

# WALTER C. RECKLESS MEMORIAL LECTURE\*

## The Innocence Revolution and the Death Penalty

Lawrence C. Marshall\*\*

It is a great honor to be part of this lecture series, honoring the memory of Walter Reckless and his outstanding contributions to the field of criminal justice. I am particularly pleased to be part of a series that was inaugurated by Simon Dinitz, and which has included a lecture by Randall Dale Adams, an innocent man who served time on death row in Texas.

### I

The United States criminal justice system is in the midst of a revolution. Spawned by the advent of forensic DNA testing and hundreds of post-conviction exonerations, the innocence revolution is changing assumptions about some central issues of criminal law and procedure.

This revolution is quite different from those that preceded it. The Warren Court's "rights revolution" was based on a controversial set of value judgments pursuant to constitutional values of autonomy, integrity, and respect for the individual, which trumped, in some instances, the interests in accurately prosecuting criminal actors. Given the nature of these value judgments, it is not overly surprising that the Burger and Rehnquist Courts—courts with value systems quite different from the Warren Court's—have scaled back many of these decisions.

The innocence revolution is quite different, as it addresses a value that everyone shares: accurate determinations of guilt and innocence. Put another way,

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\* On April 24, 2003, Lawrence C. Marshall presented the Fourteenth Annual Walter C. Reckless Memorial Lecture at The Ohio State University. The Reckless Lecture, sponsored by the Criminal Justice Research Center, and which the *Ohio State Journal of Criminal Law* intends to publish each year, is named after Walter Cade Reckless, a pioneer in American criminology and corrections, whose academic career spanned sixteen years at Vanderbilt University and three decades at The Ohio State University.

Professor Marshall's full lecture, of which the following is an edited version, originally was entitled, "The Innocence Revolution: Assessing the Impact of Wrongful Convictions on the State of Capital Punishment and the Criminal Justice System." The *Journal* thanks Professor Ruth D. Peterson, Professor of Sociology and Director of the Criminal Justice Research Center, for her assistance in making the Reckless Lectures available to the *Ohio State Journal of Criminal Law*.

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the innocence revolution is born of science and fact, as opposed to choices among a competing set of controversial values.

The revolution has just begun, and it is far too early to reach definitive conclusions about how dramatically it will transform criminal justice. Nonetheless, it is safe to conclude that our newfound appreciation of the system's fallibility is destined to leave a lasting mark on criminal law.

## II

As anyone who reads the newspapers knows, wrongful convictions are being exposed in this country with a great deal of regularity. Consider the case of Michael Evans and Paul Terry, clients we represent at Northwestern University's Center on Wrongful Convictions. These two men were incarcerated for twenty-six years for rape and murder. They were sentenced to hundreds of years in prison and had every reason to believe they would die in custody. Several years ago, however, the lawyer who prosecuted these men suggested to me that the case might warrant a second look. This lawyer explained that his newfound understanding of wrongful convictions had led him to conclude that the evidence presented against Evans and Terry was the sort that carried a high risk of error. He suggested that we explore whether DNA might be available to corroborate or refute the accuracy of the conviction. It took us about five years to find that DNA, but we finally did. The results are now in and the DNA completely exonerates both of these men. After twenty-six years!

This is just one example, representative of hundreds of wrongful conviction cases that have been exposed over the past several years. Well over 100 individuals have walked off of death row based on innocence, proven by DNA or other methods. In addition, well over 100 other individuals have been released from life sentences or lengthy terms of imprisonment based on DNA testing alone.

It is easy to be awed by the power of DNA to free the innocent and to convict the guilty. It is imperative, though, not to fall into the trap of believing that DNA itself can solve the wrongful convictions crisis. DNA testing depends on the perpetrator having left behind biological evidence susceptible to forensic testing. In some crimes, such as sexual assaults, this occurs with great frequency. In other crimes, though, including homicide, most crime scenes do not contain biological evidence from the perpetrator that is susceptible to biological testing.

The great significance of DNA testing, therefore, is that it provides a window into the error rate that exists in *all* cases. Moreover, as Barry Scheck, Peter Neufeld and Jim Dwyer have argued so powerfully in their book, *Actual Innocence*,<sup>1</sup> DNA exonerations provide great insights into the fallibility of particular types of evidence that were once assumed extraordinarily trustworthy. When DNA teaches us lessons about the incidence of eyewitness error or false

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<sup>1</sup> JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

confessions, those lessons are not limited to DNA cases. The lessons apply with equal force to cases that are not susceptible to forensic testing.

