

BOOK REVIEW

LITIGATING IN THE SHADOW OF INNOCENCE

*Lawrence C. Marshall**

A Review of WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* (2006).

In 1976, the Supreme Court of the United States, allowing optimism to trump experience, accepted various states' assurances that new death penalty procedures the states had then recently adopted would avoid the vices that had led the Court to strike down the death penalty in 1972.¹ Now, some thirty years later, a body of evidence has developed demonstrating that this experiment has failed—that the problems of arbitrariness, racism and propensity to error are endemic to the criminal justice system (particularly with regard to capital punishment) and cannot be cured by what Justice Blackmun called “tinker[ing] with the machinery of death.”² Despite the Court's best intentions, the death penalty procedures of the 1980s and 1990s and the first half of this decade reflect little if any significant improvement over the condemned pre-1972 systems.³

* Professor of Law and David & Stephanie Mills Director of Clinical Education, Stanford Law School.

1. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The Court's 1972 decision was *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari).

3. See generally JAMES LIEBMAN ET AL., *A BROKEN SYSTEM, PART I: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000), available at <http://www.thejusticeproject.org/press/reports/liebman-part-1.html>; JAMES LIEBMAN ET AL., *A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES*

For more than twenty years, Professor Welsh White was a robust contributor to the literature documenting the state of the death penalty in America. In 1987 and again in 1991, he authored thorough surveys of the state of capital punishment which served as rich sources of information for researchers and students alike.⁴ One of the unique aspects of that work was Professor White's keen interest in the perspectives of lawyers who defend capital cases. These lawyers, he was sure, had insights into the dynamics of the process that could not be gleaned by simply reading appellate decisions. With the publication of his final volume in January 2006,⁵ an advance issue released just three days before his death, Professor White has left us with an important work that focuses on that cadre of lawyers. Through their eyes and experiences, Professor White chronicles many of the legal and climactic changes that have occurred in American capital punishment during the past decade. As with his earlier work, Professor White's agenda was to place the reader in "a good position to determine whether the promise held out by the Supreme Court in *Gregg v. Georgia* has been fulfilled."⁶

One gets the strong sense that Professor White believed that the key to changing or abolishing the death penalty in the United States was to educate policymakers and the public about its practical operation. This, of course, was Justice Thurgood Marshall's hypothesis in *Furman v. Georgia*: that the widespread support that the death penalty enjoys in the country is a product of mass ignorance about how it is applied.⁷ Professor White did not simply posit the theory, he dedicated much of his life to the mission of educating the public about the inequities of the American death penalty. This final book does that in an extraordinarily effective way by combing together studies of illustrative cases, analysis of the lawyers' roles and dilemmas, and cogent explanations of the state of the law.

AND WHAT CAN BE DONE ABOUT IT 121 fig.11 (2002), available at <http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii.html>; DAVID R. DOW, MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME (2002); BILL KURTIS, THE DEATH PENALTY ON TRIAL: CRISIS IN AMERICAN JUSTICE (2004); FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003).

4. See WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1991) [hereinafter NINETIES]; WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1987) [hereinafter EIGHTIES]. Professor White also authored more than a dozen articles on the death penalty, beginning with Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. CRIM. L. & CRIMINOLOGY 943 (1983).

5. WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006) [hereinafter SHADOW OF DEATH].

6. EIGHTIES, *supra* note 4, at 2.

7. See *Furman*, 408 U.S. at 361-64 (Marshall, J., concurring).

Comparing Professor White's three major works on the death penalty provides important insight into changes in the death penalty debate and, in particular, to the increasingly important role that wrongful convictions have played in that discourse. In his 1987 survey of the death penalty in the United States, Professor White makes only scant reference to the specter of a wrongly-convicted capital defendant.⁸ By the time of his 1993 work, the issue of wrongful convictions plays a somewhat larger role with the addition of a nine-page section on miscarriages of justice, documenting the Texas cases of Randall Dale Adams and Clarence Brandley.⁹ In this final volume, by contrast, wrongful convictions play a core role throughout. The topic pervades virtually every chapter of the book and two lengthy chapters are devoted fully to the subject: one titled "Defending Capital Defendants Who Are Innocent,"¹⁰ and another titled "Defending Capital Defendants Who Have Strong Claims of Innocence."¹¹

This focus on wrongful convictions mirrors the tenor of much anti-death-penalty and death-penalty-reform advocacy over the past decade. In the mid-1990s, with the public debate on capital punishment focusing on general moral issues relating to the state's power to take life, many of those supporting reform or abolition of the death penalty determined that it was critical to isolate attention on an issue with the potential to open people's minds to some of the gross inequities that plague administration of the death penalty. In this regard, focusing on wrongful convictions had the potential to carry far more weight than the stories of wrongful sentences (i.e., those who committed murder but whose sentences were the products of sentencing error, racism, or arbitrariness). In part this stemmed from the particular horror of executing an innocent person. The change in focus was also fueled, though, by the fact that many wrongful convictions are objectively verifiable or, at the very least, subject to general consensus.¹²

8. See EIGHTIES, *supra* note 4, at 67 (mentioning the problem with attributing significance to a defendant's lack of remorse inasmuch as "some may actually be innocent").

9. See NINETIES, *supra* note 4, at 38-46.

10. SHADOW OF DEATH, *supra* note 5, at 37-75.

11. *Id.* at 77-103.

12. The advent of post-conviction DNA testing has been an important catalyst in the innocence movement. See generally BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000). It is important to recognize, though, that just as the vast majority of capital cases yield no biological evidence susceptible of proving or disproving a suspect's identity, so too, the vast majority of exonerations in capital cases have not been based on DNA evidence. See DEATH PENALTY INFORMATION CENTER, INNOCENCE: LIST OF THOSE FREED FROM DEATH ROW (2006), <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (DNA played a role in the exoneration of 14 of the 123 individuals released from death row since 1973).

It is this widespread consensus about many wrongful convictions that informs much of *Litigating in the Shadow of Death* and much of the modern conversation about capital punishment in America. In this regard, the list of released death-row inmates compiled by the Death Penalty Information Center (“DPIC”) has been widely relied upon in discussing the scope of the problem. DPIC lists 123 individuals who were once sentenced to death, but have been released since 1973 after charges against them were dropped, they were acquitted upon retrial, or were granted pardons based on innocence.¹³ That much is beyond debate. What has become highly debated is what that figure means. DPIC refers to these individuals as “innocent,” and it appears clear that whether the word “innocent” or the word “exonerated” is used, the intended message is that these individuals were convicted of crimes they did not commit.

Several prominent capital-punishment supporters have attacked that premise, arguing that many, if not most, of the individuals included on the DPIC list probably committed the crimes of which they were convicted, and that scholars’ and the public’s concern over wrongful convictions is the result of a savvy public relations campaign that has exaggerated the magnitude of the problem.¹⁴ They argue that this effort is motivated by a desire among anti-death-penalty advocates to divert attention from the fact that Americans continue to support the death penalty.¹⁵ Justice Scalia recently advanced this position, challenging whether many of those released after having been sentenced to death are truly innocent, and labeling innocence-oriented arguments about the death penalty as part of “sanctimonious criticism of America’s death penalty.”¹⁶

In *Litigating in the Shadow of Death*, Professor White discusses this question in some detail and addresses the argument “that capital defendants acquitted at retrials may in fact be guilty because the time between the original trial and the retrial—nearly always at least five years and in some cases more than two decades—make it substantially more difficult for the prosecutor to reestablish the defendant’s guilt.”¹⁷ Although he acknowledges correctly that

13. See <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>.

14. See, e.g., WARD A. CAMPBELL, CRITIQUE OF DPIC LIST (“INNOCENCE: FREED FROM DEATH ROW”) (2005), <http://prodeathpenalty.com/DPIC.htm> (last visited Sept. 6, 2006); Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY, 501 (2005); Ramesh Ponnuru, *Bad List: A Suspect Roll of Death Row ‘Innocents,’* NAT’L REV., Sept. 16, 2002, available at http://www.findarticles.com/p/articles/mi_m1282/is_17_54/ai_90888288.

