemporary English publications. *Id.* at ii–iii. He cautioned his readers, as well, that he did not claim to have identified all instances of wrongful execution that might have transpired. According to Phillipps, "[v]arious instances occur, of the fatal error having been too late discovered; but who can say, how many instances have occurred, where the mistake has never been discovered?" *Id.* at 27.

66. *Id.* at 56 (italicization modernized).

67. *Id.*

68. Indeed, Phillipps himself described the cases as "irregular." *Id.*

69. We might imagine that narratives of such cases appealed to contemporary tastes in the same way that the tale of "the return of Martin Guerre" appealed both to residents of early modern France

were soon forced to confront the stark realities of these cases and, in time, of their own domestic miscarriages of justice as well.

B. AMERICAN RESPONSES TO WRONGFUL EXECUTION

How did American lawyers, judges, and legal commentators in the early decades of the nineteenth century respond to the undeniable fact that persons—including those within their lifetimes—had been executed for crimes that had never occurred at all?

I. Denial

Consider, first, the case of John Canton and Charles Redding, tried at the Court of General Sessions in New York City in 1817 on a charge of robbing Thomas Ogden on the highway. The prosecution's case was circumstantial, and included an imperfect description of the perpetrators by the victim, a statement by a "vagrant" then confined in the penitentiary, and the fact that one defendant had been found with "two braces of small brass-barrelled pistols" in his possession and the other with a "watch key" that the victim believed to be his, "though he [c]ould not be positive."⁷⁰

At the close of the prosecution's case, the defendants' counsel, Barent Gardenier, employed a novel tactic: he "commenced reading to the jury several cases from Phillip[p]s's *A Treatise on the Law of Evidence*, under the head[ing] of 'presumptive proof.'"⁷¹ Among the cases narrated by Gardenier was the regrettable story of Jennings, executed after having been found with stolen coins in his possession though "continuing to the last to declare his innocence."⁷² But Gardenier did not stop there. He proceeded to read to the jury "several" more cases of wrongful execution that had been identified by Philipps, concluding his catalog of error by "expatiating" to the jury "on the danger of relying on circumstantial testimony."⁷³

The presiding judge, Mayor Jacob Radcliff, apparently did not take well to Gardenier's forensic strategy. In Radcliff's instruction to the jury,

and more modern audiences. See NATALIE ZEMON DAVIS, *THE RETURN OF MARTIN GUERRE* (1983).

70. Case of John Canton and Charles Redding (N.Y. Ct. Gen. Sess. 1817), in DANIEL ROGERS, *THE NEW-YORK CITY-HALL RECORDER, FOR THE YEAR 1817*, at 149–50 (Dennis & Co., Inc., 1953) (1817) [hereinafter *Canton & Redding's Case*]. The victim, Thomas Ogden, "could not swear that the prisoners at the bar were the men, yet their general appearance corresponded with the idea that he had formed of the robbers." *Id.* at 150. George Henry, a "vagrant" confined in the penitentiary, stated that he had previously seen the suspects with a watch and pocket book and heard them bragging that they had "obtained the watch from a gentleman on the Third Avenue, who was in a carriage with a lady." *Id.*

71. *Id.* at 151. To be precise, the cases recited by Gardenier appeared in Philipps's *Theory of Presumptive Proof*, which was appended to the first American edition of Philipps's *Treatise*, published in 1816.

72. *Id.*

73. *Id.* at 151–52.

he cautioned that “the cases read by the counsel for the prisoner . . . were extreme” and “such as do not exist, perhaps, in one case in a thousand.”⁷⁴ Radcliff then urged the jurors not to give undue credence to Phillipps’s tract:

The plain, practical rules of evidence, which had been established for ages, ought not to be shaken by any collection of cases in the works of *theoretical* writers. Such cases . . . may be inserted for the purpose of inducing the greater caution in juries; but, if employed for any other purpose, their application to the generality of cases, depending on circumstantial testimony, is dangerous to the extreme.⁷⁵

According to Radcliff, as many as “one half of the cases tried in our courts, depends on a combination of circumstances,” and “to apply extreme cases in such determination, would be sapping some of the most salutary rules known to our law.”⁷⁶ After receiving this extensive and strenuous charge, the jury returned a verdict of guilty, and the defendants were sentenced to the New York State Prison for life.⁷⁷

In criticizing Phillipps’s *Theory of Presumptive Proof* as “theoretical,” “dangerous,” and “extreme,” Radcliff sought to repel the vigorous attack on circumstantial evidence launched by Phillipps and Gardenier. But criticisms of Phillipps’s *Theory of Presumptive Proof* were not confined to trial judges responsible for ensuring order in American courtrooms. In his report of *Canton and Redding’s Case* published in *The New-York City-Hall Reporter*, a collection of early nineteenth-century criminal cases from New York City, Daniel Rogers also sharply criticized Phillipps’s *Theory of Presumptive Proof*, noting that its “sole object” appeared to be “to show that the plain, practical rules, by which courts have been governed in cases depending on circumstantial evidence, are objectionable.”⁷⁸ In Rogers’s view, Phillipps had unfairly brought into question the reliability of circumstantial evidence by failing to recognize the many instances in which direct, eyewitness testimony had also proved untrustworthy.⁷⁹ According to Rogers, “by ransacking the English annals, or the reports of adjudicated cases,” Phillipps might well have “selected eleven cases in which verdicts had been rendered on *direct* proof . . . but in which the witness or witnesses . . . were guilty of the foulest perjury.”⁸⁰ In Rogers’s view, Phillipps’s *Theory of Presumptive Proof* at best “afford[ed] amusement to men of speculative minds,” especially because its many

74. *Id.* at 152.

75. *Id.* (emphasis added).

76. *Id.*

77. *Id.* As the instruction to the jury noted, “[a]ll human testimony is fallible[,] but juries in their decisions must rely on such testimony.” *Id.*

78. *Id.* at 151.

79. *Id.*

80. *Id.*

recommendations concerning the treatment of circumstantial evidence were “too subtle and refined for the comprehension of common jurors.”⁸¹ Echoing the position of Mayor Radcliff, Rogers urged that judges “discard loose and specious speculations, and strictly adhere to those rules . . . [that have been] founded on the wisdom and experience of ages.”⁸²

Phillipps fared little better with Esek Cowen, the American annotator of his distinguished *Treatise on the Law of Evidence*. Cowen observed that, although Phillipps’s *Treatise* contained “some very sensible remarks,” the cases identified by Phillipps in his *Theory of Presumptive Proof* had “furnished our criminals . . . with a ready magazine of defensive armour” and “were, for some time, rung through our criminal courts as seriously impugning the doctrine which sanctions . . . [circumstantial] evidence.”⁸³ As a result, “[w]eak juries were sometimes alarmed . . . and judges felt bound peremptorily to interpose, in order to maintain the best settled principles in the law of evidence.”⁸⁴ Addressing Phillipps’s cases in turn, Phillipps’s principal American annotator attributed the errors to “fraud, perjury, conspiracy, a

81. *Id.*

82. *Id.* at 152.

83. ESEK COWEN, NOTES TO PHILLIPPS’ TREATISE ON THE LAW OF EVIDENCE 562, 556 (1850) [hereinafter COWEN, NOTES]. Cowen served as the official reporter of the New York Supreme Court (1823–1828) and as an Associate Justice of the New York Supreme Court (1836–1844). For biographical details, see Historical Society of the Courts of the State of New York, at http://www.courts.state.ny.us/history/Gallery_B.htm.

Evidence of the use of Phillipps’s attack on circumstantial evidence by other early nineteenth-century American defense lawyers is fragmentary but suggestive. The 1850 annotation to Phillipps’s *Treatise* suggests that similar arguments were raised in the United States Circuit Court for the District of New York in both *United States v. Jacobson* (1817) and *United States v. Jones* (1824). In *Jacobson*, a case involving the alleged willful destruction of a sailing ship, the trial judge responded to an objection by defense counsel that the case was “merely circumstantial” by stating that “[t]he rule . . . , even in capital cases, is that should the circumstances of a case be sufficient to convince the mind, and remove every rational doubt, the jury is bound to place as much reliance on such circumstances as on direct and positive proof; for facts and circumstances cannot lie.” *United States v. Jacobson*, 26 F. Cas. 567, 567 (C.C.D.N.Y. 1817) (No. 15,461). Although the report of the case does not reveal whether the trial judge was specifically responding to an attempted use of Phillipps’s *Theory of Presumptive Proof* by defense counsel, Phillipps’s American annotator observed suggestively that the case was tried “shortly after” the work’s publication the previous year. COWEN, NOTES, *supra*, at 562. The 1850 edition of Phillipps’s *Treatise* further observed that “[s]imilar resorts” to those attempted in *Jacobson* were pursued a few years later in *United States v. Jones*. In *Jones*, a case involving “piratical murder,” the trial judge instructed the jury as follows:

A number of cases have been cited and read, to show you the dangerous tendency of this kind of proof. It is possible an innocent person may have suffered; but such cases (if any such there were) could be no objection to this kind of evidence [i.e., circumstantial evidence]. If jurors were to disregard it, there would be an end to the administration of law, and to government. It is the duty of the jury to weigh all the evidence for and against the prisoner; and fair and legal inferences are to be made from facts and circumstances. They are often more satisfactory and conclusive than the testimony of witnesses.

26 F. Cas. 644, 648 (C.C.D.N.Y. 1824) (No. 15,493).

84. COWEN, NOTES, *supra* note 83, at 556.

prejudiced jury, professional error and mistake of witnesses, the misapprehension of direct testimony and its accidental non-correction” and “an *alleged* want of sagacity” in the trial judge—but not to any defect in circumstantial evidence or the administration of criminal justice per se.⁸⁵

Thus, as with certain modern-day proponents of capital punishment,⁸⁶ some influential observers in early nineteenth-century America simply responded to English and European cases of wrongful execution by denying the existence of the problem or by questioning their relevance to the American case.

Yet, while certain American commentators in the early decades of the nineteenth century might seek to explain away such errors as the product of corrupt *ancien régime* justice, they might well find it more distressing to confront such travesties at home. For in the second decade of the nineteenth century, as Stuart Banner has noted, American criminal justice administrators would be forced to confront “the first nationally known American cases of apparently innocent people executed or condemned.”⁸⁷ The realization that American criminal justice might itself be susceptible to fatal error—just like the English system from which it derived—created additional challenges for American criminal justice administrators.