Consider the twelve death row inmates who have been exonerated based on DNA testing in the past decade. Each of these men owes his life to the fact that the victim in the murder for which he stood convicted was not only murdered but was also raped. Had the victim not been raped, these men still would have been completely innocent, but they would have been unable to prove their innocence because the proof of their innocence came through DNA tests of semen associated with the rape. Perversely, they are alive because they were “lucky” that the victim was raped. That is the critical lesson here. DNA cannot solve the crisis, but it can help illuminate the scope and nature of the problem.

This realization is often overlooked in the discussion of wrongful convictions. For example, many state legislatures throughout the United States have enacted statutes providing access to post-conviction DNA testing. These statutes are critically important, but it is frightening when some of these legislators claim that passing a testing statute is all that is needed to confront the crisis. We need to ensure DNA testing whenever it is possible, but we also need to undertake reforms based on the new knowledge that the results of these tests are generating.

Similarly, I am dismayed to hear people claim that these exonerations prove that the system “works,” because these individuals were freed prior to being executed. Imagine an FDA inspector who examines a sampling of 100 hot dogs from a factory that produces thousands each day. The inspector determines that fifteen of these 100 hot dogs contain botulism. How would we react if the owner were to proclaim relief that the inspector has identified and removed the fifteen bad hot dogs from the factory, and that all the others were fine? Yet this is precisely what some want to argue about the criminal justice system. We are not able to inspect all convictions in the same manner that we can inspect convictions susceptible to DNA corroboration or refutation. Instead, we must treat the DNA cases as the equivalent of a random sampling of convictions and recognize that the error rate this sampling reveals, and the nature of errors it reveals, replicates the general error rate and sources of error among all cases.

The question, then, is no longer whether innocent people are convicted or whether innocent people are sentenced to death. We now know that this happens with a regularity that none of us ever imagined before. This is a very new revelation. Only ten years ago some very reasonable people believed that the frequency of wrongful convictions was so low that the issue was not worth a place in the public policy debate. Only ten years ago, some very reasonable people believed that our system was so committed to accuracy, so replete with procedural protection, that it was virtually unthinkable that innocent defendants would be convicted in any criminal case, much less a capital case. Today, we understand that this confidence was misplaced.

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. For purposes of this lecture, I shall limit my observations to the impact this new understanding has on the debate over capital punishment in the United States. It should go without saying, though, that the lessons of innocence reach far beyond the death penalty into every aspect of the criminal process.

### III

The nature of the death penalty debate has changed significantly in recent years. Not long ago, the debate over capital punishment was gauged in rather abstract theoretical terms: the question presented was whether the government is entitled to kill those convicted of certain awful crimes. This question, of course, implicated many questions of theology, philosophy and political theory. We are all familiar with this debate and we know where the numbers come out when the debate is framed in abstract terms: A significant majority of Americans support the general idea that government has the right to impose capital punishment under certain circumstances.

The problem with framing the debate in this manner is that the propriety of the death penalty is hardly an abstract question. It is as practical an issue as one can imagine. The major change in the death penalty debate is that discussion now focuses on practical issues surrounding the imposition of capital punishment. Newfound understanding of the flaws and vices associated with the application of the death penalty is spawning growing opposition to executions.

A new group of abolitionists is emerging. These new abolitionists are not particularly interested in the philosophical, theoretical, or theological debate about the propriety of capital punishment. Rather, they have concluded that regardless of whether one believes the government has the right to take life as an abstract matter, one cannot support the death penalty given the practical issues surrounding the unfairness and inaccuracy of its implementation.

This ever-growing group of pragmatic abolitionists serves as strong confirmation of Justice Thurgood Marshall's thesis, set forth in *Furman v. Georgia*,<sup>2</sup> that once people learn about the realities surrounding application of the death penalty they will turn away in droves from supporting capital punishment. Justice Marshall argued that public support for the death penalty was, in effect, a product of mass ignorance about the discrimination, arbitrariness and errors associated with its application. For many years following the *Furman* decision in 1972, abolitionists sought to educate the public about these problems, but these efforts fell, in large part, on deaf ears. It was easy enough to prove that the death penalty was arbitrary and discriminatory, but those issues did not tend to spawn massive public outcry. On the other hand, although the specter of innocent people on death row was the kind of issue that could generate deep concern, throughout

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<sup>2</sup> 408 U.S. 238 (1972).

the 1970s and 1980s the public remained unconvinced that it was really possible for a truly innocent person to be sentenced to death.