15. See *supra* note 14.

16. *Kansas v. Marsh*, 548 U.S. ___, ___; 126 S. Ct. 2516, 2532 (2006) (Scalia, J., concurring).

17. *SHADOW OF DEATH*, *supra* note 5, at 38.

such cases may exist, Professor White explains that in many of the cases he examined the defense prevailed at retrial (through acquittal or the dropping of charges) because inadmissible prosecution evidence which had been admitted at the first trial was excluded, because exculpatory evidence which was excluded at the first trial was admitted, and because the defendant who did not have the benefit of effective assistance of counsel at the first trial had the benefit of effective counsel during the proceedings leading to his release.¹⁸ In other words, typically it is the defendant's release—not his conviction—that is a more accurate gauge of the truth.

In this essay, I will address the nature of the challenge to the characterization of these defendants as innocent, from both a general standpoint and through a detailed case-study of one of the defendants whose "innocence" has been questioned by a prominent critic. This approach follows the track that Professor White took in so many of his writings, particularly in *Litigating in the Shadow of Death*: It recognizes that truth lies in context and facts, not just in abstract debate. In the conclusion to the essay, I will relate the issue of wrongful conviction back to more general concerns about the death penalty, recognizing as Professor White did so powerfully, that condemning the innocent is just one small part of what is wrong with the death penalty in the United States.

I. EXONERATIONS AND THE NATURE OF INNOCENCE

It is important at the outset not to exaggerate the nature of the debate here. To be sure, there are those who challenge whether *some* of those often identified as wrongly convicted actually committed the crime for which they had once been convicted. But this debate about *some* of the 123 listed does not detract from the fact that even the most severe critics of the lists *agree that dozens of actually-innocent defendants have been sentenced to death in the past decades*. There is, then, the possibility of widespread consensus about many cases.¹⁹ Still, because death penalty proponents increasingly have taken

18. *Id.* at 38-39.

19. Of course, the conclusion that there are wrongful convictions in death-penalty cases does not necessarily compel the conclusion that the death penalty ought to be abolished. See Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 580-83 (2004). An educated and informed citizenry that understood the rate of error, and that otherwise supported capital punishment, could determine "that the good to be derived from capital punishment . . . outweighs the risk of error." *Marsh*, 126 S. Ct. at 2539 (Scalia, J., concurring). See generally Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 (2005) (arguing that, if one assumes that the death penalty deters a significant number of murders, there

to publicly attacking the list of wrongful convictions, it is important to address their critique in some detail.

To begin with, one must look at the criteria which DPIC uses for including or excluding a case from the list. In order to be included, an individual who had at one time been sentenced to death must have one of the following:

- a. Been acquitted of all charges related to the crime that placed them on death row;
- b. Had all charges related to the crime that placed them on death row dismissed by the prosecution; or
- c. Been granted a complete pardon based on evidence of innocence.²⁰

The critical point here is that these criteria are all *objective* and rely on *official* means of exoneration.²¹

This objective approach is designed to avoid the attacks that were lodged when scholars sought to advance their own determination about various defendants' innocence. In 1987, Hugo Bedau and Michael Radelet published their study identifying 350 miscarriages of justice in potentially capital cases.²² They were roundly criticized by death-penalty-supporters precisely because of the subjectivity of their approach. Bedau and Radelet included in their list cases in which there had been no official exoneration but about which they believed that "a majority of neutral observers, given the evidence at our disposal, would judge the defendant in question to be innocent."²³ Not surprisingly, this approach was condemned for lacking any objective

is a moral duty to employ capital punishment even if some innocent defendants will be executed). Any such utilitarian calculus, however, presupposes accurate information about the risk of error. It also presupposes accurate empirical data about the purported benefits of capital punishment. See generally John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (challenging Sunstein's and Vermeule's empirical assumptions). Finally, it presupposes the utility of utilitarian argumentation in this area. See Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005).

20. See DEATH PENALTY INFORMATION CENTER, INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (Sept. 2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#Sec05a>.

21. A 2005 study conducted by Samuel Gross and his co-authors looked at exonerations in capital and non-capital cases and found 340 exonerations from 1989 through 2003. See Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United State 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005). This study uses objective criteria similar to the DPIC's. *Id.* at 524.

22. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). This work was later expanded to over 400 cases and published as a book. See MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992).

23. Bedau & Radelet, *supra* note 22, at 47.

foundation. Stephen Markman and Paul Cassell wrote that “[t]he overwhelming problem with the Bedau-Radelet study is the largely subjective nature of its methodologies and therefore of its conclusions.”²⁴ DPIC has avoided this problem—eschewing the inclusion of cases that have not been the subject of official action of the sort set forth in DPIC’s objective criteria.

This approach—focusing only on those who have been officially exonerated in one of these enumerated ways—severely limits the number of cases that DPIC includes on its list. No matter how widespread the view that an individual who is on death row is innocent, that person is not included on the list unless and until he has been officially exonerated. So, too, the DPIC list excludes all of those whose convictions are reversed and are demonstrably innocent, but nonetheless have plead guilty to some lesser offense to avoid the perils of a new trial in which they might again be wrongly convicted.²⁵ And, of course, because there is generally no means of officially exonerating a person after execution, the DPIC list excludes any defendant who was executed despite any new revelations strongly pointing to that person’s innocence.²⁶

This last point is critical to understanding why DPIC and others do not identify any executed defendants on their lists of the exonerated. Justice Scalia concludes that it is the absence of any such errors that “explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to.”²⁷ This analysis misses the point entirely. There is no shortage of cases in which it appears quite probable that innocent defendants have been executed. Yet, in the absence of

24. Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 126 (1988).

25. A defendant is allowed to plead guilty while maintaining his innocence. See *North Carolina v. Alford*, 400 U.S. 25 (1970). For a defendant about to stand retrial after having once been convicted and sentenced to death for a crime, the enticement of a favorable plea-bargain (often involving no more than time-served) can be irresistible. See generally Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1153-58 (2005) (discussing incentives for innocent defendants to plead guilty).

26. See, e.g., Maurice Possley & Steve Mills, *‘I didn’t do it. But I know who did’: New Evidence Suggests a 1989 Execution in Texas was a Case of Mistaken Identity*, CHI. TRIB., June 25, 2006, at C20 (discussing Carlos De Luna who was executed in Texas in 1989); Lise Olsen, *The Cantu Case: Death and Doubt*, HOUSTON CHRON., Nov. 21, 2005, at A1, available at <http://www.chron.com/cs/CDA/printstory.mpl/chronicle/3472872> (discussing Ruben Cantu who was executed in Texas in 1993); Kate Zernike, *In a 1980 Killing, a New Look at the Death Penalty*, N.Y. TIMES, July 19, 2005, at A15 (discussing Larry Griffin who was executed in Missouri in 1995); Maurice Possley, *Report: Inmate Wrongly Executed; Arson Experts Say Evidence in Texas Case Scientifically Invalid*, CHI. TRIB., May 3, 2006, at C1 (discussing Cameron Willingham who was executed in Texas in 2004).

