

Personal Reflections on *Connick v. Thompson*

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INTRODUCTION

Shortly after the Supreme Court published *Connick v. Thompson*, reaction among legal commentators was almost unanimously unfavorable.¹ Even the anonymous posts on various websites joined the condemnation.² After all, the facts—repeated *Brady* violations by several New Orleans DAs that resulted in Thompson spending fourteen years on death row for a crime he did not commit—called for moral outrage. While I shared much of that outrage, *Thompson* has a more personal importance to me: I had two minor roles in the case, one a source of some professional satisfaction and one a cause of a sense of deep disappointment.

This essay briefly describes the facts of *Thompson* and my role in the case. Thereafter, I use the case as a vehicle to discuss why I oppose the death penalty.

From 1977 until 1990, I taught at Loyola Law School in New Orleans. In the late 1980s, I was on the board of an organization that secured counsel for inmates on death row. I contacted Fran Milone, a close friend, who by then was a partner at Morgan, Lewis & Bockius in Philadelphia, and asked him to get his firm involved. That was in 1989. The firm's representation would last for years.

By 1989, John Thompson had already been on death row for four years and was about to spend many more years there.³ In late 1984, a member of a prominent New Orleans family was murdered. A few weeks later, three siblings were robbed at gunpoint by a single perpetrator. In the struggle that ensued, the robber was injured and left blood on his victim's pant leg. The police crime scene technician took the blood-stained cloth back to the lab.⁴

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¹ *Connick v. Thompson*, 131 S. Ct. 1350 (2011); see e.g. Andrew Rosenthal, *The Big Sleazy*, N.Y. TIMES, Nov. 17, 2011, 10:00 AM, <http://takingnote.blogs.nytimes.com/2011/11/17/the-big-sleazy/>.

² See info53, Comment to *Supreme Court Rules Against Exonerated Death Row Inmate Who Sued Prosecutors*, WASH. POST, Mar. 30, 2011, 8:22 PM, http://www.washingtonpost.com/politics/supreme-court-rules-against-exonerated-death-row-inmate-who-sued-prosecutors/2011/03/29/AF8tZPwB_allComments.html?ctab=all_&#comments.

³ *Connick*, 131 S. Ct. at 1356.

⁴ *Id.* at 1371 (Ginsburg, J., dissenting).

In early 1985, police arrested Thompson for the earlier murder. When his picture appeared in the newspaper, one of the robbery victims identified him as the person guilty of robbery.⁵

Around that time, a member of the New Orleans DA's office approved the robbery case for prosecution. On the paperwork, he indicated that the government may wish to perform a blood test on the swatch of cloth from the robbery victim's pants. The case was then sent to the DA in charge of the murder case. Meanwhile, the prosecutor sent the blood to the lab for testing and got back a report that the robber's blood was type B. That information was never handed over to the defense.⁶

Following normal procedure would have required the prosecutor's office to try the murder case first. Instead, the DA's office petitioned the trial court to allow the state to try Thompson for robbery first. Their motive was clear: securing a robbery conviction would reduce the chances that Thompson would take the stand in his murder trial. That is exactly what happened.⁷

Securing the conviction in the robbery case meant that Thompson did not take the stand in the murder trial. After his conviction, a member of the robbery victim's family testified at the sentencing phase, evidence that the state relied on heavily in its closing argument to secure the death penalty. After his appeals were exhausted, Thompson's execution was set for May 20, 1999. His attorneys informed him that he was out of options.⁸

Luckily, in late April of that year, still on the job, a defense investigator found a microfiche copy of the report indicating that the robber's blood was type B. Thompson was then tested and found to have type O blood, meaning that he could not have been the robber. The DA's office agreed to a stay of execution.⁹

An ensuing investigation revealed that in 1994, Gerry Deegan, a former student of mine, then a DA involved in the case, told another former student, also a DA, that he had intentionally suppressed the blood evidence. This was a clear ethical and legal violation. Deegan made his confession shortly before his death from cancer. Sadly, Mike Riehlmann, also a former student of mine, did not come forward until 1999 when the defense found the blood evidence. It took four more years after the discovery of the withheld evidence for Thompson to get a new trial and an acquittal.¹⁰

What are the lessons that I draw from this case?

⁵ *Id.* at 1372.