It is worth reflecting on why the clear evidence of arbitrariness and discrimination did not alone move public opinion significantly. Why is it that the American people were willing to tolerate a system that allows race and class to play so significant a role in the ultimate question of whom we will kill? The reason, I suspect, is that these issues can be dismissed as problems of under-inclusiveness, and under-inclusiveness is not an issue that tends to trigger moral outrage among the general public. For example, imagine that a destitute African-American man has been sentenced to death for the murder of a white woman. Statistically, there may be strong evidence demonstrating that a wealthy white defendant, or even a poor white defendant, would have been unlikely to receive a death sentence for the same crime committed against an African-American woman. Surely, as a matter of equal protection and fundamental fairness, such discriminatory disparity is despicable. Yet, a member of the public might well conclude that the way to remedy the unfairness is to impose the death penalty more broadly—to make sure that whites convicted of killing African-Americans receive the penalty as often as the African-Americans convicted of killing whites. The concern, in other words, is not that a certain person is being executed, but that other similarly situated people are not. This is a deep concern but not one that necessarily convinces the masses to oppose the death penalty. In many people's minds, if a defendant on death row committed a heinous crime, there is no reason to spare him—or even be concerned about him—simply because other equally guilty people might escape death.

The issue of innocence is different. There is no difficulty convincing the public to be outraged that an innocent person has been condemned to die. This defendant is not making an equal protection claim that you ought not kill me unless you also kill others just like me. He is making the most basic kind of plea imaginable: I am not guilty!

I have no doubt that if the public can be convinced, on the facts, that innocent people are being sentenced to death with some frequency, the death penalty will be abolished in the United States. In other words, I submit that Justice Marshall's thesis was only partially true: convincing the American people about the arbitrariness and unfairness of the death penalty was not enough: it is the issue of innocence that carries the real potential to transform American opinion on the use of capital punishment.

#### IV

The Illinois experience is a wonderful example of the power of innocence. In 1978, Illinois reinstated the death penalty with the overwhelming support of the public. By the early 1990s, Illinois had the fourth largest death row in the United States. Between 1978 and the mid-1990s, the legislature had acted on several occasions to expand the class of murderers eligible for the death penalty. No one

would ever have imagined that Illinois was about to play a central role in transforming American views on the death penalty.

Yet, in January 2000, Republican Governor George Ryan, a longstanding supporter of the death penalty, declared a moratorium on executions. The engine driving this action was a series of thirteen death row exonerations during the 1990s. This in a State that had executed twelve individuals since the death penalty was reinstated in 1978. Thus, of twenty-five cases that had been finally resolved (through either execution or exoneration), over fifty percent had been exposed as wrongful convictions. Governor Ryan often explained that he is not a lawyer; he is a pharmacist from Kankakee. He was sure that had his pharmacy been discovered to have a fifty percent error rate in filling prescriptions, it would have been closed down immediately. In his view, that same result followed whether he was a pharmacist dispensing chemicals to heal or a governor dispensing chemicals to kill.

Upon declaring the moratorium, the Governor appointed a fifteen-member blue ribbon commission to assess the capital justice system in Illinois and to determine what needed to be fixed. Two years later, that Commission recommended eighty-five reforms that were necessary to restore confidence in the capital justice system. Even were all these reforms to be enacted, though, the Commission cautioned that the risk of executing the innocent would remain.

In the aftermath of the Commission's report, as Governor Ryan's term in office wound down, the Governor was asked to commute the sentences of all Illinois death row inmates. Given the flaws in the system as documented by his own Commission's study, the Governor was asked to ensure that no one convicted or sentenced under that system be executed.

This effort to secure mass commutations was met with significant opposition. Prosecutors argued that there were many cases in which there was no doubt about a defendant's guilt and there was no reason to commute those sentences. Proponents of the commutations countered by reminding the Governor that each of the exonerated defendants had been convicted *beyond a reasonable doubt* and that in several of those cases the courts had described the evidence against the defendant as overwhelming. Yet, it turned out—often through a series of miracles that never could have been anticipated by examining the paper record—that the defendant was innocent. To be sure, proponents of the commutations agreed, most of those on death row were guilty, but it was equally certain that some were innocent. Some were still waiting for their miracle to come. The problem was identifying which were which, and given the impossibility of doing that accurately, death sentences should be taken off the table.