27. *Marsh v. Kansas*, 548 U.S. ___, ___; 126 S. Ct. 2516, 2539 (2006) (Scalia, J., concurring).

official mechanisms for post-mortem exoneration, any claim that these defendants are definitively innocent would necessarily turn on subjective conclusions. Justice Scalia surely would never be satisfied with that kind of subjectivity. Indeed, he faults Bedau and Radelet for their admissions that they include cases on their executed-but-innocent list even though no “appellate opinions . . . set forth the facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of [their conclusions].”²⁸ Justice Scalia never explains which appellate courts take jurisdiction over post-execution claims of exoneration.

Despite its underinclusiveness, DPIC’s choice of “official exoneration” as the relevant measure is appropriate. This is the only objective approach that avoids subjective conclusions about which individuals one group or another determines to be innocent. Justice Scalia attributes great significance to the January 2006 DNA results confirming the guilt of Roger Coleman, who was executed in Virginia in 1992. According to Justice Scalia, the results of the testing in that case are significant because Coleman “persuaded many that he was actually innocent and became the poster-child for the abolitionist lobby.”²⁹ Significantly, though, Coleman’s case was never on the DPIC list, despite the view of some that he might be innocent.³⁰ The evidence inculcating Coleman does nothing, therefore, to impair the integrity of the objective approach utilized by DPIC.³¹

28. See *Marsh*, 126 S. Ct. at 2535 (Scalia, J., concurring) (citing Markman & Cassell, *supra* note 24, at 134).

29. *Marsh*, 126 S. Ct. at 2533 (Scalia, J., concurring).

30. Similarly, neither Rick McGinn nor Derek Barnabei were ever included on DPIC’s list, so it is difficult to understand how DNA tests confirming their guilt help support any critique of DPIC’s methodology. See *Marsh*, 126 S. Ct. at 2534 (Scalia, J., concurring) (mentioning the McGinn and Barnabei cases as instances in which guilt was confirmed).

31. Justice Scalia’s focus on the Roger Coleman case as somehow undercutting the innocence movement misunderstands the nature of the widespread demands for DNA testing in the aftermath of Coleman’s execution. To be sure, there were some who maintained that Coleman was innocent, but many who advocated testing in that case were fighting for the testing to *determine* whether he was guilty or innocent, not to *confirm* any conclusion that he was indeed innocent. The same is true of the struggle for post-mortem testing in the case of Joseph O’Dell, who was executed by Virginia in 1996. Yet in O’Dell’s case, the Commonwealth of Virginia fought against any such testing and obtained an order from the Virginia Supreme Court allowing all remaining DNA to be burned instead of tested. See Samuel Gross, Commentary, *For Some, the Evidence Doesn’t Matter*, L.A. TIMES, Nov. 10, 2002, at M5. The prosecutor in that case asserted that testing would frustrate the cause of justice in Virginia because if it exonerated O’Dell it “would be shouted from the rooftops that the [C]ommonwealth of Virginia [had] executed an innocent man.” Roger Parloff, *Gone but Not Forgotten*, AM. LAW., Jan.-Feb. 1999, at 5, 6 (quoting Deputy Chief Commonwealth Attorney Albert Alberi) (quoted in Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 564 (2002)). It is ironic, then, that Justice Scalia uses that same metaphor in asserting that where there is clear

Contrast DPIC's conservative approach with the methods used by the leading critics of the DPIC list. These critics wish to have it both ways. If a defendant remains in prison, they consider him guilty without question, and attack any claims about innocence as subjective and contrary to the conclusions of the courts. If he is officially exonerated, though, these critics still often argue the defendant is guilty anyway based on their subjective suspicions about the defendant's possible involvement in the crime. In essence, they argue that once convicted, a defendant is presumed guilty, despite the fact that the conviction has been reversed, charges have been dropped, or a pardon has been issued. This is a very stingy view of the presumption of innocence. It is easy to understand why a judgment of guilt at trial defeats the presumption of innocence and requires us to treat the defendant as guilty. That is just part of the story, though. Because our system allows appeals, post-conviction proceedings and the possibility of pardons, the effect of the trial court's judgment is necessarily contingent on the outcome of those proceedings. When post-trial developments lead to the reversal of the conviction as invalid, the guilty verdict is erased and the presumption of innocence necessarily is restored.

The dominant theme of the critics' approach is that there is somehow a difference between "actual innocence" and "legal innocence." Over and over they assert that a defendant's acquittal does not mean that a defendant is "actually innocent," but only means that there was insufficient evidence to convict him. This is a non sequitur. A person is innocent—for all purposes—unless and until there is a valid finding of proof of guilt beyond a reasonable doubt. What is the alternative? If we do not rely on the adjudicative process for determinations on guilt and innocence, on what shall we rely? Surely, we get no place in the discussion if each of us must choose for ourselves which pundit we will look to for announcements on who is "legally innocent" and who is "factually innocent." Just as the law must look to the formal processes in determining who is guilty and who is innocent, so must public discourse.

It is troubling, then, to read Justice Scalia's concurring opinion in *Kansas v. Marsh*, in which he seeks to differentiate between the innocent and those

evidence that an innocent person was executed, "the innocent's name would be shouted from the rooftops by the abolition lobby." *Marsh*, 126 S. Ct. at 2533 (Scalia, J., concurring). For every one case (such as Roger Coleman's) in which post-mortem DNA testing is performed, there are scores of cases (such as Joseph O'Dell's) in which DNA testing is not allowed or in which there was never any biological evidence that could be tested in the first place. The fact that Roger Coleman was implicated by DNA testing casts no light on any of those cases.

who have been released based on a court's determination that the evidence of guilt is insufficient to sustain a conviction. One case he uses to support this distinction is *People v. Smith*, in which the Illinois Supreme Court unanimously ruled that Stephen Smith was entitled to his freedom.³² Smith had been convicted on the testimony of a single witness who testified that she saw the victim walk out of a bar alone and then saw Smith follow the victim out of the bar and shoot the victim as he stood alone. This testimony flew in the face of the uncontroverted facts of the case, most critically the fact that the victim was shot while standing next to others.³³ Based on these factual inconsistencies and other impeachment of the prosecution's witness, the Illinois Supreme Court held that "no reasonable trier of fact could have found her credible" and there was no other evidence "pointing specifically to defendant."³⁴ The defendant, the court explained, was "entitled to a finding of not guilty."³⁵ This was the verdict any reasonable jury would have returned, and in view of the jury's unreasonable verdict, the job of declaring the defendant not-guilty fell on the reviewing court.

There was, then, no technicality or legal loophole that led to Stephen Smith's release: he was found "not guilty" on the evidence. Yet, according to Justice Scalia a "not guilty" verdict hardly proves innocence—it simply proves the absence of admissible proof that satisfies the constitutional standard of proof "beyond a reasonable doubt."³⁶ This approach is an ugly variation on "heads I win, tails you lose." If a defendant is convicted, then he is certainly guilty. If the defendant is acquitted, he is still probably guilty and certainly cannot rely on his acquittal to assert his innocence. The problem with this analysis is that it proceeds as if we have a system of three verdicts: guilty, not guilty and innocent.³⁷ Were we to employ such a system, it would be fair to cast doubt on a defendant who was found "not guilty," because the trier-of-fact's refusal to enter a verdict of "innocent" would suggest that the verdict was something less than a full exoneration. But we do not have that system in place, so the question becomes how we are to handle any ambiguity that emerges from requiring a binary choice of guilty or not guilty.