Consider, first, the curious and tortuous case of the Boorn brothers of Vermont. In 1812, Russell Colvin, a local eccentric prone to wandering, disappeared from his home in Manchester, Vermont.⁸⁸ His brothers-in-law, Jesse and Stephen Boorn, were suspected of Colvin’s disappearance, but the body of Colvin, the supposed victim, could not be found.⁸⁹ After seven years had passed, and long after initial suspicion had dissipated from the brothers, a relative of the two suspects claimed to have experienced a dream in which Colvin had appeared to him.⁹⁰

Interest in Colvin’s disappearance and presumed murder revived and, during the course of a renewed investigation, a dog uncovered some bones believed to be those of Colvin.⁹¹ Upon the basis of this new “evidence,” which seemed, by the “scientific” standards of the day, to demonstrate conclusively that Colvin had been killed, Jesse Boorn was imprisoned. Thereafter, a convicted forger in an adjacent cell claimed to

85. *Id.* at 558.

86. *See, e.g.,* Cassell, *Defense, supra* note 12.

87. BANNER, *supra* note 55, at 122 (citing cases).

88. GERALD W. MCFARLAND, *THE “COUNTERFEIT” MAN: THE TRUE STORY OF THE BOORN-COLVIN MURDER CASE 4-6* (1990)

89. *Id.* at 6.

90. *Id.* at 49.

91. *Id.* at 59.

the authorities that Jesse had confessed.⁹² When confronted with his alleged jailhouse statement, Jesse placed the blame on his brother Stephen, who had relocated to New York and was apparently believed by Jesse to be outside the jurisdiction of the Vermont courts.⁹³ Tracked down and arrested in New York, Stephen ultimately confessed to killing Colvin in self-defense, likely concluding—quite sensibly—that the decision of Jesse to accuse him of Colvin’s killing rendered his prospects for acquittal rather dim.⁹⁴ Instead, both brothers were tried, convicted, and sentenced to death. Although the Vermont legislature commuted Jesse’s sentence to life imprisonment, it declined to respite the sentence of Stephen—seemingly, the more culpable of the two.⁹⁵

Supporters of the condemned man then undertook a concerted effort to find Colvin, placing advertisements in regional newspapers containing descriptions of the man they believed to be merely missing, and not dead.⁹⁶ Shortly before Stephen Boorn was to have been executed, Colvin miraculously re-emerged after a resident of New York City had read the description of Colvin in a local newspaper and notified the Boorns’ representatives that a man fitting Colvin’s description was living in New Jersey.⁹⁷ Colvin’s “triumphant” return to Vermont secured the release of both of his erstwhile “killers.”⁹⁸

Not surprisingly, opponents of the death penalty in nineteenth-century America and England seized upon the problem of wrongful execution to argue that the administration of the death penalty involved intolerable risk. In the 1840s, the American abolitionist Lydia Maria Child wrote, in her *Letters from New York*, of the case of a German immigrant to New York who had been executed only to have the real perpetrator confess upon her deathbed.⁹⁹ Indeed, as late as 1877, James Carson expressed the view, in his *Capital Punishment is Murder Legalized*, that the seventeenth-century case of the Perrys and other notorious instances of wrongful execution in both England and America made him “fearlessly assert that hundreds of persons are executed who are not proved guilty; and many of them, perhaps, are altogether innocent of the crime laid to their charge.”¹⁰⁰

But if the prospect of wrongful execution provided inspiration to

92. *Id.* at 65.

93. *Id.* at 66.

94. *Id.* at 78.

95. *Id.* at 106–15.

96. *Id.* at 116–20.

97. *Id.* at 123–25.

98. *Id.* at 128–30. The Boorns’ attorney later published a short history of the case. See LEONARD SARGEANT, *THE TRIAL, CONFESSIONS AND CONVICTION OF JESSE AND STEPHEN BOORN FOR THE MURDER OF RUSSELL COLVIN; AND THE RETURN OF THE MAN SUPPOSED TO HAVE BEEN MURDERED* (1873).

99. LYDIA MARIA CHILD, *LETTERS FROM NEW-YORK* 215–16 (1843).

100. JAMES C.L. CARSON, *CAPITAL PUNISHMENT IS MURDER LEGALIZED* 174–75 (3d ed. 1877).

opponents of the death penalty, how did it affect nineteenth-century American criminal justice administrators?

2. *The Corpus Delicti Rule*

As many American jurisdictions (at least in the North) during the early decades of the nineteenth century increasingly restricted capital punishment to those convicted of intentional murder, trial judges were placed in a position to institute one measure that would reduce the risk of wrongful executions in which persons, in truth, had never been killed. By requiring that the *corpus delicti* rule be strictly enforced, i.e., by ensuring that a murder had actually been committed before placing a defendant on trial for his life, embarrassing incidents such as those involving the Perrys and Boorns could be avoided.¹⁰¹ By 1791, the English treatise writer Capel Lofft felt confident that the rules “laid down” with respect to proof of the *corpus delicti* were not “likely to be overlooked” by either lawyers or judges—at least in England.¹⁰² Moreover, one might have expected the sorry experience of the *Boorn* case to have encouraged American judges in the antebellum era to think very carefully about placing persons on trial for their lives when the bodies of their alleged victims could not be found.

As a practical matter, however, nineteenth-century American judges faced difficult questions in determining how strictly the *corpus delicti* rule should be applied in cases of suspected murder. On the one hand, the prospect of a “victim” appearing back at the scene of the “crime,” while remote, had certainly been proven possible. As such, the phenomenon possessed the worrisome capacity to call the administration of the death penalty into serious question. On the other hand, commentators on criminal justice administration expressed the concern that particularly cunning criminals not be allowed to manipulate the *corpus delicti* doctrine as a means of avoiding conviction. Addressing the latter concern, the treatise writer W.M. Best noted in 1876 that it would be “a

101. “By 1860 no northern state punished with death any offense other than murder and treason,” and many limited the capital sanction to first-degree (intentional) murder. BANNER, *supra* note 55, at 131. Although states in the South “moved nearly as far as the North in ceasing to execute whites for crimes other than murder,” many other felonies “remained capital on the books.” *Id.* at 139–40. Although “the list of capital crimes for whites in the antebellum South was much longer than in the North, it was far shorter than the corresponding list for southern blacks.” *Id.* at 140–41.

102. The full quotation is, admittedly, rather difficult to parse:

Two Rules are laid down by Lord C. J. Hale, and these in the present state of the Administration of criminal Justice, to the perfecting of which that great man so eminently contributed, are rather hints to the student on the *Theory* than requisite to be called to remembrance in the practice: for we are not now in times in which they are likely to be overlooked. They are, never to *indict of stealing the goods of an unknown person till it appear by due proof that a felony has actually been committed on those goods. Never to convict of Murther or Manslaughter, unless the fact can be proved to be done, or at least the body were found.*

2 CAPEL LOFFT, *THE LAW OF EVIDENCE BY LORD CHIEF BARON GILBERT 898* (1791) (“Of Criminal Presumptions”).

startling thing to proclaim to every murderer that, in order to secure impunity to himself, he has nothing to do but consume or decompose the body by fire, [or] by lime, or . . . to sink it in an unfathomable part of the sea."¹⁰³ In cases before them, American trial judges demonstrated similar sensitivity that prosecutions for heinous crimes not be thwarted by an unduly rigid application of the *corpus delicti* rule. Thus, in *United States v. Matthews*, a case concerning an alleged murder at sea, the court determined that requiring the body of the victim to actually be *seen* after the victim's death "would afford the most complete protection and indemnity from the worst offences, and would amount to an unusual condonation of all murders committed on the high seas"—since corpses, in such circumstances, were unlikely to be retrieved.¹⁰⁴

Additionally, in the highly-publicized case of *Commonwealth v. Webster*, which involved the disappearance and suspected murder of Professor George Parkman of Harvard, the accused was believed to have murdered Parkman and disposed of the body.¹⁰⁵ There, the trial court determined that the case could go to the jury even though the only physical evidence of the *corpus delicti* was "a great number of fragments of human bones and certain blocks of mineral teeth, imbedded in slag and cinders, together with small quantities of gold, which . . . were found in an assay furnace of the laboratory" in which the accused had worked.¹⁰⁶ Determining on appeal that this physical evidence constituted sufficient proof of the *corpus delicti*, Chief Justice Lemuel Shaw observed that "most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness."¹⁰⁷ According to Shaw, if courts and juries did not avail themselves of circumstantial evidence in criminal proceedings, it would be impossible to estimate "how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished."¹⁰⁸

103. BEST, *supra* note 21, at 787.

104. 26 F. Cas. 1205, 1207 (C.C.S.D.N.Y. 1843) (No. 15,741b) (citing Justice Story's remarks in *United States v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204)).

105. *Commonwealth v. Webster*, 59 Mass. 295, 296 (1850).

106. *Id.* at 299; see also CHRISTOPHER JOYCE & ERIC STOVER, WITNESSES FROM THE GRAVE: THE STORIES BONES TELL 45-53 (1991); PHILLIPPS, FAMOUS CASES, *supra* note 24, at 47-49; ROBERT SULLIVAN, THE DISAPPEARANCE OF DR. PARKMAN 144-45 (1971).

107. *Webster*, 59 Mass. at 311.

108. *Id.* Shaw further noted:

The advantages [of circumstantial evidence] are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want to due deliberation and sobriety of judgment, to make hasty and false deductions

Id. at 312.

Although American judges in cases alleging murder permitted cases to go to juries even where bodies could not be found, defense lawyers in such cases continued to press trial judges to apply the *corpus delicti* rule strictly. At times, they succeeded in doing so. In the *Ruloff* case, decided by the New York Court of Appeals in 1858, the appellant had been convicted of murdering his infant child.¹⁰⁹ The evidence at trial showed that Ruloff “did not live happily with his wife”; that his wife and infant had last been seen by a neighbor on June 24, 1845, but by no one since; that on June 25, Ruloff had borrowed a wagon from a neighbor and had used it to carry a box from his home to an unknown location; that Ruloff had later returned with the wagon, the box, and his wife’s ring and shawl; that he had told stories “as to her being at sundry places where she was proved not to have been”; that he had “a cast iron mortar of twenty-five or thirty pounds weight, and flat irons, which on searching . . . [his] house were not found”; and, finally, that he had fled to Chicago, where he claimed that his wife and children had drowned in the Illinois River.¹¹⁰

At trial, Ruloff’s lawyer moved for a directed verdict on the grounds that “no direct evidence of death or the murder of the infant daughter had been given.”¹¹¹ The trial judge denied the motion, and the jury later convicted Ruloff.¹¹² The appellate court reversed and, in doing so, canvassed the now-familiar range of Anglo-American sources bearing on the dangers of circumstantial evidence and wrongful execution: Coke, Hale, Blackstone, Phillipps’s *Theory of Presumptive Proof*, and various nineteenth-century Anglo-American treatises on circumstantial evidence.¹¹³ After surveying these materials, the appellate court concluded that there was “no judicial authority warranting [a] departure” from “Lord Hale’s rule” that required “*certain* proof that some one is dead to be the ground on which . . . an accused person is to be convicted of murder.”¹¹⁴

During the nineteenth century, American judges struggled to determine how strictly to apply the *corpus delicti* rule in cases where bodies could not be found. Wishing to avoid the types of embarrassing instances of wrongful execution that had marred English criminal justice administration in the seventeenth and eighteenth centuries and that had nearly come to pass in the *Boorn* case, American judges also sought to ensure that persons who had committed deadly, clandestine crimes stand trial for their misdeeds. In short, American judges applied the *corpus delicti* doctrine in ways that permitted convictions to be secured but left

109. *Ruloff v. People*, 18 N.Y. 179 (1858).