The Governor was also urged to consider the comparative magnitude of errors in favor of executing versus errors in favor of imposing life without parole. On the one hand, the specter of executing someone who was not guilty (or even someone who was guilty but was not deserving of death) is our legal system's ultimate nightmare. On the other hand, the prospect of imposing life imprisonment on someone who is, in the view of some, deserving of death, is a far less devastating error.

Governor Ryan ultimately understood all of this. The Governor also understood something richer and deeper. He understood that the system's error rate in determining guilt has implications not only on the accuracy of convictions, but also on the trustworthiness of capital sentences. If a system had proven itself so flawed at answering the relatively easy, objective question of whether a defendant committed a crime, how could that system possibly be trusted with the far more complicated question of whether someone who has been convicted should be sentenced to death? That latter decision requires the delicate balancing of mitigating factors (such as mental illness, history of abuse, or impaired capacity) with aggravating factors (such as future dangerousness, heinousness of the crime, and criminal history). Governor Ryan understood that even if all 171 Illinois death row inmates were, in fact guilty, that did not mean that the broken system's decision that they should die was one worthy of trust.

After much obviously excruciating deliberation, Governor Ryan decided that the risks were too much to bear. On January 10, 2003, Governor Ryan commuted the sentences of all 167 inmates on Illinois' death row. Instead of execution, these individuals would serve prison terms—in almost all cases, life imprisonment without possibility of parole. In four other cases, the Governor pardoned inmates on the ground of actual innocence, concluding that the only evidence against them were untrustworthy confessions that were extracted through physical torture.

The Governor's actions were met with mixed reactions from predictable circles. Despite widespread predictions of intense public outrage, however, a St. Louis Dispatch poll showed that approximately fifty percent of Illinoisans supported the Governor's decision to commute all sentences.<sup>3</sup>

Now, twelve months after the commutations, there is no doubt that the climate toward capital punishment in Illinois has changed dramatically. The newly elected Governor, a supporter of capital punishment, has announced that he will maintain the moratorium indefinitely. The legislature has enacted a set of significant reforms designed to enhance the accuracy of capital proceedings. In the meantime, it appears that juries and judges have become far less inclined to impose death sentences. Only two death sentences have been imposed during this ten-month period. This rate is a far cry from the average of thirteen death sentences imposed each year during the 1980s.

The Illinois experience is a strong testament to the power of the innocence issue to have a bold impact on the death penalty debate. Unlike other challenges to the fairness of capital proceedings, which have failed to stimulate widespread public outrage, evidence of the system's propensity to factual error has the power to open closed minds and trigger reexamination of the costs and benefits of capital punishment. This reexamination has led many former supporters of the death penalty to join the chorus of the new abolitionists.

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<sup>3</sup> Kevin McDermott, *Illinoisans are Split Closely on Ryan's Commutations; Death Penalty has more, stronger support in Missouri than Illinois, Poll Shows*, ST. LOUIS POST-DISPATCH, Feb. 7, 2003, at A1.

## V

As a descriptive matter, the power of innocence on public opinion is unmistakable. It is important to consider, though, whether as a normative matter the innocence issue deserves this much attention. Is the public's interest in exonerations simply an example of media fascination with sensational anecdotes, or is this a phenomenon that deserves a prominent place in the death penalty debate?

Under one view, the proof that innocent people are condemned to die is dispositive of the debate without more. To many, showing that there is any risk of executing innocent defendants is enough to show that the death penalty is intolerable. This theme was captured in the classic statement of the Marquis de Lafayette that, "[t]ill the infallibility of human judgments shall have been proved to me, I shall demand the abolition of the death penalty."<sup>4</sup>

Is this view superficial? Some argue it is, pointing out that there are many areas of life in which we accept the risk of innocent people suffering, or even dying. For example, all would agree that the risk of wrongful convictions is no argument in support of abolishing prisons. This is not because we dismiss the horrors of incarcerating innocent people. Rather, we tolerate the costs of incarcerating the innocent because the benefits of having a prison system—even one that bears those risks—is so obvious that we cannot even begin to imagine life without prisons. In a world without prisons, anarchy and violence would reign. Hence, we have no choice but to maintain prisons despite the inevitability of incarcerating some innocent people (although we most certainly have a duty to do everything in our power to minimize the risk of error). Similarly, we know that immunizations carry some inevitable risk of killing healthy children, yet we have concluded that the value of immunizations, in terms of lives saved, justifies their continued use.