32. 708 N.E.2d 365 (Ill. 1999).

33. *Id.* at 367, 370.

34. *Id.* at 371.

35. *Id.*

36. *Marsh*, 126 S. Ct. at 2536 (Scalia, J., concurring) (quoting *Smith*, 708 N.E.2d at 371 ("Courts do not find people guilty or innocent. They find them guilty or not guilty.")).

37. See generally Andrew Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. REV. 1297 (2000).

It is here that the critics of the innocence lists show their true colors. In the face of ambiguity, they seize upon the possibility of factual (as opposed to legal) guilt and are able in that way to deflect any concerns about the system having convicted (and sentenced to death) individuals who are later acquitted or released through the dropping of charges or pardon.

Each and every person on the DPIC list is a person who at one time was convicted and sentenced to death but is now presumed as innocent as any of us who were never suspected or charged in the crime. This is the only meaningful way of speaking about innocence. To conclude otherwise is to attribute significance to a trial-court judgment that was deemed unfair, unreliable and, often, unconstitutional. Ironically, it is the same individuals who generally extol the need for “finality” in convictions who refuse to accept the “finality” of exonerations.³⁸

The stark reality here is that Joshua Marquis, Ward Campbell and Justice Scalia are not examining unsolved cases around the country and announcing that uncharged suspect “a” or uncharged suspect “b” is guilty. They do this only once a defendant has been charged or once convicted. Their approach is a circular one. They begin with the premise that prosecutors get it right when they charge a defendant and that juries get it right when they convict. This leads them to conclude that anyone who, once having been convicted, is then acquitted at retrial or secures freedom through reversal of the conviction followed by the dropping of charges, acquittal at retrial, or through pardon, is presumed to have “slipped through one of the countless cracks in the law”³⁹ and becomes an open target for those wish to declare them guilty.⁴⁰ If we

38. There is one category of cases in which it might be fair to argue that (a) acquittal upon retrial or (b) reversal of a conviction followed by the dropping of charges does not equate with innocence, as that term is widely understood in the law. Unlike other rules of criminal procedure, the Fourth Amendment’s exclusionary rule is not typically designed to enhance the accuracy of adjudications, but places privacy interests above the search for truth. *See Stone v. Powell*, 428 U.S. 465, 489-90 (1976) (In applying the exclusionary rule, “the attention of the participants therein, [is] diverted from the ultimate question of guilt or innocence.”). For this reason, if a defendant were convicted but then released because the critical evidence implicating him was ruled inadmissible on appeal pursuant to the Fourth Amendment, the release of the defendant would not necessarily attest to his innocence. Significantly, not one of the DPIC cases involves this scenario.

39. Marquis, *supra* note 14, at 519.

40. Justice Scalia’s description of the Delbert Tibbs case is a prime example of this approach. *See Marsh*, 126 S. Ct. at 2537-38 (Scalia, J., concurring) (referring to Tibbs as a “dubious candidate” for inclusion on a list of wrongly convicted). Justice Scalia is quick to quote a law enforcement officer who asserts that Tibbs would have been retried but for the fact that his accuser (one of the two key witnesses against him) had become a crack user since the first trial and was no longer a viable witness. *Id.* at 2538. Yet, Justice Scalia never mentions the numerous reasons that the Florida Supreme Court reversed Tibbs’s conviction in the first place—including all the reasons that court identified that “cast doubt on [the accuser’s]

change the initial premise, though, and recognize that prosecutors often err in whom they charge and that juries often convict wrongly, we see reversals, subsequent acquittals, dropping of charges and pardons in a very different light.⁴¹

There is a moral component here as well. Individuals who have been convicted, much less sentenced to death, only years later to be freed, often suffer deep emotional consequences.⁴² As a society, we owe them many things including counseling, medical care, and reparations. We also owe them apologies for having been the victims of what our own courts, prosecutors and governors have deemed to have been miscarriages of justice. As it stands, we give them little of that.⁴³ But at the very least, we should do no further harm. It is deeply damaging to these individuals to learn that, despite all they have been through in fighting for and securing their freedom and official exoneration, their innocence continues to be attacked in fora in which no rules of evidence, reliability or confrontation apply.

DPIC's characterization of these released inmates as "innocent," is not, then, any sort of sleight of hand. It is the legally and morally sound way to

believability." *Tibbs v. State*, 337 So. 2d 788, 791 (Fla. 1976). Nor does Justice Scalia mention that at the trial leading to Tibbs's conviction the prosecution relied upon a jailhouse informant about whom the Florida Supreme Court stated, "we agree after reading the transcript that no credence can be given to the testimony of Tibbs' *** jailmate. *** This testimony appears to be the product of purely selfish considerations. *Id.* at 790. Indeed, the prosecutor who had secured Tibbs's conviction later acknowledged that the original investigation of the crime had been "tainted from the beginning and the [police] investigators knew it." See RADELET, BEDAU & PUTNAM, *supra* note 22, at 59. The prosecutor announced that he would serve as a defense witness for Tibbs were Tibbs to be retried. *Id.*

41. Ward Campbell quotes the Supreme Court for the proposition that "'Actual innocence means factual innocence, not mere legal insufficiency.'" CAMPBELL, *supra* note 14, at B.2 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). In fact, though, *Bousley* ties the definition of "actual innocence" to the adjudicative process. For a defendant to establish "actual innocence" as a gateway for consideration of otherwise unreviewable issues, he must demonstrate that, "'in light of all the evidence,'" "it is more likely than not that no reasonable juror would have convicted him." *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995) (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970))).

42. In many cases they have been diagnosed as suffering from Post-Traumatic Stress Disorder syndrome or PTSD. See generally Adrian A. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME AND JUSTICE 1 (2005). PTSD "is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL, Text Revision, 4th ed. (2000) (DSM-IV-TR) 309.81. The characteristic symptoms include "persistent reexperiencing of the traumatic event . . . , persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness . . . , and persistent symptoms of increased arousal." *Id.*

43. See generally LOLA VOLLENS & DAVE EGGERS, *SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED* (McSweeney's 2005).

characterize those who stand acquitted or uncharged in a crime. This is true whether the individual was never charged or whether he was convicted only to later be acquitted at retrial, released on the prosecutor's motion, or granted a pardon based on innocence. Respect for the rule of law demands that we respect the final determinations of the legal system—not its contingent ones—and that we refrain from libelously challenging these individuals' innocence.

II. DISSECTING THE CRITIQUE: A CASE STUDY

The problems with the critics' approach to the innocence list is not limited to these general flaws. Rather, their individual critique of cases involves wild subjective speculation of the sort which the DPIC list strives mightily to avoid. Dissecting one of the cases from the DPIC list which these critics challenge demonstrates the irresponsibility of their attacks. I have chosen to analyze the Rolando Cruz case not because I have surveyed the critics' list and determined that this is the weakest link in their critique. Rather, I chose this case because I know it well—having represented Cruz for more than a decade. In keeping with Professor White's motif of focusing on the facts of individual cases, I will present a rather detailed account of the Rolando Cruz case as a vehicle for assessing the approach these critics have adopted.⁴⁴

In January 1985, Rolando Cruz was convicted and sentenced to death for the February 1983 rape and murder of Jeanine Nicarico, a young girl in DuPage County, Illinois.⁴⁵ Despite the most intensive criminal investigation in the history of the county, which included calling over 200 witnesses before an investigative grand jury, no eyewitness, physical or forensic evidence emerged tying Cruz to the crime. To the extent there was any eyewitness

44. As long-time counsel for Mr. Cruz, I provide the following account based on the record in the case, interviews with witnesses, and first-hand observations. I have not footnoted each individual fact, but have included footnotes to some specific materials that further elucidate a particular point or support a direct quote. For a detailed account of the Cruz case and its aftermath, see THOMAS FRISBIE & RANDY GARRETT, *VICTIMS OF JUSTICE REVISITED* (2005). Another excellent source of materials on the case is the extensive writings of Chicago Tribune columnist Eric Zorn, which are collected at <http://www.ericzorn.com/columns/nicarico/>.