110. *Id.* at 180–81.

111. *Id.* at 181.

112. *Id.* at 179–81.

113. *Id.* at 185–99.

114. *Id.* at 198–99 (emphasis added).

open the troubling possibility that innocent persons would be wrongfully executed for crimes that had never taken place.

3. *Circumstantial Evidence*

During the nineteenth century, criminal justice administration in capital cases continued to demonstrate certain continuities with the eighteenth century with respect to the treatment of circumstantial evidence. As in the eighteenth century, some participants in the criminal justice system expressed concerns about the acceptability of convicting persons based on circumstantial evidence. And, as in the eighteenth century, such concerns were occasionally resisted by judges who sought to preserve circumstantial evidence as an acceptable foundation upon which to convict persons charged with capital offenses.

Some sense of these enduring tensions can be gleaned by reading capital cases from those American jurisdictions that allowed jurors to insist that persons convicted of capital offenses based solely on circumstantial evidence be spared from execution. In 1874, in *Merritt v. State*, the Supreme Court of Georgia described the applicable law in Georgia as follows:

By the penal code of this state the punishment of murder shall be death, *except when the conviction is founded solely on circumstantial testimony*. When the conviction is had solely on circumstantial testimony, then it is discretionary with the presiding judge to impose the death penalty or to sentence the defendant to imprisonment in the penitentiary for life, unless the jury . . . shall recommend that the defendant be imprisoned in the penitentiary for life[;] in that case the presiding judge has no discretion, but is bound to commute the punishment from death to imprisonment for life in the penitentiary.¹¹⁵

Thus, Georgia law permitted either juries or judges in capital murder cases to spare persons from death who were deemed to have been convicted wholly upon circumstantial evidence.

We know little about the motivations for such sentencing regimes or how they operated in practice. One suspects that the approach to circumstantial evidence under the Georgia statute reflected a concern with both the inherent limitations of circumstantial evidence and a corresponding desire to mitigate the rigors of the death penalty in instances where some residual doubt about either culpability or desert continued to exist.¹¹⁶ With this said, fragmentary evidence suggests that

115. *Merritt v. State*, 52 Ga. 82, 85 (1874) (emphasis added).

116. The model jury charges of certain states continue to evince similar reservations about the status of circumstantial evidence. Although defendants in capital cases tried in *federal* court may be convicted solely on circumstantial evidence, "many states that allow the death penalty permit a conviction based solely on circumstantial evidence only if such evidence *excludes to a moral certainty* every other reasonable inference except guilt." *United States v. Quinones*, 205 F. Supp. 2d 256, 267 (S.D.N.Y. 2002) (citing, by way of example, practice in Arkansas, Indiana, and New York) (emphasis added).

juries may have sought to spare defendants from death not only in those cases where they considered the evidentiary foundations of the case to be suspect. In *Merritt*, for example, the jury attempted to insist that the woman whom they had convicted of murder be sentenced to a term of life imprisonment even when she had “picked up a knife, . . . rolled up her sleeves, opened the knife, approached [the] deceased, . . . [and] stabbed and struck [the] deceased in the right breast, immediately under the right nipple.”¹¹⁷ Although the jury may have believed that the condemned woman had taken up the knife with some justification—in order to deal with an especially annoying neighbor—the evidence was anything but circumstantial. Accordingly, the Georgia Supreme Court reversed the jury’s attempted sentence of life imprisonment, finding that ample direct evidence had been present in the case and, thus, that the jury lacked the ability under Georgia law to insist on a term of life imprisonment.¹¹⁸

Although the state of Georgia, at least in theory, provided jurors with some latitude to mitigate the sentences of persons convicted solely upon circumstantial evidence, other American jurisdictions sought to ensure that potential jurors whose evidentiary sensitivities were overly refined be *excluded* from jury service in capital cases altogether. Under Alabama law, for example, the prosecution was permitted to challenge for cause any person who had either “a fixed opinion against capital, or penitentiary punishment” or who thought that “a conviction should not be had on circumstantial evidence.”¹¹⁹ At the trial of George Jackson, charged in 1882 with the murder of one Adam Howard in Montgomery, Alabama, a venireman named A.N. Noble stated that he was “opposed to hanging on circumstantial evidence,” though “not opposed to a conviction.”¹²⁰ Agreeing with the decision of the trial judge to strike Noble for cause, the appellate court concluded that Noble’s “fixed opinion against capital punishment,” as evidenced by his resistance to convicting upon circumstantial evidence, “was sufficient to disqualify him.”¹²¹ According to Alabama’s highest court, the State of Alabama had sought “to place positive and circumstantial evidence upon the same basis of equality, so as to abolish all prejudice or discrimination against them, as media or instrumentalities for arriving at the truth, in the process of judicial investigation of capital felonies against the State.”¹²²

117. *Merritt*, 52 Ga. at 83–84.

118. *Id.* at 86–88.

119. *Jackson v. State*, 74 Ala. 26, 29–30 (1883) (citing Ala. Code § 4883 (1876)).

120. *Id.* at 27.

121. *Id.* at 30.

122. *Id.*; see also *Garrett v. State*, 76 Ala. 18, 20 (1884) (dismissing venireman who stated that “he would convict on circumstantial evidence, but would not hang on such evidence”); *Smith v. State*, 55 Ala. 1, 9 (1876) (“It is good ground of challenge for cause by the State, in any case, whether of felony or misdemeanor, that the juror holds to such an opinion of the law, that he cannot, or will not, convict

In some jurisdictions, members of the venire who expressed qualms about circumstantial evidence might be stricken even when such compunctions had not been specifically identified by the legislature as a basis upon which to strike for cause. At the outset of a murder trial in Cooper County, Missouri, in 1878, the venirepersons were polled as to whether “they would convict one accused of murder on circumstantial evidence alone.”¹²³ All of the potential jurors except one stated that they would refuse to convict under such circumstances, and the final person polled acknowledged that he would “have ‘scruples in doing so.’”¹²⁴ Although the statutory law of Missouri—unlike that of Alabama—did not identify a venireperson’s unwillingness to convict upon circumstantial evidence as a basis upon which to strike for cause, the Supreme Court of Missouri concluded that the trial court’s decision to strike the potential jurors was proper, on the grounds that “the State has the same right as the defendant to an impartial jury.”¹²⁵

From our modern-day perspective, it is difficult to appreciate fully either the source or the strength of this nineteenth-century anxiety concerning the evidentiary status of circumstantial evidence. What does seem clear is that, well into the latter decades of the nineteenth century, both potential and sitting jurors occasionally expressed serious misgivings about convicting persons of capital offenses based upon circumstantial proof. However, like their eighteenth-century English counterparts, American judges at both the trial and appellate levels struggled to preserve the ability to rely upon circumstantial evidence as a means of securing convictions in capital cases.

4. *Appellate Review*

At common law, English defendants convicted of felonies possessed only the most limited opportunities for post-conviction review. Defendants could petition the Home Office to have their capital sentences respited, but success in this endeavor typically depended on the favorable recommendation of the trial bench.¹²⁶ They could challenge certain aspects of the trial proceedings by way of the writ of error, but this method of review was essentially restricted to errors apparent on the face of the underlying record.¹²⁷ Most significantly, convicted persons

on circumstantial evidence, however strong it may be.”).

123. *State v. West*, 69 Mo. 401, 402 (1878).

124. *Id.*

125. *Id.* at 403 (noting that “[a] juror should be in [a] condition of mind to do exact justice between the State and the accused”).

126. On the pardon process in England during the seventeenth and eighteenth centuries, see J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 430–49 (1986).

127. See, e.g., ROSEMARY PATTENDEN, *ENGLISH CRIMINAL APPEALS 1844–1994: APPEALS AGAINST CONVICTION AND SENTENCE IN ENGLAND AND WALES* (1996); David Rossman, “*Were There No Appeal?*”: *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990).

possessed “no means for correcting the errors of juries... notwithstanding the inherent probability of error in a human tribunal.”¹²⁸ Indeed, it was not until 1907 that English criminal defendants secured the ability to have their convictions set aside on the ground that the jury’s verdict was “unreasonable” or could not be “supported... [by] the evidence.”¹²⁹

As in England, American criminal defendants historically possessed the ability to file post-conviction motions alleging legal error in “the indictment process, the means by which the jury was selected, lack of jurisdiction in the court, or other procedural irregularities” apparent on the face of the record.¹³⁰ Moreover, during the course of the nineteenth century, American jurisdictions increasingly permitted defendants—especially in capital cases—to seek a new trial if the appellate court, in its discretion, determined “that the verdict was against the weight of evidence... or that justice [so] requires.”¹³¹ As late as the 1930s, however, the majority of American jurisdictions continued to deny persons convicted of felonies the ability to seek review based on the insufficiency of the evidence.¹³² Reflecting on the state of affairs in America as late as the 1930s, Edwin Borchard observed that “in nearly all our states the appellate courts can reverse a conviction only for errors of law,” making them “bound by the jury’s finding of fact, however wrong [the appellate court] may consider the conclusion.”¹³³

Of course, like today, the prospect that an appellate court might see fit to identify the commission of a *legal* error in the proceedings below by no means ensured that the defendant would be afforded a new trial or even spared from execution. By the 1870s, American courts had developed the “harmless error” doctrine, which rendered inconsequential those legal errors deemed by the appellate court not to have materially affected the jury’s verdict of guilt.¹³⁴ In *Territory v.*

128. PATTENDEN, *supra* note 127, at 5.

129. In that year, England established a Court of Criminal Appeal—spurred, it should be noted, by yet another prominent scandal involving a wrongful conviction. Under the 1907 Act, appeals based upon disputed issues of fact could be secured by leave of the Court of Criminal Appeal or by way of a “certificate” from the judge who had initially tried the case. PATTENDEN, *supra* note 127, at 129.

130. Rossman, *supra* note 127, at 534.

131. EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE xxi, xxiii, xxviii (1932) (citing N.Y. CODE CRIM. P. § 528).