Therefore, to analyze whether the significant risk of executing the innocent is an independent justification for abolishing the death penalty, it is necessary to look at the putative benefits of the death penalty, and to compare these with its costs, which we now, for the first time, know to include the risk of wrongful conviction (and sentences). Is the death penalty similar to jails in that it is beyond doubt that we must maintain it regardless of its costs? Is it similar to immunizations, where we can point to a clear net gain in lives saved?

The comparison to the necessity of jails can be dismissed readily. The need for incarcerating dangerous criminals is beyond dispute; every society does this in one form or another. Obviously, the need to impose capital punishment is nowhere near as obvious or universally recognized. Here in the United States, twelve states find it perfectly acceptable to proceed without capital punishment. The same is

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<sup>4</sup> Charles Lucas, *Recueil Des Débats Des Assemblées Législatives De La France Sur La Question De La Peine De Mort*, pt. 2, 42 (1831), quoted in *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT 1787-1975*, at 98 (Philip English Mackey ed., 1976).



true for the rest of North America, all of Europe, and almost all of South America. Indeed, even in those thirty-eight American states that maintain the death penalty, a sentence of death is imposed in only about two percent of murder cases. Anarchy does not result in jurisdictions or cases in which capital punishment is not imposed, so the analogy to prisons is a rather empty one.

Is the comparison to immunizations a more apt one? At one level it is. Many of those who support the death penalty argue that, on balance, capital punishment, like immunizations, saves innocent lives. They are willing to treat the execution of innocent defendants as “collateral damage” in our war on crime. There is nothing theoretically flawed in this approach from a utilitarian perspective. Nonetheless, I agree with the intuition of so many Americans that this defense of capital punishment fails on the facts because there is no conclusive evidence to show that the death penalty provides sufficient value to justify its costs, particularly when those costs include the risk of executing the innocent and undeserving.

Before evaluating some of these costs and benefits, the burden of proof in this debate should be defined. In any individual criminal case, we demand proof beyond a reasonable doubt before we are willing to impose punishment on a defendant. That same burden ought to apply to the systemic question of whether we should be imposing capital punishment. In order to justify that action, we should demand proof beyond a reasonable doubt that the benefits of imposing that punishment outweigh its costs.

So how do the benefits of the death penalty compare with the costs? Is there proof, beyond a reasonable doubt, that the penalty returns value that outweighs the costs it generates? Although detailed evaluation of all asserted benefits of capital punishment is not possible here, I will examine three of the primary values asserted by supporters of capital punishment.

At one time in history the most persuasive argument for capital punishment was incapacitation, also known as specific deterrence. The fear that a violent inmate would kill while in prison persuaded many that killing such prisoners was not only justified, but was indispensable to public safety. To the extent that this argument had potency, it has been overtaken by technology. The advent of SuperMax correctional facilities now enables states to house particularly dangerous inmates under conditions that completely neutralize the inmate. If need be, the dangerous inmate can be contained in a setting that completely isolates him from any human contact: all food can be served through automation; showers are contained within the isolated cell; solitary recreation can take place in a fenced area adjacent to the cell, the door of which can be opened remotely. These technological advances have provided a method—one that does not involve killing—to incapacitate prisoners and prevent further criminal behavior.

A second argument often offered in support of the death penalty is general deterrence: that individuals considering committing murder will decide against it because of the incremental difference between the risk of being executed and the risk of being imprisoned for life without possibility of parole. At the common-sense level, this claim seems preposterous. Life in prison is so unattractive that

any deterrence that criminal penalties are capable of achieving is most assuredly accomplished by that threat alone. Those who commit murders despite that threat almost always either (a) believe that they will not be identified or (b) do not care at the moment of the murder what might happen to them. Most of the studies that have been done on the subject of general deterrence confirm this. Although a few recent studies have concluded that executions deter murders, the overwhelming consensus of criminologists is that capital punishment does not deter others from committing murders. Certainly, proponents of the general-deterrence-hypothesis cannot come close to proving their claim by the “beyond a reasonable doubt” standard that we ought to demand before we opt to kill.