45. Another defendant, Alejandro Hernandez, was also convicted and sentenced to death. The jury could not reach a verdict with regard to a third defendant, Stephen Buckley. I will focus on the Cruz case alone in this discussion. For more information on the Hernandez case, see SCOTT TUROW, *ULTIMATE PUNISHMENT* (2003). Buckley's eventual civil rights suit was the subject of the Supreme Court's decision in *Buckley v. Fitzgerald*, 509 U.S. 259 (1993).

testimony, it suggested that a white male was seen near the scene of the kidnapping and, again, near the site at which the victim's body was found. Nonetheless, in March 1984 a grand jury indicted Cruz (a Latino) and two other individuals for the crimes. Charges against Cruz were based on several acquaintances' shaky claims that they had heard Cruz make somewhat incriminating statements. John Sam, one of the many detectives who had investigated the case, resigned from the force because he was so convinced that innocent men were being charged.⁴⁶

Trial was set for January 1985. As required under Illinois law, the prosecution and defense proceeded to exchange discovery. By December of 1984, the defense had long since been tendered all discovery pertaining to statements that Cruz had made. Yet, one week before trial, the defense was tendered supplemental discovery relating to a statement that had never been alluded to before.

The new disclosures claimed that several weeks before trial, in December 1984, two detectives approached the prosecutors at a Christmas party and reported significant, previously undisclosed evidence against Cruz. The detectives claimed that they had interviewed Cruz back on May 9, 1983, at which time Cruz had reported having had a "dream" or a "vision" in which he saw facts about the crime that were not publicly known—including the fact that the victim was killed near the rural path by which her body was found. The detectives explained that, despite the fact that they had written detailed reports about even the smallest details of the investigation and had shared all important information with other members of the special task force investigating the crime, they had not written any reports or shared any information about Cruz's statement (which was, by far, the most important event in the history of the investigation). They also claimed that despite having audio-taped their other interviews with Cruz, they chose not to tape this one interview.

Rather, the detectives maintained that they had called their supervisor at his home that evening and had reported on what Cruz had said. According to the detectives, their supervisor instructed them to call the lead prosecutor who, in turn, told them not to write any reports about the interview because he would call Cruz to the grand jury later that week, at which time he would ask Cruz about the "dream" or "vision."

46. For a profile of John Sam, and other officials who took stands against the prosecution of Cruz and his co-defendants, see Barry Siegel, *Presumed Guilty: an Illinois Murder Case Became a Test of Conscience Inside the System*, L.A. TIMES MAG., Nov. 1, 1992, at 18.

On the following morning, May 10, 1983, these same detectives conducted an audiotaped interview with Cruz, during which Cruz said nothing personally incriminating. Instead, he repeated the same story that he had been telling the detectives for weeks—about having heard information on the street about some other suspects. The detectives recognized that this information was, in the words of the prosecution, “baloney.”⁴⁷ At no time during the May 10 interview did either of the detectives ask Cruz about any “dream” or “vision” statement he had supposedly made the previous evening.

Cruz was called to the grand jury five separate times during the ensuing nine months. Yet, at no time did the prosecutor ever ask him about any “dream” or “vision” from May 9 or any other date. Nor was either of the detectives called to testify about such a statement, despite what all acknowledge to have been extremely exhaustive grand jury proceedings.

Given these circumstances, Cruz’s defense lawyers were shocked that the prosecution intended to use the detectives’ newly reported account as the centerpiece of its case against Cruz. The defense consistently maintained that Cruz never made the May 9 statement and that the detectives had fabricated it. It was simply incredible, the defense maintained, that detectives and a prosecutor, faced with a highly incriminating statement in a case of this magnitude, would have made no report and then completely forgot or ignored the statement for more than 19 months.

At trial, among the facts that the prosecution used to bolster the credibility of the alleged “vision statement” was the presence of extensive blood on the rural prairie path near where the body was found. The prosecution maintained that this blood proved that Cruz was accurate in reporting that the murder had occurred at that site.

In the end, Cruz was convicted by a jury which apparently refused to believe that public servants would lie about a defendant having confessed. At Cruz’s capital sentencing, the prosecution presented the testimony of a jailhouse informant who claimed that Cruz had confided to him that he committed the rape and murder with his two co-defendants, Alejandro Hernandez and Stephen Buckley. Cruz was sentenced to die.

Six months after Cruz’s conviction, while Cruz sat on death row, another young girl was raped and murdered in an adjacent county. A suspect named Brian Dugan was charged with the crime in short order based on substantial physical evidence. Over the course of the next several months, Dugan

47. See Art Barnum & Nancy Ryan, *Former Prosecutor Recounts Nicarico Investigation*, CHI. TRIB., Jan. 20, 1990, at 5.

engaged in plea negotiations with the prosecutors. In return for an agreement not to seek the death penalty, Dugan agreed to plead guilty to six separate crimes in various counties: three unsolved rapes; one murder of a nurse; the rape-murder with which he had been charged; and the rape-murder in DuPage County for which Cruz and his co-defendants had been convicted and sentenced to death. With respect to that rape and murder, Dugan described over 50 facts, including the interior of the victim's home, the tape and towel he used to cover her eyes, and the details of the murder itself near the path by which the victim's body was found.

Witnesses and victims from most of these crimes were brought in and identified Dugan as the lone culprit. When prosecutors from each of the relevant counties were called in to hear Dugan's detailed account of the crimes from that county, all but one set of prosecutors concluded without doubt that Dugan alone committed the crime for which he was prepared to confess. Dugan pled guilty to these five offenses and was sentenced to multiple sentences of life without parole.

The prosecutors who had secured a death sentence against Cruz, however, concluded that Dugan had nothing to do with the crime for which Cruz had been convicted. Despite Dugan's ability to recount scores of facts about the crime, a witness who put him near the scene, and the consistency between Dugan's boot and a bootmark left on the door of the victim's home, the prosecutors maintained that Dugan was a liar who was simply seeking to garner attention. They supported this claim by harping on some minor errors in Dugan's account, such as his failure to remember having seen a boat and basketball net on the far end of the driveway of the victim's home, or his mistaken belief that the victim was wearing toenail polish.

The Illinois State Police investigator assigned to the case came to a different conclusion, based on Dugan's ability to corroborate so many of the obscure facts that Dugan related. Having come to believe that Dugan was involved, the State Police conducted an extensive investigation to determine whether there was any personal connection between Dugan and Cruz. Investigators interviewed hundreds of witnesses who knew either of them or who frequented the places where either of them spent time. At the end of this investigation, the State Police reported that there was no evidence that Cruz and Dugan ever knew one another.