132. BORCHARD, *supra* note 131, at xxi; *see also id.* at xxviii n.4 (citing AMERICAN LAW INSTITUTE, PROPOSED CODE OF CRIMINAL PROCEDURE 597 (1930); NATIONAL COMMISSION OF LAW OBSERVANCE, REPORT ON CRIMINAL PROCEDURE, No. 8, at 44 (1931)).

133. BORCHARD, *supra* note 131, at xxi–xxii (“Contrary to the European practice generally, evidence of miscarried justice or perjury discovered after final judgment is in many American jurisdictions no ground for a new trial, because appellate courts maintain their incompetence to consider it. A petition for executive clemency becomes then the only available remedy.”).

134. On “harmless error” analysis, see Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast that Swallowed the Constitution*, 25 T. MARSHALL L. REV. 45 (1999–

Hargrave (1873), for example, an Arizona territorial court observed that the series of “harmless errors” that it had detected in the trial proceedings below

ought not to disturb the judgment in the present case, for they do not appear to have prejudiced the defendant, and they are mentioned here only to show that they have not been overlooked in the examination of the record, and as a caution in other cases which may be less carefully tried than this one has obviously been.¹³⁵

In a sample of cases from California in the early twentieth century, the state’s supreme court affirmed capital cases at a rate of ninety-eight percent—overturning only one out of fifty-eight death penalty cases in which it rendered decisions on the merits.¹³⁶

On balance, the expansion of rights of criminal appeal in nineteenth-century America appears to have placed appellate judges in a paradoxical position with respect to the problem of both wrongful conviction and wrongful execution. On the one hand, through their ability to identify errors in trial proceedings, appellate judges possessed the capacity to prevent persons from being wrongfully punished for crimes that they had not, in fact, committed. On the other hand, as Lawrence Friedman has observed, the “hypertechnicality” associated with nineteenth-century appellate decisions also supported the existing system of criminal justice administration, by furnishing “the appearance of meticulous justice” that “legitimated and defended the system.”¹³⁷ Put differently, although appellate judges possessed the potential to call the system of criminal justice administration into question, they also had the ability to legitimate it by characterizing trial-level errors as “harmless,” by stressing the thoroughness with which they had reviewed the underlying record, and by assuring readers of their published opinions that they had approached the issue of the defendant’s culpability with neutrality and detachment.

III. THE PROBLEM OF WRONGFUL EXECUTION IN CONTEMPORARY AMERICA

How do English and American responses to the problem of wrongful execution from roughly 1640 to 1900 compare with approaches to the phenomenon during the last century in America?

As we have seen, Anglo-American legal commentators, lawyers, and

2000).

135. 1 *Ariz.* 95, 96–97 (1873).

136. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 417 (1993) (citing LESTER ORFIELD, *CRIMINAL APPEALS IN AMERICA* 226 (1939)); see also Ronald H. Beattie, *Criminal Appeals in California*, 24 *CAL. L. REV.* 623, 631 (1936) (cited in ORFIELD, *supra*, at 226 n.71).

137. FRIEDMAN, *supra* note 136, at 257–58.

social reformers from the seventeenth through the early nineteenth centuries had little difficulty pointing to cases in which persons were widely believed to have been executed wrongfully and, in turn, in using such cases to serve their particular goals. In contrast, commentators seeking to identify and capitalize upon such cases in the modern era face a set of considerable challenges. At the threshold, persons seeking to identify instances of wrongful execution confront skeptics who doubt the historical prevalence of such cases and even their very existence in recent decades. In turn, a series of procedural barriers—most notably, the reluctance of prosecutors and judges to permit post-execution testing of biological samples—have made it difficult for interested parties (typically public interest groups or members of the press) to identify clear instances of wrongful execution by testing potentially exculpatory DNA evidence. Even those cases of wrongful execution that have been identified and advanced by critics of capital punishment have typically been forced to compete with powerful “counter-narratives” advanced by judges, prosecutors, victims, or groups sympathetic to capital punishment, which typically emphasize the guilt of the condemned, the finality of the jury’s verdict, and the rectitude of the underlying legal proceedings. And while state and federal courts have been confronted in recent years by arguments that the risk of executing innocent persons violates constitutional commitments to due process, virtually all courts have refused to declare either federal or state death penalty regimes unconstitutional on such grounds. Finally, certain prominent supporters of the death penalty continue to argue that wrongful executions—even if they conceivably occur—are to be anticipated and, at any rate, would be justified based upon other presumed benefits of maintaining capital punishment.

A. THE HISTORICAL PROBLEM

In the early decades of the twentieth century, America witnessed a period of sustained interest in the issues of wrongful conviction and wrongful execution.¹³⁸ In 1912, the American Prison Congress—the predecessor of the American Correctional Association—published a report claiming to have found no cases of wrongful execution in American history, though the organization’s approach of surveying prison wardens in the United States and Canada about whether they had “personal knowledge” of such cases did little to inspire confidence in the survey’s methodology.¹³⁹

¹³⁸ For a helpful review of these efforts, see Canada Dep’t of Justice, FPT Heads of Prosecutions Committee Report of the Working Group on the Prevention of Miscarriages of Justice, at <http://canada.justice.gc.ca/en/dept/pub/hop/p2.html> (last visited Apr. 15, 2005).

¹³⁹ Robert H. Gault, *Find No Unjust Hangings*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 131 (1912). The warden of Leavenworth Prison, for his part, conceded that he knew of “one or two persons who

More scholarly and more influential was Edwin Borchard's *Convicting the Innocent: Errors of Criminal Justice* (1932), which identified sixty-five convictions in England and America of "completely innocent people."¹⁴⁰ Borchard, a Professor of Law at Yale University, attributed the miscarriages of justice to numerous sources of error, including erroneous eyewitness testimony, false confessions, faulty circumstantial evidence, and prosecutorial excesses.¹⁴¹ But Borchard's study, focused as it was on the phenomenon of wrongful conviction, did not directly address the problem of wrongful execution. Indeed, many of the cases identified by Borchard had been identified precisely because the convicted persons had been sentenced to life imprisonment rather than death, thus making it more likely that attention would be drawn to their plights during their lifetimes.

Despite the importance of these pioneering studies, the modern debate about the prevalence of wrongful execution in the United States dates from the 1980s, most notably with the publication in 1987 of an article by Hugo Bedau and Michael Radelet in the *Stanford Law Review*.¹⁴² After first observing that "the risk of executing the innocent is largely unknown," Bedau (a philosopher) and Radelet (a sociologist) proceeded to identify 350 cases in which they considered that persons had been wrongfully convicted for capital or "potentially capital" crimes, as well as twenty-three cases in which persons they "believe[d] to be innocent . . . were executed."¹⁴³ Their list of persons wrongfully executed, which spanned the period from 1905 to 1974, included several prominent historical figures, such as Joe Hill (1915), Sacco and Vanzetti (1921), and Bruno Hauptmann (1935).¹⁴⁴ According to the authors, the nineteen others were "household name[s]" in their day but have now been largely

may . . . have been executed wrongfully." *Id.* (emphasis added).

140. See BORCHARD, *supra* note 131, at xiii.

141. See *id.* For later studies, see JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957); EDWARD D. RADIN, *THE INNOCENTS* (1964); Erle Stanley Gardner, *Helping the Innocent*, 17 *UCLA L. REV.* 535 (1970).

142. Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21 (1987) [hereinafter Bedau & Radelet, *Miscarriages*]. The paper had been presented by the authors two years earlier at the annual meeting of the American Society of Criminology. *Id.* at 21. For an earlier statement exploring similar themes, see Hugo Adam Bedau, *Murder, Errors of Justice, and Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 434-52 (H.A. Bedau ed., 1964) (identifying seven twentieth-century cases and one nineteenth-century case of wrongful execution).

143. Bedau & Radelet, *Miscarriages*, *supra* note 142, at 23, 72-73.

144. Hill, an early twentieth-century labor leader, was convicted of murdering a grocery store owner in Salt Lake City in 1914 and killed by a Utah firing squad the year after. See Joe Hill: The Man Behind the Martyr, at <http://www.kued.org/joehill/story/index.html> (last visited Apr. 15, 2005). Sacco and Vanzetti were convicted of robbery and murder in South Braintree, Massachusetts, in 1920 and executed seven years later. See Sacco Vanzetti Project, at <http://www.saccovanzettiproject.org/project.htm>. Hauptmann was convicted in New Jersey in 1935 for the kidnapping and murder of the Lindbergh baby and executed the following year. See Steven Limbaugh, *The Case of New Jersey v. Bruno Richard Hauptmann*, 68 *UMKC L. REV.* 585 (2000).

forgotten.¹⁴⁵

The Bedau/Radelet study prompted a sharp response the following year by Paul Cassell (at the time, a Special Assistant U.S. Attorney) and Stephen Markman (then serving as an official in the Department of Justice).¹⁴⁶ Alleging that the Bedau/Radelet study was “severely flawed in critical respects,” Cassell and Markman concluded that the study “wholly fail[ed] to demonstrate an unacceptable risk of executing the innocent.”¹⁴⁷ Addressing Bedau and Radelet’s twenty-three cases of alleged wrongful execution, Cassell and Markman raised three principal objections. First, they observed that “only about seven percent of the study [i.e., twenty-three of 350 cases] deal[t] with cases of allegedly erroneous execution.” Second, they noted that the study’s tally of “wrongful executions” included cases from “the early part” of the twentieth century, “long before the adoption” of what Cassell and Markman styled “the extensive contemporary system of safeguards in the death penalty’s administration.” Finally, they contended that Bedau and Radelet’s reconstruction of the cases was “one-sided,” claiming that there “appear[ed] to be little resemblance between the authors’ descriptions and the actual cases” as they had transpired. In conclusion, Cassell and Markman contended that the authors had presented “no credible evidence that any innocent person ha[d] been executed” since the early 1970s, when “procedural protections . . . [were] adopted to reduce as much as possible the likelihood that error will be committed or, if committed, that it will go undetected.”¹⁴⁸

Since the exchange of these initial salvos in the late 1980s, the leading participants have continued their debate.¹⁴⁹ Suffice it to say that the skeptics remain unconvinced. In a recent article, Cassell (now a federal district court judge) has observed that “the claim that innocents have actually been executed has been repeated by abolitionists so often

145. Bedau & Radelet, *Miscarriages*, *supra* note 142, at 74. They were Vance Garner (Alabama, 1905); Charles Louis Tucker (Massachusetts, 1905); Mead Shumway (Nebraska, 1907); Charles Becker & Frank Cirofici (New York, 1912); Thomas Bambrick (New York, 1915); Albert Sanders (Alabama, 1917); Maurice Mays (Tennessee, 1919); Harold Lamb (New Jersey, 1920); Stephen Grzechowiak & Max Rybarczyk (New York, 1929); Everett Appelgate (New York, 1936); George Chew Wing (New York, 1937); Roosevelt Collins (Alabama, 1937); Charles Sberna (New York, 1938); Willie McGee (Mississippi, 1945); William Henry Anderson (Florida, 1945); Sie Dawson (Florida, 1960); and James Adams (Florida, 1974). *Id.* at 73.