Another argument in support of capital punishment that has risen to particular prominence in recent years is that victims’ families deserve closure, which can only be accomplished through the execution of the perpetrator. During an era in which much focus has been placed on the victims’ rights movement, this argument has much surface appeal. Upon analysis, though, this defense of capital punishment cannot justify proceeding with a system that carries the risk of executing the innocent and the undeserving.

No caring person can be unmoved by the plight of murder victims’ families. Indeed, were it the case that executing convicted killers could bring murder victims back to life there would be no doubt, in my mind, that we should be executing convicted killers swiftly and regularly. Under that scenario, the costs of error would be overwhelmed by the value of execution. The sad fact is, though, that we cannot resurrect the dead by executing others.

Nonetheless, the claim is made that executions are essential for the families of some murder victims to heal. This assertion is often advanced by family members themselves, and there is a natural resistance to challenge the thesis for fear of appearing callous or insensitive to the views of victims who have suffered so much pain. To the extent that important public policy issues are at stake, though, it is essential to subject the healing/closure argument to critical analysis. We should do this with great sensitivity and compassion for those who have been victimized. Nonetheless, we must conduct the inquiry rigorously to determine whether the posited benefits truly provide adequate return in light of the human costs imposed.

That sober inquiry reveals that the goals of promoting healing among the families of murder victims cannot justify the continued use of capital punishment. There is simply no evidence that executions deliver on their promise of promoting the psychological welfare of murder victims’ families. (Of course, even if the evidence did suggest that families of murder victims were made better off by executions, we would still have to tackle the question of whether it is morally justified to inflict immense pain upon one set of innocent families—those of convicted murderers—in order to provide another set of innocent families with psychological comfort.)

For example, there is no evidence that families of murder victims in non-death states such as Michigan or Wisconsin endure more lasting pain than families of murder victims in death states such as Texas or Ohio. Remember also that only

two percent of all murders are punished with the death penalty, even in death penalty states. If we really believed that executions were essential to the well-being of victims' families, how could we betray these other ninety-eight percent of families by depriving them of healing? Not one study of which I am aware has ever found that the psychological health of families in cases in which executions have been imposed is better than in cases in which life sentences are imposed.

The fact is, though, that many families of murder victims passionately believe that the execution of the convicted murderer is essential to their recovery. There is, of course, a strong and ever growing contrary movement among victims' families, exemplified by the work of Murder Victims' Families for Reconciliation,<sup>5</sup> but what are we to make of the fact that so many victims' families show up at executions and rally so vehemently in support of the death penalty?

The answer to this question turns, I believe, on how we tend to treat these victims' families. These people are faced with unspeakable pain that accompanies the murder of a loved one. Yet instead of reaching out to them with meaningful support and love, our societal response is to tell them that all we can do for them is to kill the convicted perpetrator. Resources that could be used for counseling and economic assistance are diverted into the quest for an execution. It is surely no surprise, and most certainly not the fault of these victims, that they come to support the only measure held out for them as the key to recovery. All they know is that there is a gaping hole in their hearts, and they are told that this hole might be repaired somewhat by the execution of the convicted murderer. Who can blame them for clinging on to that one and only hope? We have no right to denigrate these victims' good-faith belief that execution will bring them peace. We have a duty, though, to indict a system that offers victims no hope except revenge and the misguided and unproven promise that executions will bring solace.

Those who oppose the application of the death penalty have a moral imperative to consider this point and to work on ways in which alternatives to executions can be made available to the family victims of murders. It is perverse for us to be so full of compassion toward accused killers, but to ignore the pain of those whose lives have been turned upside down by murderous acts.

## VI

When many states throughout America decided to reinstate the death penalty in the late 1970s, their citizens and the courts were told that the new and improved death penalty would overcome many of the vices that plagued the systems that were struck down in *Furman v. Georgia*. We have now had more than twenty-five years of experience and we have learned that this promise has been breached. The death penalty is still administered in arbitrary ways. It still focuses almost exclusively on those who cannot afford good lawyers and who do not have the benefit of a quality public defender system. It still remains a bastion of racial

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<sup>5</sup> See <http://www.mvfr.org> (last updated Jan. 2004).

discrimination. And it still condemns innocent people to die with frightening regularity. Even if these first three points are incapable of moving public and judicial opinion on the subject of capital punishment, the last of these facts has proven very potent. The innocence revolution has arrived.