In 1998, the Illinois Supreme Court granted Cruz a new trial, holding that the joint-trial of Cruz and his co-defendants was constitutional error.⁴⁸ In the

48. *People v. Cruz*, 521 N.E.2d 18 (Ill. 1988). *See also* *People v. Hernandez*, 521 N.E.2d 25 (Ill.

aftermath of this ruling, many believed that prosecutors would not retry Cruz—as the evidence implicating Dugan appeared overwhelming.⁴⁹ This prediction proved mistaken. Not only did the prosecutors announce that they would retry Cruz, they also moved to exclude from the jury’s consideration any mention of Dugan and his detailed account of having committed the murder alone. After an extensive pre-trial hearing, the trial judge ruled that Dugan’s account has sufficient indicia of reliability and that Cruz’s defense could introduce his confession to the jury. The jury was not, however, allowed to hear that Dugan had simultaneously confessed to having acted alone in six crimes and that it was undisputed that he had been telling the truth about the other five.

At Cruz’s second trial in 1990, the detectives’ account of the “vision statement” played center stage once again. The prosecution also presented a new jailhouse informant—a man who had been on death row while Cruz was there. Like the earlier jailhouse informant, this informant also claimed that Cruz confessed to him, but the new informant testified that Cruz described committing the crime with Alejandro Hernandez and *Brian Dugan*. The essence of the prosecution’s position at the second trial was that Dugan may well have been involved, but if he was, he was not acting alone. Of course, this new theory flew in the face of the prosecution’s persistent position over the course of the prior five years that Dugan was completely uninvolved.

Although Dugan’s statement was corroborated in many of its details, the prosecution sought to show that some of the errors in Dugan’s account proved that he must not have been present at some points of the crime. In particular, the prosecution presented expert testimony that there was only minimal blood on the Prairie Path, which proved that Dugan was wrong when he claimed that the victim had been murdered there. This position was completely opposite to the prosecution’s claim at the first trial (also supported by expert testimony) that the extensive amount of blood on the Prairie Path was a key reason to credit the accuracy of Cruz’s supposed vision statement (in which he was alleged to have stated that the victim was killed near the path). The jury was not allowed to hear, though, that the prosecution and its witnesses had completely changed position on this point of fact.

1988).

49. Because the evidence about Dugan emerged only after the completion of Cruz’s trial and sentencing, it formed no part of the record on appeal and was not considered by the Supreme Court in its 1988 decision.

Once again, the jury apparently refused to accept the idea that these two detectives were lying about something so critical as the “vision statement,” and Cruz was convicted. In March 1990, he was again sentenced to death.

It was at this point that I was asked to represent Cruz in his second appeal to the Illinois Supreme Court. I was privileged to work with a team of *pro bono* lawyers and students at Northwestern University School of Law.⁵⁰ In June 1991, we filed our opening brief and began waiting for the State’s reply. As each new filing deadline for the state approached, the Attorney General’s office asked the court for an extension of time. On March 6, 1992, we learned the cause of that delay. A Chicago Sun Times banner headline announced that the prosecutor assigned to work on the case, Mary Brigid Kenney, had resigned her position because she concluded that Cruz’s trial was grossly unfair and that Cruz was entitled to a new trial.⁵¹ She also expressed the view that Cruz was almost certainly not guilty. After her internal efforts to have the State Attorney General confess error in the Illinois Supreme Court failed, she submitted her letter of resignation, writing that “I cannot sit idly as this office continues to pursue the unjust prosecution and execution of Rolando Cruz.”⁵²

Yet again, many observers believed that the case would now collapse, but yet again the prosecution sunk in its heels and continued to fight for Cruz’s execution. On December 4, 1992, it appeared that they had won that fight when the Illinois Supreme Court issued a 4-3 opinion upholding Cruz’s conviction and death sentence. With regard to the limitation on evidence about Brian Dugan’s confessions, the Court ruled that despite any other indicia of reliability relative to Dugan’s confessions, Cruz had no right to present any evidence about Brian Dugan to the jury. According to the majority, because Dugan had confessed during plea negotiations (meaning that these statements could not be used to prosecute him), Dugan’s confession was not a statement against penal interest and was therefore inadmissible as part of Cruz’s defense. With regard to multiple other issues that Cruz had pressed on appeal, the majority agreed that several of them had merit, but the majority nonetheless upheld Cruz’s conviction and death sentence on the ground that

50. John Hanlon, who had represented Cruz in his first appeal, was my partner in this appeal. The students’ participation in the case was the foundation for the creation of the Center on Wrongful Convictions at Northwestern University School of Law.

51. Michael Briggs & Thomas Frisbie, *Burris Aide Quits, Hits Nicarico ‘Error’; Wrong Men Convicted in Girl’s Slaying—Deputy*, CHI. SUN-TIMES, Mar. 6, 1992, at 1.

52. *Id.* My former colleague Rob Warden, Executive Director of the Center on Wrongful Convictions, recently wrote a moving tribute to Kenney’s bravery. MY HERO: EXTRAORDINARY PEOPLE ON THE HEROES WHO INSPIRE THEM 202-07 (2005).

there was “overwhelming” evidence of Cruz’s guilt, including physical evidence tying him to the crime.⁵³

This claim was truly astonishing. No one had ever claimed that the evidence against Cruz was anywhere near “overwhelming,” and no one had ever introduced a shred of physical evidence implicating Cruz. Yet, here was the Supreme Court of Illinois sending Cruz to death based on a claim about physical evidence that the court never identified or explained. Cruz’s only hope was to ask for rehearing by the court, which he did with support of six amicus briefs from a wide array of groups and individuals. Three justices from the original court that decided the case had retired by this time, and the newly constituted court agreed to rehear the case. On rehearing, the prosecutor was asked if there was any physical evidence that connected Cruz to the case. He acknowledged there was not.

One year later, in July 1994, the Court issued its 4-3 opinion reversing Cruz’s conviction for a second time.⁵⁴ The court identified a series of errors, including the limitations on Cruz’s ability to inform the jury about the context and credibility of Dugan’s confession to having committed the crimes alone.⁵⁵

Once again, the conventional wisdom was that the prosecutors would drop the case, but once again they dug in and readied themselves for a third trial. Working with Cruz, I was able to recruit a team of outstanding Chicago trial-lawyers to represent Cruz with me at this trial.⁵⁶ By the time our investigation in preparation for trial was over, several of the witnesses who had testified against Cruz at earlier trials admitted that they had lied. More significantly, DNA results completely excluded Cruz and his co-defendants, but placed Dugan in the group of men (0.03% of the population) with DNA matching the semen of the rapist.

Given these new results, the prosecution changed theories once again, now claiming that Cruz had committed the crime with Dugan and that Dugan was the rapist. Yet again, a jailhouse informant emerged with a new claim that happened to precisely fit the prosecution’s then-current theory of the case. The prosecution disclosed in discovery that its new informant would testify that Cruz admitted having participated in the crime, but that Dugan was the

53. See Charles N. Wheeler III, *Bernardin, Others Seek A New Trial for Cruz; ‘Friends’ Join Plea In Nicarico Case*, CHI. SUN-TIMES, Feb. 5, 1993, at 4.

54. *People v. Cruz*, 643 N.E.2d 636 (Ill. 1994).

55. *Id.* at 645-56.

56. The team was made up of Thomas Breen, Matthew Kennelly, Nan Nolan and myself. We were assisted by a team of dedicated students from The Northwestern University Legal Clinic and a wonderful student from DePaul Law School.

rapist. When approached by a defense investigator, though, the new informant admitted that all he ever heard from Cruz was protestations of innocence. According to this new informant's affidavit, he fabricated his story about having heard Cruz confess because prosecutors had pressured and threatened him. The new informant made clear that he would not testify for the prosecution at trial.