146. See Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

147. *Id.* at 121.

148. *Id.* at 122.

149. Compare Hugo Bedau & Michael Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988), and MICHAEL RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992), with Cassell, *Defense*, *supra* note 12, and Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64 (2000).

that it has become something of an urban legend.”¹⁵⁰ Most recently, Bedau and Radelet have responded that the prevalence of “close calls” and other statistical evidence strongly suggest that some innocent persons have been executed—though they acknowledge that “[c]lose calls, by themselves, do not provide evidence sufficient to enable us to point to the innocence of a particular individual defendant who was executed.”¹⁵¹ In sum, although polls have revealed that most Americans believe that persons convicted of crimes have, indeed, been wrongfully executed, other prominent commentators remain thoroughly unconvinced.¹⁵²

B. THE PROCEDURAL PROBLEM

In theory, the advent of “the DNA revolution” of the 1980s held out the prospect of a new chapter in the history of wrongful execution by permitting interested parties to assess the correctness of the verdicts of persons who had been convicted and executed. Yet, although breakthroughs in scientific evidence have brought increased attention in recent decades to the problem of wrongful conviction, they have not unearthed a similar rash of cases involving wrongful executions. The reasons for this disparity are many—including the simple fact that more persons are wrongfully convicted than are wrongfully executed and that capital defense attorneys understandably focus their attention on the living rather than the dead. But certain procedural problems also contribute to the challenge of identifying cases of wrongful execution in the modern age.

Legal practitioners, scholars, journalism students, politicians, and investigative reporters have had little difficulty—as a relative matter—in identifying cases of wrongful conviction over the course of the past three decades: a recent empirical study of nearly 4,600 capital appeals from 1973 to 1995 demonstrated that the overall rate of prejudicial error was sixty-eight percent.¹⁵³ Moreover, although the Supreme Court’s “actual

150. Cassell, *Defense*, *supra* note 12, at 205–06; see also Paul G. Cassell, *We're Not Executing the Innocent*, WALL ST. J., June 16, 2000, available at http://www.prodeathpenalty.com/Liebman/Cassell_Innocents.htm [hereinafter Cassell, *Executing the Innocent*] (“[C]ontrary to urban legend, there is no credible example of any innocent person executed in this country under the modern death-penalty system.”).

151. Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 *DRAKE L. REV.* 587, 590 (2004). For an attempt to assess the statistical likelihood of wrongful execution, see Joe McKenna, Editorial, *Dead Reckoning—Calculating the Odds That Innocent People Are Being Executed*, HARTFORD COURANT, June 27, 2003, at A13 (cited in Bedau et al., *Convicting the Innocent*, *supra*).

152. “These [public] opinions persist despite the fact that there is no single defendant who has been executed in the modern era who has had his innocence so persuasively established that death penalty advocates such as Markman and Cassell would concede the issue.” FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 163–64 (2003).

153. See James S. Liebman, *Rates of Reversible Error and the Risk of Wrongful Execution*, 86

innocence” doctrine has made it more difficult for persons to launch legal challenges to their convictions, it remains the case that a significant (and growing) number of exonerations of death row inmates have occurred in recent years.¹⁵⁴

By contrast, efforts to demonstrate that persons have been wrongfully *executed* face more significant obstacles. In many instances, there is no biological evidence available to test. On other occasions, once-testable material may have become degraded—especially when years or decades have elapsed since trial.¹⁵⁵ Even when biological evidence that is capable of being analyzed survives, the resistance of prosecutors and courts to post-execution DNA testing frequently makes it difficult to subject the material to scientific scrutiny.¹⁵⁶ For example, in the case of Roger Keith Coleman, who was executed in Virginia in 1992 after being convicted of rape and murder, the court denied a request for posthumous DNA testing requested by Centurion Ministries—a non-profit organization dedicated to the vindication of persons who are “completely innocent”—and by various media organizations.¹⁵⁷ The petitioners sought to retest existing DNA evidence relating to Coleman’s case on the theory that the improved accuracy of DNA technology in the roughly nine years since Coleman’s conviction had the realistic prospect to yield a more accurate result.¹⁵⁸ The court refused the petitioners’ request, reasoning that “ordering re-testing of the *Coleman* DNA at this stage would have no bearing on the fairness of the death penalty as it is

JUDICATURE 78 (2002); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000); see also John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the “Modern” Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285 (2003).

154. Under the Supreme Court’s “actual innocence” doctrine, capital convicts must demonstrate not simply “actual innocence,” but an independent constitutional violation. See *Herrera v. Collins*, 506 U.S. 390, 416–19 (1993). For treatments of the Supreme Court’s “actual innocence” jurisprudence, see J. Brent Alldredge, *Federal Habeas Corpus and Postconviction Claims of Actual Innocence Based on DNA Evidence*, 56 SMU L. REV. 1005 (2003); Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501 (1996); D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004); George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263 (2003). In recent years, selected states have permitted convicts to raise a freestanding claim of actual innocence in state post-conviction proceedings. See Laura Denvir Stith, *A Contrast of State and Federal Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421 (2004).

155. “DNA testing may help prevent some . . . near-tragedies in the future; but it can only be used in the minority of cases involving recoverable, and relevant, DNA samples.” *United States v. Quinones*, 205 F. Supp. 2d 256, 264 (S.D.N.Y. 2002).

156. See generally Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

157. See *Globe Newspaper Co. v. Commonwealth*, 570 S.E.2d 809 (Va. 2002) (affirming lower court decision). For further details of the case, see JOHN C. TUCKER, *MAY GOD HAVE MERCY* (1997).

158. I am indebted to my colleague Richard McAdams for sharing with me his thoughts and materials relating to the *Coleman* case.

now administered or on the public confidence [in] the criminal justice system.”¹⁵⁹ Paradoxically, in the court’s view, the scientific methods available a decade after Coleman’s conviction had advanced so dramatically that a finding of earlier scientific error would have done nothing to impugn the integrity of current (or, apparently, even previous) capital convictions.

Of course, whether this resistance to reopening the cases of persons who have been executed will prove sustainable over time remains another matter. Franklin Zimring, author of *The Contradictions of American Capital Punishment* (2003), has summarized the issue as follows:

[T]he identification of a DNA-innocent executed defendant would put a human face on the issue of wrongful execution and provide a poster child for moratorium campaigning across the nation, so the states are resisting providing samples in postexecution cases. But as large numbers of states pass DNA access legislation for living defendants, the objection to testing when the defendant has been executed will seem bereft of moral principle.¹⁶⁰

Even in cases where potentially exculpatory DNA evidence is not available, prosecutors have occasionally seen fit to reexamine cases of executed persons—at least when such cases have been prosecuted by their predecessors. Shortly before this Article went to press, prosecutors in Missouri reopened the case of Larry Griffin, executed in 1995 for the drive-by killing of a nineteen-year-old drug dealer in 1980.¹⁶¹ The evidentiary defects in Griffin’s case had been emphasized by two formidable advocates: the NAACP Legal Defense and Educational Fund and Samuel Gross, a professor at the University of Michigan Law School and a leading expert on exonerations.¹⁶²

159. The court posed the issue as follows: “How can investigation of the death penalty as it was implemented in 1992 be beneficial in scrutinizing the death penalty as it is carried out in 2001 when the processes are so different?” *In re Globe Newspaper Co.*, No. 211-00, slip op. at 8 (Va. Cir. Ct. May 31, 2001) (letter opinion denying petitioners’ request for DNA testing). The court conceded that, in the case of Ellis Wayne Felker, a court in Georgia had permitted the request of four news organizations to seek post-execution DNA testing based on a Georgia statute that permitted the trial court to “open to public inspection” any “exhibit tendered to the court as evidence in a civil or criminal trial.” GA. CODE ANN. § 50-18-71.1.(a) (1998). Virginia lacked a similar statute. The court’s decision to prevent post-execution testing in the *Coleman* case was ultimately affirmed on appeal. *See Globe Newspaper Co. v. Commonwealth*, 570 S.E.2d 809 (Va. 2002). (The post-execution tests in Felker’s case proved inconclusive.)

160. ZIMRING, *supra* note 152, at 191.

161. *See* Terry Ganey, *Reopening Griffin Case May Sway Debate Over Executions*, ST. LOUIS POST-DISPATCH, July 13, 2005, at A1, available at 2005 WLNR 10990290; Terry Ganey, *After Execution, Case Is Reopened*, ST. LOUIS POST-DISPATCH, July 12, 2005, at A1, available at 2005 WLNR 10989908.

162. For details on the Griffin case, see Letter from Samuel R. Gross, Professor of Law, University of Michigan Law School, and Cooperating Attorney, NAACP Legal Defense and Educational Fund, and Josiah Thompson, Thompson Investigations, to Saul Green, Miller, Canfield, Paddock & Stone P.L.C. (June 10, 2005), available at <http://www.law.umich.edu/NewsandInfo/griffin-report.pdf>.

Resistance to reopening the cases of persons who have been executed may also increasingly appear incongruous from an international perspective, especially given that other common law countries, most notably Great Britain, have instituted this type of searching scrutiny. Since its creation in 1997, Great Britain's Criminal Cases Review Commission (CCRC)—an independent public body established to investigate suspected “miscarriages of justice” in England, Wales, and Northern Ireland—has already referred two cases to the Court of Appeal that have resulted in posthumous exonerations of persons who had been wrongfully hanged.¹⁶³ In 1998, the Court of Appeal quashed the convictions of Derek Bentley, hanged in 1953 at the age of nineteen for allegedly murdering a police constable, and Mahmood Hussein Mattan, a Somali sailor hanged in 1952 for allegedly killing a shopkeeper in Wales.¹⁶⁴

Yet despite the successes of the CCRC, the prospect of such an approach being adopted in any systematic fashion in America appears remote. First, whereas criminal justice in Britain is capable of being comprehensively overseen by one Home Office, one appellate court system, and a single CCRC, responsibility for criminal justice administration in America is decentralized and less amenable either to systematic supervision or comprehensive correctives. Second, and more abstractly, because Britain abolished the death penalty in 1965, the discovery several decades later of persons demonstrated to have been wrongfully executed does not call into question the practice of capital punishment in that nation. Moreover, exonerations of persons executed in the 1950s typically do not challenge the decisions of active prosecutors or of trial judges currently on the bench.¹⁶⁵ Tellingly, despite the creation

163. Established in 1997, the Commission had received 7,782 applications through May 31, 2005, and had referred 274 cases to the Court of Appeal. The Court of Appeal had quashed 155 convictions, upheld 65, and reserved judgment on three. See Criminal Cases Review Commission, Case Statistics, at http://www.ccrcc.gov.uk/cases/case_44.htm (last visited June 17, 2005). For an overview of the Commission's work, see Criminal Cases Review Commission Annual Report 2003–2004, available at http://www.ccrcc.gov.uk/publications/publications_get.asp. For academic treatments of the CCRC, see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835 (2004); L.H. Leigh, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 38 ALBERTA L. REV. 365 (2000).