The defense team also met with the other two informants from the earlier trials. One of these—the informant who had first come forward at Cruz's 1985 sentencing—tearfully admitted that he had concocted his story under pressure from the police and in return for some small luxuries in jail. As for the informant from death row who had testified at the 1990 trial, he refused to speak with either side about his trial-testimony but did express dismay that the prosecution had not abided by its previously undisclosed agreement to seek leniency on his behalf. He then offered to tell the defense what it wanted to hear if the defense would deposit \$500 in his prison commissary account. Given these developments, neither of these informants had any credibility left by the time of Cruz's third trial, and neither was expected to be called by the prosecution.

Having twice been burned by juries that were unwilling to believe that the "vision statement" was fabricated by the detectives, Cruz opted for a bench trial, as was his right under Illinois law. The prosecution's witness list included, of course, the two detectives who claimed to have taken the May 9 "vision statement." The prosecution also indicated that it would call the detectives' supervisor (by this time a Lieutenant) who would testify that he received a call at home on the evening of May 9 from the detectives reporting on the "vision statement." It was the anticipated testimony of this Lieutenant (who had not testified at either of the first two trials but had testified at a hearing prior to the third trial) that put fear in the hearts of defense counsel, for he appeared to be a neutral player with little incentive to lie.

As the prosecution's case drew to a close, we were surprised that it had not yet called the Lieutenant to the stand. On the final day of the prosecution's case, we found out why. The lead prosecutor tendered us a report indicating that four days earlier, on the eve of his anticipated testimony, the Lieutenant had informed the prosecutor that there was a problem with his testimony: he now realized that he never received the call from the detectives after all. The Lieutenant explained that when he had earlier testified to having received the call, he was relying not on his own memory but on his trust of the detectives who claimed they had called him that evening. Now, however, he was completely sure that the call never happened because he realized he was on vacation in Florida on the day the call was supposedly made. To confirm

his memory about this, the Lieutenant reviewed his credit card statements from 1983 (12 years earlier) and confirmed that he was vacation with his family in the Tampa Bay area.

With this revelation, the prosecution's case was destroyed. In addition to all the reasons to discredit the detectives claims about any "vision statement," there was now undeniable evidence that they had lied about calling their supervisor—a critical link in their account of the events. Later that day, after the prosecution rested, the judge finally ended Rolando Cruz's 12-year ordeal by directing a verdict for the defense. The judge explained that the case against Cruz defied "common sense," and that the emptiness of the case against Cruz was cemented by the "devastating" admission by the Lieutenant.⁵⁷

In the aftermath of the Cruz verdict, a special prosecutor was appointed to investigate the detectives and the others responsible for the handling of the case. Two years later, a grand jury indicted seven individuals for their roles in the investigation and prosecution of Cruz. Those charged included the two detectives who claimed to have taken the "vision statement," the Lieutenant who had corroborated that claim at a pre-trial hearing (and later admitted that his testimony had been untrue), one other detective, and three prosecutors. In June 1999, these defendants, who came to be known as the DuPage Seven, were acquitted of criminal wrongdoing in a DuPage County trial. In September 2000, the County and the individual defendants in Cruz's civil case settled the case with Cruz and his co-defendants. The press reported the settlement at \$3.5 million.⁵⁸ On December 19, 2002, Cruz was issued a full pardon based on factual innocence.⁵⁹

Throughout all this wrangling over responsibility for the wrongful prosecution and conviction of Cruz, Brian Dugan remained uncharged—despite his continued willingness to plead guilty in return for a sentence of life without parole. Meanwhile, more refined DNA tests identified Dugan "with scientific certainty" as the rapist.⁶⁰ In November 2005, Dugan finally was indicted for the crimes, for which the prosecution is now seeking a sentence of death. The indictment charged that Dugan acted alone.

57. See Jeffery Bils & Maurice Possley, *Judge Rules Cruz Innocent; Nicarico Case Still Open after 12 Years*, CHI. TRIB., Nov. 4, 1995, at 1.

58. See John Chase, *Angry Dupage Settles Cruz Suits; 3 Former Defendants to Split \$3.5 Million*, CHI. TRIB., Sept. 27, 2000, at 1.

59. See Steve Mills & Ray Long, *Cruz, 2 Others Pardoned; Ryan Says 3 Men Were Victims of 'Justice System Run Amok'*, CHI. TRIB., Dec. 20, 2002, at 1.

60. See Steve Mills, *Nicarico Case Has Suspect, Dna Link, but No Charges; Slow Progress in 1983 Slaying Confounds Some*, CHI. TRIB., Dec. 26, 2004, at 3.

In the face of all these facts and developments, Ward Campbell nonetheless asserts that it is “arguable” that Cruz should not be listed as a wrongly convicted person. He supports this claim with the following assertions:

During the third trial, the trial court judge lambasted the police for “sloppy” police work and accused a sheriff’s deputy of lying. He then directed a verdict for Cruz and freed him before the presentation of the defense case. The trial court did acknowledge that the prosecution had “circumstantial evidence” but did not consider it sufficient to support a conviction beyond a reasonable doubt.

* * * * *

During this time, another convicted murderer named Brian Dugan announced he was willing to confess to being the lone perpetrator of the Nicarico murder in return for immunity from the death penalty. Dugan himself had been sentenced to two life sentences for other sex related murders. A 1995 DNA test implicated Dugan in Nicarico’s murder, but excluded Cruz and Hernandez as actual perpetrators. However, this test result did not exclude Cruz’s and Hernandez’s potential culpability as accomplices to Nicarico’s murder.

Ultimately, after Cruz’s acquittal by the court, Illinois law enforcement officers and prosecutors were prosecuted for their roles in Cruz’s case. The trial court excluded evidence that after the first trial for the Nicarico murder, Cruz looked at Nicarico’s sister and mouthed the words, “You’re next.” However, during this trial, the defense for the accused law enforcement officers attempted to link Cruz with other suspects in the murder. There was evidence which raised a question as to whether Cruz and Dugan could have lived on the same block at the time of the murder, thus raising questions as to whether Dugan acted alone. Moreover, Dugan had a relevant modus operandi for burglaries which involved accomplices. Cruz himself took the stand and contradicted his previous testimony. He also testified that he was seeing a psychiatrist about his lying! The jury was advised that scientific evidence excluded Cruz as the rapist, but did not exclude Dugan. However, the jury was also told that the scientific evidence could not exclude the possibility that Cruz was present at the Nicarico murder. The police officers were acquitted. The trial court also acquitted one of the officers of a charge that he had falsely testified about incriminating statements Cruz made in jail. Some jurors stated they believed Cruz was guilty of the Nicarico murder. Other jurors observed that they could not believe Cruz’s testimony that he had not made a so-called incriminating “dream statement” to the police about the murder in which he described details of the Nicarico murder.⁶¹

These sorts of claims reek of McCarthyism. They add up to the claim that, regardless of all the evidence described above, Cruz may be guilty:

- because the trial court held that there was *inadequate* circumstantial evidence against him. (In fact, the trial court lambasted the State’s case against Cruz as defying common sense and as riddled with lies and inconsistencies.);

61. CAMPBELL, *supra* note 14.

- because the victim's sister claimed (prior to the 1999 trial of those accused with having framed Cruz) that after Cruz's first trial in 1985 Cruz had "mouthed" the words "you're next" to her (even though she acknowledged that she did not hear him say anything, a judge ruled that her conjecture about what she thought Cruz said was unreliable and inadmissible, and she failed to come forward with this claim during Cruz's 1990 and 1995 trials);
- because, despite the compelling evidence against Dugan, Cruz might have been involved because there was "a question" as to whether Cruz and Dugan "could have lived on the same block at the time of the murder" (despite the exhaustive investigations over more than 15 years failing to find any connection between Cruz and Dugan);
- because Dugan had committed some burglaries with accomplices (even though all his sex crimes were committed alone);
- because, despite the DNA evidence corroborating Dugan's confession about having acted alone, DNA cannot exclude Cruz (or any other among the six-and-a-half billion people in the world) from having been at the scene;
- because Cruz had a history of lying (even though Cruz's defense never relied upon his testimony or veracity); and
- because some jurors at the trial of the detectives and prosecutors charged with framing Cruz believed Cruz guilty (even though Cruz was not a party to that case and never presented evidence or cross-examined any witnesses in that trial).