164. On Bentley, see *Bentley Relatives "Thrilled" by Appeal Outcome*, BBC NEWS, July 30, 1998, at <http://news.bbc.co.uk/1/hi/uk/142343.stm>. On Mattan, see <http://innocent.org.uk/cases/hhmattan>. By contrast, the Court of Appeal recently upheld the conviction of James Hanratty, hanged in 1962 for allegedly committing a double murder in Bedfordshire. The Court of Appeal did so in the face of Hanratty's repeated claims of innocence prior to his execution and the position taken by other supporters that he was in North Wales at the time of the crime for which he had been convicted. See *Court Dismisses Hanratty Appeal*, BBC NEWS, May 10, 2002, at <http://news.bbc.co.uk/1/hi/wales/1979390.stm>.

165. See Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 746 (2001) (“The

of numerous commissions designed to investigate defects in the administration of criminal justice in America, and episodic interest among prosecutors in reopening certain highly suspect cases, no American jurisdiction has instituted a body similar to the CCRC that is charged with systematically “scour[ing] the landscape for individual injustices.”¹⁶⁶

C. THE NARRATIVE PROBLEM

In the seventeenth and eighteenth centuries, few appear to have doubted that persons were occasionally executed for crimes that they had not committed and, indeed, that had never occurred at all. Over time, more careful application of the *corpus delicti* rule by trial judges diminished the prospect that such glaring instances of wrongful execution would become widely apparent.

This is by no means to suggest that miscarriages of justice were avoided in either England or America. To the contrary, shameful cases of wrongful conviction continued to plague Anglo-American criminal justice administration in the ensuing centuries, from the *Scottsboro* case,¹⁶⁷ to those of the Birmingham Six and Guildford Four,¹⁶⁸ to our recent spate of DNA-related exonerations.¹⁶⁹ Nonetheless, compared with the period before 1800, when instances of wrongful execution were patently clear, scholars and social activists seeking to identify compelling instances of wrongful execution in the modern age face a far more difficult task.

Consider the case of Joseph Roger O’Dell, one of two that figure prominently in Sister Helen Prejean’s recent book *The Death of Innocents*. In Sister Helen’s retelling, O’Dell is portrayed as having been caught up in a series of events beyond his control in which he plays no culpable role. Her rendition is relatively simple. On Tuesday, February 5, 1985, at approximately 11:30 p.m., Helen Schartner left the County Line Lounge in Virginia Beach, Virginia.¹⁷⁰ O’Dell was at the County Line

first reaction by many such judges to an anti-death penalty or moratorium movement would likely be to *resent* it, as an implicit criticism of their past rulings.”)

166. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 348 (2002).

167. On the *Scottsboro* case, see Michael Klarman, *Scottsboro* (University of Virginia Public Law and Legal Theory Working Paper Series, Working Paper No. 17) (Feb. 2005), available at http://law.bepress.com/uvalwps/uva_publiclaw/art17/.

168. See, e.g., ROBERT KEE, *TRIAL & ERROR* (1987) (describing case of four persons convicted of pub bombings in Guildford, England in 1974); CHRIS MULLIN, *ERROR OF JUDGEMENT: THE TRUTH ABOUT THE BIRMINGHAM BOMBINGS* (rev. ed. 1997) (describing case of six persons convicted of two pub bombings in Birmingham, England in 1974).

169. On recent DNA-related exonerations, see *supra* note 2.

170. This version is compiled from the following sources: PREJEAN, *supra* note 13, at 62–65; a monograph O’Dell wrote in jail; and Lori Urs, *Commonwealth v. Joseph O’Dell: Truth and Justice or Confuse the Courts? The DNA Controversy*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 311 (1999).

Lounge that night, but he never met or talked to Schartner. After leaving the lounge, he got into a fight—in which he was bloodied—in the parking lot of a bar called the Brass Rail. After two Norfolk police officers arrived at the scene to break up the fight, O'Dell threw his bloody jacket into the passenger seat of his car, spattering blood on the seat. When his girlfriend later became aware of the blood on his clothes, O'Dell falsely attributed the stains to a bout of bloody vomiting, seeking to avoid the prospect that his female companion might contact his parole officer and report unfavorably on his behavior.

In 1986, a Virginia jury convicted O'Dell of capital murder during the commission of a rape and sodomy by force and, in a separate penalty phase, sentenced him to death. Although O'Dell sought to have independent tests conducted on his blood-stained clothing, the Commonwealth of Virginia failed to keep his articles of clothing under refrigeration and, as a result, rendered the samples incapable of being tested. After his post-conviction efforts proved unavailing and his execution date approached, O'Dell became the subject of fervent international appeals. Two days before O'Dell's scheduled execution, the papal nuncio delivered a request to President Bill Clinton on behalf of Pope John Paul II seeking executive clemency on O'Dell's behalf. A videotape of a similar request by Mother Teresa was played outside the prison in which O'Dell was held shortly before his scheduled execution. O'Dell, for his part, protested his innocence up to his death, which occurred by lethal injection on July 23, 1997.

But consider the following counter-narrative, drawn from the opinions of the appellate courts that heard O'Dell's various post-conviction appeals.¹⁷¹ O'Dell left the County Line Lounge within fifteen minutes of Helen Schartner's departure. At the time, he already had a lengthy criminal record, having been convicted of a prison murder, of kidnapping and robbing a woman in Florida in 1975 during an attempted rape, and of roughly a dozen other felonies. Although the State of Florida had sentenced O'Dell to a ninety-nine-year term for his kidnapping/robbery conviction, he had been released on parole in 1983.

Helen Schartner's body was found in a field across the highway from the County Line Lounge. She had been killed by manual strangulation—with sufficient force to break bones in her neck. She also had eight bloody wounds on her head caused by a cylinder-equipped handgun. Less than three hours after leaving the nightclub, O'Dell had “entered a convenience store with blood on his face and hands, in his hair, and down

Urs, who worked on O'Dell's case as a paralegal, married O'Dell while he was on death row.

171. This version relies largely on the opinion of the Supreme Court of Virginia in *O'Dell v. Virginia*, 364 S.E.2d 491 (Va. 1988), which resulted from the automatic post-conviction review in state court of O'Dell's death sentence.

the front of his clothes.”¹⁷² At around 7:00 a.m. the following morning, O’Dell called a woman friend, Connie Craig, to say that he wanted to speak with her before leaving for Florida. O’Dell then visited Craig’s house, and slept there until 9:30 or 10:00 p.m. The following day, O’Dell called Craig and told her that “he had put his clothes in her garage, but he intended to take them out the following day.”¹⁷³ After Craig read about Schartner’s murder in the local newspaper, she went to her garage and found a paper bag containing four pieces of bloody clothing, including jeans with mud on them.

At trial, an expert from the state crime lab and five forensic scientists testified that the blood on O’Dell’s clothing “was the same type as Schartner’s in each of the 11 blood classifications analyzed” (a likelihood of 3 in 1,000) and that blood found in the passenger seat of O’Dell’s car was also consistent with that of Schartner’s. The state also introduced pubic hairs found in O’Dell’s car that were consistent with those of the victim and a cast of a tire print from the crime scene with tread elements similar to those on the tires of O’Dell’s car. Although a cylinder-equipped handgun had been seen in O’Dell’s car roughly ten days before Schartner’s murder, the gun could no longer be found. Finally, a jailhouse informant testified that O’Dell had confessed to him that O’Dell had strangled Schartner after she had refused to have sex with him.¹⁷⁴ Ten months before O’Dell was executed by lethal injection, the U.S. Court of Appeals for the Fourth Circuit concluded that his claims of actual innocence were “not even colorable.”¹⁷⁵

It is not my intention to pick between these dramatically divergent narratives. Many impassioned observers of the case have done so already. The city of Palermo, Italy, for instance, found O’Dell’s story to be so compelling that it made O’Dell an honorary citizen after his death and flew his body to Italy for burial.¹⁷⁶ On the other hand, the reporter for the *Virginian-Pilot* who was assigned to O’Dell’s trial has stated that she has “no doubt—none—that O’Dell was guilty of one of the most horrible crimes committed here or anywhere.”¹⁷⁷ What can be said is that cases like those of Joseph Roger O’Dell lack the factual undeniability and moral clarity of cases, like that of the three Perrys, where persons were convicted and executed for crimes that had never occurred at all.

172. *Id.* at 495.

173. *Id.*

174. *Id.* at 496.

175. *O’Dell v. Netherland*, 95 F.3d 1214, 1218 (4th Cir. 1996).

176. The tombstone reads: “Joseph O’Dell 3rd . . . honorary citizen of Palermo, killed by Virginia U.S.A., in a merciless and brutal justice system.” Jeffrey Fleishman, *Italians Fight U.S. Use of Death Penalty*, PHILADELPHIA INQUIRER, Aug. 20, 2000, available at <http://www.commondreams.org/headlines/082000-03.htm>.

177. Kerry Dougherty, *Debate the Death Penalty, But Not Joseph O’Dell’s Guilt*, VIRGINIAN-PILOT (Norfolk), Dec. 21, 1996, available at www.vuac.org/capital/josephodell.pdf.

To be sure, seventeenth-century observers forwarded differing explanations for such calamitous events. But few appeared to doubt that persons had been convicted of crimes that they had not, in fact, committed.

In the modern age, by contrast, purported instances of wrongful execution lack this type of clarity. Much like the competing versions of the crimes narrated in Kurosawa's *Rashomon*, alleged instances of wrongful execution offered in the modern age are susceptible to widely varying interpretations as to their very existence.¹⁷⁸ Moreover, because modern-day cases of alleged wrongful execution lack the definitiveness and moral clarity of a case like that of the three Perrys, they are especially susceptible to being accused of serving legal and political ends.¹⁷⁹ As a result, contemporary chroniclers of wrongful execution must not only dislodge the entrenched views of prosecutors, jurors, and judges, they must also struggle with the allegation that the version of history that they tell has been crafted to serve the ends they seek to pursue.

D. THE CONSTITUTIONAL PROBLEM

What is the significance, if any, of wrongful execution considered as a constitutional problem?

From time to time over the past few decades, members of the U.S. Supreme Court have expressed serious concern about the risk of wrongful execution. In his famous dissent in *Callins v. Collins* (1993), in which he stated that he would “no longer tinker with the machinery of death,” Justice Blackmun emphasized “the inevitability of factual, legal, and moral error [that] gives us a system that we know must wrongly kill some defendants.”¹⁸⁰ In *Herrera v. Collins* (1993), Justices O'Connor and Kennedy articulated “the fundamental legal principle that executing the innocent is inconsistent with the Constitution” and stated that a state-sanctioned killing of this type, were it to transpire, would be “a constitutionally intolerable event.”¹⁸¹ And in *Atkins v. Virginia* (2002),

178. In Kurosawa's *RASHOMON* (Daiei 1950), four different narrators chronicle a tale of rape and murder. Because each of the narrators is fallible, it is ultimately impossible to determine the true nature of the events.

179. See Austin Sarat, *Bearing Witness and Writing History in the Struggle Against Capital Punishment*, 8 *YALE J.L. & HUMAN.* 451 (1996). The practice, of course, goes back to the early modern period when the Ordinary of Newgate—the chaplain of Newgate prison—sought to craft the stories of convicted felons to stress their repentance. See LINCOLN B. FALLER, *TURNED TO ACCOUNT: THE FORMS AND FUNCTIONS OF CRIMINAL BIOGRAPHY IN LATE SEVENTEENTH AND EARLY EIGHTEENTH-CENTURY ENGLAND* (1987); Peter Linebaugh, *The Ordinary of Newgate and His Account*, in *CRIME IN ENGLAND 1550–1800*, at 246 (J.S. Cockburn ed., 1977); Andrea McKenzie, *Martyrs in Low Life? Dying “Game” in Augustan England*, 42 *J. BRIT. STUDS.* 167 (2003).

180. 510 U.S. 1141, 1145–46 (1993) (Blackmun, J., dissenting from denial of certiorari).

181. *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) (“Regardless of the verbal formula employed—‘contrary to contemporary standards of decency,’ ‘shocking to the conscience,’ or offensive to a ‘principle of justice so rooted in the traditions and conscience of our

which held that the execution of persons who are mentally retarded violates the Eighth Amendment, Justice Stevens, writing for the Court, rested his opinion in large part on the particular vulnerability of such persons to wrongful execution.¹⁸²

Recent developments in the lower courts have addressed more directly the question of whether the risk of wrongful execution renders the administration of the death penalty unconstitutional. Most dramatically, U.S. District Judge Jed Rakoff, in 2002, held that the death penalty, as administered under federal law, was unconstitutional on the grounds that it violated the U.S. Constitution's guarantees of both procedural and substantive due process.¹⁸³ Reflecting on the fact that over thirty persons on death row had been exonerated over the past decade, as well as on recent studies finding a sixty-eight percent rate of prejudicial error in capital cases, the court concluded that "the inference is unmistakable that numerous innocent people have been executed whose innocence might otherwise have been similarly established."¹⁸⁴ As the court noted:

[T]he unacceptably high rate at which innocent persons are convicted of capital crimes, when coupled with the frequently prolonged delays before such errors are detected (and then often only fortuitously or by application of newly-developed techniques), compels the conclusion that execution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings.¹⁸⁵

Having previously observed that the prospect of executive clemency was too remote in the modern age to protect the innocent,¹⁸⁶ Judge

people as to be ranked as fundamental'—the execution of a legally and factually innocent person would be a constitutionally intolerable event.") (internal citations omitted).

182. *Atkins v. Virginia*, 536 U.S. 304 (2002) (Stevens, J.). As Justice Stevens noted, "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution" because of the heightened possibility of "false confessions," "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation," the challenges faced by such defendants in assisting counsel and testifying, the prospect that their "demeanor may create an unwarranted impression of lack of remorse for their crimes," and the danger that mental retardation will be viewed as a sign of "future dangerousness." *Id.* at 320–21.

183. *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002). Congress adopted the FDPA in 1994. See 18 U.S.C. §§ 3591–3598 (2005).

184. *Quinones*, 196 F. Supp. 2d at 418 (issuing preliminary order declaring the FDPA to be unconstitutional and requesting briefing from government on issue). In its preliminary order entered in April 2002, the court declared that "[n]o system so persistently and systematically fraught with error can warrant the kind of reliance that would justify removing the possibility of future exoneration by imposing death." *Id.* (internal citation removed).

185. *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002).

186. As the court observed, "there has been a precipitous decline in the number of clemencies granted in recent years." *Quinones*, 196 F. Supp. 2d at 420 n.9 (citing BANNER, *supra* note 55, at 291). For academic treatments of the operation of clemency in capital cases, see Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239 (2003); Victoria

Rakoff declared the Federal Death Penalty Act (FDPA)¹⁸⁷ to be unconstitutional under the Due Process Clause of the Fifth Amendment because it denied persons the opportunity to prove their innocence during their lifetimes.¹⁸⁸

On appeal, the Second Circuit reversed in a 3–0 decision.¹⁸⁹ Writing for the appellate panel, Judge Cabranes first reflected—quite correctly, as we have seen—that English legal commentators had “recognized that capital punishment inherently entails a risk that innocent people will be executed” by the time the Bill of Rights was ratified in 1791.¹⁹⁰ Concluding that the court below had “erred in looking to ‘evolving standards’ in conducting its due process analysis,” the appellate court then determined that American jurisdictions have never recognized a fundamental right “to exonerate oneself throughout the natural course of one’s life.”¹⁹¹ To the contrary, the Supreme Court, in Judge Cabranes’s view, had specifically rejected that position in its 1993 decision in *Herrera*.¹⁹²

Other federal and state courts that have been confronted with similar challenges to the constitutionality of the death penalty have agreed with the position taken by the Second Circuit in *Quinones*.¹⁹³ In

J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996).

187. 18 U.S.C. §§ 3591–3598 (2005).

188. *Quinones*, 205 F. Supp. 2d at 257.

189. *United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002) (Cabranes, J.).

190. *Id.* at 63 (citing JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* (Robert Heward ed., 1830) (circa 1775)). As the appellate court noted, “the argument that innocent people may be executed—in small or large numbers—is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment.” *Id.*

191. *Id.* at 61, 62. The lower court had held that “due process is, virtually by definition, an evolving concept that takes account of current conditions and new discoveries, as well as heightened moral awareness” and that “[t]o freeze ‘due process’ in the precise form it took in 1787 would be to freeze it to death.” *Quinones*, 205 F. Supp. 2d at 260 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846–51 (1992); *Rochin v. California*, 342 U.S. 165, 171–72 (1952)).

192. *Quinones*, 313 F.3d at 52. By contrast, the district court read the case more narrowly, concluding that “*Herrera* does not address the issue presented in the instant case . . . [T]he *Herrera* Court’s sole holding is that a belated or successive habeas petitioner must make a persuasive showing of actual innocence to warrant habeas relief.” *Quinones*, 205 F. Supp. 2d at 263.

193. Federal cases: *United States v. Robinson*, 367 F.3d 278, 290 (5th Cir. 2004) (“Whatever the risk that another person will be wrongfully convicted, Robinson has not even attempted to show . . . that his conviction is erroneous, and he has presented no evidence to suggest that the FDPA is unconstitutional as applied to his case.”); *United States v. Perez*, No. 3: 02cr7(JBA), 2004 U.S. Dist. LEXIS 7500, at *6 n.2 (D. Conn. Apr. 29, 2004) (noting that “the Second Circuit . . . [has] rejected the claim that growing evidence that innocent people are being executed requires abolition of the death penalty as violative of due process”); *United States v. Mikos*, No. 02CR137–1, 2003 U.S. Dist. LEXIS 16044, at *53 (N.D. Ill. Sept. 11, 2003) (“The recent results from DNA research demonstrate what society already knows—our system of justice is imperfect. However, the Supreme Court has acknowledged this imperfection and continued to allow for the imposition of capital punishment.”); *United States v. Denis*, 246 F. Supp. 2d 1250, 1253–54 (S.D. Fla. 2002) (“This case, as any federal death case, will be presided [over] by a judge appointed by the President, confirmed by the Senate, with a

short, as Carol and Jordan Steiker have suggested in a recent “thought piece” entitled “Abolition in Our Time,” the Supreme Court has never required “perfection” in administration of the death penalty as a matter of due process and is unlikely to do so in the foreseeable future.¹⁹⁴

E. THE PHILOSOPHICAL PROBLEM

In arguing that Congress, when it passed the FDPA in 1994, could not have intended that it take the life of innocent persons, Judge Rakoff reasoned that “cold-blooded utilitarianism” would be “uncharacteristic” of that legislative body, “which, experience suggests, is much more likely to favor the Kantian, ‘Golden Rule’ approach characteristic of the world’s great religions.” Under this approach, suggested the court, “the relevant question would presumably be: ‘Are you prepared to apply to yourself a legal process that would execute you for a crime you never committed before you were able to finally prove your innocence?’”¹⁹⁵

It is by no means clear to me that Congress or other prominent participants in the administration of the nation’s death penalty at either the federal or state level operate with the Kantian categorical imperative in mind. Nor does it seem likely that the death penalty engages the empathy of legislators in the way Judge Rakoff suggests that it should. To the contrary, legislators throughout history have grudgingly extended

life term as provided by the United States Constitution.”); *United States v. Church*, 217 F. Supp. 2d 700, 702 (W.D. Va. 2002) (“The federal experience with death penalty cases certainly does not support an argument that the federal court system is likely to convict the truly innocent”); *United States v. O’Driscoll*, No. 4:CR-01-00277, 2002 U.S. Dist. LEXIS 25845 at *8–9 (M.D. Pa. Sept. 16, 2002) (“Trials conducted under the Federal Death Penalty Act, supervised by Article III judges, provide more procedural safeguards than afforded in most state judicial systems”). *But see* *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002) (holding that the evidentiary regime associated with the FDPA’s “death-eligibility” factors failed to satisfy constitutional mandates), *rev’d*, 360 F.3d 135 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 369 (2004).

State cases: *Deardorff v. Alabama*, CR-01-0794, 2004 Ala. Crim. App. LEXIS 118, at *65 (Ala. Crim. App. June 25, 2004) (rejecting petitioner’s theory “that statutes that impose the death penalty in the United States . . . create a substantial risk that an innocent person will be executed” and thus violate due process); *People v. Bull*, 705 N.E.2d 824, 842 (Ill. 1998) (“Defendant’s complaint is simply that the American criminal trial . . . is not perfect. However, . . . defendant does not suggest a substitute for this system as the means of determining guilt or innocence. . . . Have mistakes been made? Will mistakes be made? Certainly.”).

See also Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359 (2004); Joshua Herman, Comment, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777 (2003); Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 29 (2003).