Equally startling are Campbell's concluding remarks about the Cruz case, where he states that Dugan's confession to having acted alone is "subject to question" because Dugan has "no incentive to implicate or 'snitch off'" any accomplices.⁶² This claim is patently wrong. For years, Dugan has told the prosecutors that he would plead guilty and confess in open court so long as the prosecution agreed not to seek the death penalty against him. The prosecution has refused this offer and is now actively seeking the death penalty. How is it, then, that Dugan has no incentive to implicate others (truly or falsely) in order to enhance his efforts to obtain a life sentence? There can be no doubt that during Cruz's 1990 and 1995 trials and during the co-defendants' 1990 and 1991 trials, as well as during the DuPage Seven trial in 1998, the prosecution would have given anything for Dugan to have claimed that he acted together with Cruz and/or Cruz's co-defendants. Far from having "no incentive" to implicate others, Dugan had as strong an incentive as one can imagine-saving his life. These incentives continue through today.

There is something profoundly wrong with the enterprise of a roving band of opinionators callously accusing individuals of having committed, or possibly committed, murders despite the fact that these people have been freed by the legal system. The case-study of the Cruz case reveals the extent to which these kinds of accusations ignore the realities of a case and seize on

62. CAMPBELL, *supra* note 14.

minor details which might seem significant to those uninitiated in the case, but are obviously meaningless to those who are made aware of all the relevant facts.

In the end, then, we are back to where we started. The only sensible way to have public debate about the subject of wrongful convictions is to take subjective spin out of the picture and rely on objective criteria as DPIC does. The reason that Rolando Cruz is properly included on the list of death-row-exoneration wrongful convictions does not depend on my, or anyone else's, ability to make a convincing case that he is innocent. Rather, he is properly included because, after having been sentenced to death, he was acquitted in a retrial (and, although it does not matter to his case, was also pardoned on the ground of actual innocence). That is all that matters, unless we are to indulge in reckless mudslinging of the sort in which DPIC's critics have engaged.⁶³

III. CONCLUDING OBSERVATIONS

Unlike many discussions of wrongful convictions, Professor White did not simply discuss the issue as part of a call for abolition of capital punishment or reforming the ways in which police gather certain forms of evidence. Instead, he integrated the issue into many of the areas in which he has long focused attention—the law of ineffective assistance of counsel, plea bargaining, death-qualification of juries and the availability of post-conviction relief.

This exercise is a vital one. The recent revelations regarding the alarming rate of wrongful convictions demand that the courts and legislatures revisit their approaches to a wide variety of issues pertaining the death penalty.⁶⁴ These include reforms in the methods of conducting eyewitness identification, recording interrogations, regulation of jailhouse informants and ensuring the

63. To anyone familiar with the ways in which exonerations usually occur, the arguments that exonerations prove that the system works are thoroughly misguided. *See, e.g., Marsh*, 126 S. Ct. at 2536 (Scalia, J., concurring) ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency demonstrates not the failure of the system but its success."). The Cruz case is just one example of the serendipities—some might say miracles—that are often necessary before an innocent person can secure release. *See generally* Lawrence C. Marshall, *Do Exonerations Prove that "the System Works?"*, 86 JUDICATURE 83, 84 (2002) (describing ways in which exonerations come about).

64. *See* Marshall, *supra* note 19, at 575-76 ("Just as Columbus's revelations exploded many assumptions about the shape of the world, DNA has exploded many of our assumptions about the reliability of certain forms of evidence and the accuracy of convictions. It is time to draw new maps that take these lessons to heart.").

integrity and reliability of scientific evidence admitted at trial. Even if these reforms are capable of reducing the rate of wrongful convictions, however, they will not eliminate the problem and will decidedly not address the larger issue of the reliability of the sentencing phase of capital trials.

Put simply, a system that errs so often in assessing whether an individual even committed the crime for which he stands trial is hardly a system that inspires confidence in its assessments about which convicted defendants should live or die.⁶⁵ The problem with our current system is not only that the convicted defendant may not be guilty. We also need to confront the problem of the convicted defendant who is guilty but is not one of those guilty defendants who ought to be sentenced to death. This class includes actual murderers who are not legally death-eligible and those who, although death-eligible, have been sentenced to death as a result of arbitrariness, racism or incompetent lawyering. In our zeal to expose and publicize wrongful convictions, we must not ignore the epidemic of wrongful death-sentences.⁶⁶

It is appropriate to close with the last paragraph of Professor White's last book, where he observes:

Following the example of Anthony Amsterdam in the pre-*Furman* era, defense attorneys have transformed our understanding of the modern system of capital punishment, identifying fundamental problems with the way it operates. As a result, defendants in capital cases will have increased protections, and the pace of executions is likely to slow. In view of the strong commitment to capital punishment that still exists in many parts of the country, however, change is likely to be incremental and slow. Many of the problems that exist now will continue to exist. The number of executions over the next few years is likely to be considerable, remaining in excess of fifty per year. In the long run, however, just as a defense attorney's compelling narrative of injustice can produce a favorable result for a particular capital defendant, defense attorneys' compelling narratives of the series of injustices perpetrated by the modern system of capital punishment may lead to a continuing decline in the use of the death penalty, and eventually to its outright abolition.⁶⁷

65. The Court in *Marsh* ignores this connection. Writing for the majority, Justice Thomas chided Justice Souter (and his three fellow dissenters) for discussing evidence of wrongful convictions, which he argued "is simply irrelevant to the question before the Court today, namely, the constitutionality of Kansas's capital sentencing system." 126 S. Ct. at 2528 (emphasis in original). See also *id.* at 2532 (Scalia, J., concurring) (asserting that the dissenters' discussion of innocence "is especially striking because it is nailed to the door of the wrong church—that is, set forth in a case litigating a rule that has nothing to do with the evaluation of guilt or innocence."). There is great insight into the fallibility of sentencing to be gained from examining the errors of the guilt-innocence phase.

66. See generally Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005).

67. SHADOW OF DEATH, *supra* note 5, at 208.

Litigating in the Shadow of Death, written in the shadow of Professor White's own death, has given us a framework for recognizing the relationship between wrongful convictions and wrongful sentences and for recognizing the need for narrative in both contexts. All those committed to improving the administration of justice have benefited greatly from Professor White's lifetime of work and will sorely miss his wise voice as we move toward his vision of a more just system of criminal adjudication and punishment.