194. See Carol S. Steiker & Jordan M. Steiker, Commentary, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323 (2003). For similar penetrating reflections on the prospects of constitutional change, see Carol S. Steiker, Commentary, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475 (2002); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

195. *Quinones*, 205 F. Supp. 2d at 261 n.4.

protections to criminal defendants in situations when they perceived *themselves* to be at risk of becoming criminal defendants.¹⁹⁶ And, despite their occasional peccadilloes, most legislators clearly do not consider themselves likely candidates for the death penalty.

More broadly, the notion that mistakes—even fatal ones—are simply the natural cost of any fallible human activity continues to be an underlying assumption of many prominent proponents of capital punishment.¹⁹⁷ Often, such views are coupled with the utilitarian claim that capital punishment also prevents the killing of some innocent victims—either by convincing criminals engaged in violent acts to stop short of killing their victims, or by permanently incapacitating those who might have managed to escape from prison if they had been sentenced to life terms. These potentially averted killings, in the minds of such commentators, outweigh the possibility that innocent persons on death row might be wrongfully executed.¹⁹⁸ Others have questioned whether the problem of wrongful execution is simply worth all the hand-wringing that it has generated—presumably on the basis that twenty-three wrongful executions out of the roughly seven thousand state-sanctioned killings conducted since 1900 still represents a 99.67% “success” rate.¹⁹⁹ And persons from other philosophic perspectives may contend that the state is morally entitled to take life even if it occasionally errs, because such potential wrongs, although initiated by the state, are not intended by it.²⁰⁰

196. See Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599 (arguing that legislators in both the English Parliament and the American Congress have instituted significant protections in the realm of criminal justice administration when they believed themselves to be at risk of criminal prosecution).

197. According to Markman and Cassell:

Given the fallibility of human judgments, the possibility exists that the use of capital punishment may result in the execution of an innocent person. This terrible prospect raises the issue of whether the risk of error in administering the death penalty is sufficiently high both to outweigh the potential benefits of capital punishment and to offend the moral sensibilities that must support a free society’s criminal justice system.

Supra note 146, at 121; accord, Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625, 628 (2005) (“Virtually all social policies and decisions quite literally determine who will live and who will die.”).

198. For consequentialist defenses of the death penalty based on deterring the deaths of innocent victims of crime, see E. VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* 226–29 (1983); Cassell, *Defense, supra* note 12; E. van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986); John B. Wefing, Commentary, *Wishful Thinking by Ronald J. Tabak: Why DNA Testing Will Not Lead to the Abolition of the Death Penalty*, 33 CONN. L. REV. 861 (2001).

199. See Markman & Cassell, *supra* note 146, at 125 n.22.

200. For a suggestive treatment of the differences between intended consequences and unintended side-effects, see John M. Finnis, *Intention and Side-Effects*, in *LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS* 32 (R.G. Frey & Christopher W. Morris eds. 1991).

CONCLUSION: THE LESSONS OF HISTORY

We can never bring ourselves to believe, that it is necessary to forfeit the life of a man on bare suspicion, on presumptions without proof, and on inferences unsupported by evidence.²⁰¹

With roughly 3,500 persons currently on death row in America—many of whom continue to proclaim their innocence—does it make any sense to devote time to discussing the problem of persons who have been wrongfully executed in the past?²⁰² Does a focus on the history of wrongful execution detract from the hard work of representing innocent persons on death row or of curtailing a host of other evils, including improper police interrogations, *Brady* violations, and other matters?²⁰³ Is devoting scholarly attention to the phenomenon of “actual innocence” itself “misguided,” given that cases of actual innocence are likely to “constitute a non-representative sampling of criminal defendants” and, thus, may serve to “deflect[] attention from more banal miscarriages of justice,” such as the misconduct of police and prosecutors?²⁰⁴ And, finally, to the extent that historical scholarship of the type presented in this Article reveals that the framers of the United States Constitution were likely to have been acutely aware of the problem of wrongful execution based on over a century of English experience, does such legal-historical research actually set back the cause of either reforming or abolishing the death penalty?²⁰⁵

These questions are not to be taken lightly. Yet the attempt to reconstruct the history of wrongful execution may also yield certain practical benefits. Although efforts to exonerate those currently on death row have achieved momentous results, such exonerations have also been cited by proponents of the death penalty as proof that the system’s protections actually work.²⁰⁶ By contrast, no wrongful execution can be

201. PHILLIPPS, PRESUMPTIVE PROOF, *supra* note 56, at 43.

202. See Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#year> (tallying 3,471 persons on death row as of October 2004). For a discussion of the mismatch between resources and needs in the area of criminal defense, see Daryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).

203. Some have even questioned whether persons troubled by the administration of the death penalty should argue for reforming the system rather than outright abolition. See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417 (2002).

204. Medwed, *supra* note 1, at 1106 n.31.

205. See *supra* note 190 and accompanying text.

206. As the court observed in *United States v. Denis*, “the fact that five of . . . thirty one people have had their death sentences reversed [under the FDPA] only further evinces the point that the federal system has the adequate procedural safeguards in place to prevent innocent people from being put to death.” 246 F. Supp. 2d 1250, 1254 n.3 (S.D. Fla. 2002); see also Cassell, *Executing the Innocent*, *supra* note 150 (suggesting that the sixty-eight percent rate of legal error detected by Liebman in 2000 “might . . . be viewed as a reassuring sign of the judiciary’s circumspection before imposing the

salvaged on such terms. In a related vein, exonerations of persons before they are actually executed—while of life-saving importance to the exonerated—may be viewed by some as having “no bearing on the wisdom of *executing* persons properly convicted of capital crimes.”²⁰⁷ To such persons, only an example of an innocent person who had actually been executed would presumably have any chance of giving reason for pause.

But how might cases such as those of the Perrys, “the Warwickshire uncle,” or other notorious seventeenth- and eighteenth-century instances of wrongful execution possibly matter in a modern-day American political climate in which advocates of the death penalty question the relevance even of cases decided before the due process “revolution” of the 1970s?²⁰⁸

First, legal history may help make modern-day proposals designed to reduce the risk of wrongful conviction and wrongful execution seem less revolutionary than their opponents might claim and, thus, render them more likely to be accepted. In recent years, scholars and state commissions have devoted considerable energy to determining the sources of error in capital cases and to suggesting ways that those errors might be reduced.²⁰⁹ Suggestions have included raising the standard of proof in capital cases,²¹⁰ taping pre-trial interrogations to safeguard the voluntariness of confessions,²¹¹ and mandating judicial assessment and instruction concerning the reliability of the testimony of jailhouse informants.²¹² The responses of eighteenth-century English

ultimate sanction”). For a less optimistic approach, see Lawrence C. Marshall, *Do Exonerations Prove That “The System Works”?*, 86 JUDICATURE 83 (2002).

207. Markman & Cassell, *supra* note 146, at 125 (emphasis added). “After reviewing 23 years of capital sentences, the study’s authors (like other researchers) were unable to find a single case in which an innocent person was executed. Thus, the most important error rate—the rate of mistaken executions—is zero.” Cassell, *Executing the Innocent*, *supra* note 150.

208. Cf. Markman & Cassell, *supra* note 146, at 122 (questioning the relevance to contemporary debates of alleged cases of wrongful execution claimed to have occurred “long before the adoption of the extensive contemporary system of safeguards in the death penalty’s administration”).

209. See, e.g., Illinois Commission Report, *supra* note 8; James S. Liebman et al., A Broken System, Part II: Why There is So Much Error in Capital Cases and What Can Be Done About It (2002), available at <http://ccjr.policy.net/proactive/newsroom/release.vt1?id=26641>; Peter Neufeld, *Preventing the Execution of the Innocent: Testimony Before the Senate Judiciary Committee*, 29 HOFSTRA L. REV. 1155 (2001).

210. See, e.g., Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May be Death?*, 78 CHI.-KENT L. REV. 1359, 1361 (2003) (proposing that “[if] a jury finds a defendant guilty beyond a reasonable doubt, it may not proceed to the penalty phase unless it also certifies that it has found the defendant guilty *beyond all possible doubt*”).

211. See, e.g., Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois’ Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337 (2001).

212. See Illinois Commission Report, *supra* note 8, Recommendation No. 57 (recommending a “special caution with respect to the reliability of the testimony of in-custody informants”). See

commentators and judges to the risks of wrongful execution (which included the *corpus delicti* rule, the confession rule, and the corroboration rule) reveal that the types of reforms recently proposed are not revolutionary but, instead, are akin to the types of rules that English legal commentators and judges in previous centuries considered it necessary to adopt. Indeed, they did so even in the quick, crude, and error-plagued trials of the eighteenth century and in a setting where the commitment to due process was far less concrete than in today's climate of constitutionalized criminal procedure.

Second, legal history, by demonstrating the contingency of the past and the range of responses undertaken by legal actors, may help us to identify fresh approaches to the problems in criminal justice administration that confront us. By the late eighteenth century, as we have seen, English judges—including those practicing at the time of the Constitution's framing—routinely excluded the uncorroborated testimony of accomplices.²¹³ By way of example, practice under the FDPA is markedly different. As Judge Rakoff noted in *Quinones*, “federal practice, in contrast to that of many states that allow the death penalty, permits conviction on the uncorroborated testimony of an accomplice.”²¹⁴ Recognizing the profound differences between the present and past can serve not only as a useful diagnostic tool, but as a path to reform.

Third, a legal history of wrongful execution may help us to identify commonalities over time with respect to the causes of legal error. Although the English cases of wrongful execution reconstructed in this Article may appear picaresque to the modern eye, they demonstrate certain important commonalities with the sources of error in modern-day capital cases: confession evidence that is fallible, witnesses who are willing to lie, and prosecutors who are eager to rush to judgment.

Lastly, continuities between the past and present in the nature of the responses to the phenomenon of wrongful execution may place us in a better position to assess and critique the motivations and arguments of modern-day participants in the debate over capital punishment. Although certain prominent skeptics have continued to deny the existence of wrongful execution in the age of America's so-called “due process revolution,” those denials may become less convincing once we realize that commentators in early nineteenth-century America also sought to deny the relevance of wrongful execution to the American condition. Indeed, those nineteenth-century commentators did so when

generally Aaron M. Clemens, Note & Casenote, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QUINNIPIAC L. REV. 151 (2004).

213. See *supra* note 52 and accompanying text.

214. *United States v. Quinones*, 205 F. Supp. 2d 256, 267 (S.D.N.Y. 2002) (collecting cases).

the evidence of wrongful execution—in the form of “victims” who had returned to the scene—was patently clear for all to see. If accepting the existence of a problem is commonly viewed as a necessary prerequisite to change, acknowledging and understanding the history of wrongful execution may itself prove to be a valuable step towards reform.