⁶ *Id.* at 1371–72.

⁷ *Id.* at 1372–73.

⁸ James J. Grogan, *Case of the Month*, THE NATIONAL ORGANIZATION OF BAR COUNSEL, <http://www.nobc.org/caseofthemonth.aspx?id=3436> (last visited May 23, 2012).

⁹ *Connick*, 131 S. Ct. at 1375.

¹⁰ *Id.* at 1374–76.

I. LESSON ONE: WE HAVE TOO MANY INNOCENT PEOPLE ON DEATH ROW

For a majority of Americans, executing the innocent is intolerable.¹¹ Some supporters of the death penalty, like Justice Scalia, cite cases like this as evidence that we do not execute the innocent.¹² I draw very different lessons from this case. It is not a feel-good story at all.

Prior to DNA testing, every criminal defense lawyer in the country knew that death row contains too many innocent people. But claims of factual innocence were always open to debate. Witnesses who recant their testimony are open to challenge: are they lying now or when they testified originally?¹³ Members of the public may have difficulty believing a person could make a false confession of guilt. In-court eyewitness identification can be compelling; disbelieving it may seem counter-intuitive.¹⁴ DNA evidence has been a game changer, obviously. It also proves how close we have come to executing innocent people.¹⁵

What about all of the cases where no physical evidence is available? Thompson's arrest preceded DNA testing; had he not also been charged in the robbery where a technician took a blood sample, Thompson would have been like many death row inmates, convicted without compelling physical evidence.

II. LESSON TWO: WITH COMPETENT COUNSEL, INNOCENT PEOPLE GET OFF DEATH ROW . . . MAYBE

I mentioned my involvement in this case for a reason: to illustrate the serendipity that saved Thompson's life. I called a friend at one of the world's largest law firms with a vigorous pro bono department. Morgan, Lewis & Bockius devoted over \$2.5 million dollars to Thompson's defense (not counting what the firm spent representing Thompson in his civil action). Even then, Thompson was

¹¹ See James D. Unnever & Francis T. Cullen, *Executing the Innocent and Support for Capital Punishment: Implications for Public Policy*, 4 CRIMINOLOGY AND PUB. POL'Y 3, 4-5 (2005) ("[T]he real possibility exists that public support for the death penalty could be moderated if people came to believe—or were persuaded—that innocent people had been executed.").

¹² Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 61 LAW & CONTEMP. PROBS. 105, 116 (1998).

¹³ See Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 83 (2008) ("Any defendant seeking a new trial based on the testimony of a recanting witness has one immediate and significant hurdle: the defendant is hanging his or her hat on a witness who has either lied under oath or who is wasting a court's time by lying after trial.").

¹⁴ See *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification*, THE INNOCENCE PROJECT 3, available at http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (stating that jurors do not realize "confident, trustworthy witnesses can be mistaken").

¹⁵ See Fact Sheet: DNA Exonerations Nationwide, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited May 23, 2012).

30 days away from his execution date when an investigator found evidence. Even that discovery may not have saved Thompson's life; it was the additional fact that Thompson's attorneys were able to show prosecutorial misconduct.¹⁶ That came about only because of a deathbed confession, and then only because, after withholding the information, Mike Riehlmann's conscience kicked in. Had the defense team failed to discover the evidence and not been able to show good cause for failing to discover the evidence, the courts may have refused to review his case. At least some members of the Supreme Court would hold that a claim of factual innocence, without more, may not save a death row inmate's life if the Court finds a procedural default.¹⁷

If you consider a man who spends fourteen years on death row for a crime he didn't commit lucky, John Thompson was a lucky man. Merely having an extraordinary defense team, with a large bankroll, may not be enough to save an innocent man's life.

III. LESSON THREE: THERE ARE SOME OBVIOUSLY GUILTY PEOPLE ON DEATH ROW AND THEY HAVE COMMITTED TRULY HORRIBLE, HATEFUL CRIMES

Shouldn't we feel comfortable executing them?

In 2006, I received a notice of jury service in a capital case. In filling out the twenty-page eligibility form, I realized how easily I could have avoided being called to serve on the jury: declaring that I am absolutely opposed to the death penalty would have all but guaranteed that I could have avoided service.¹⁸ Despite deep qualms about the death penalty, I am not an absolutist: I can imagine extremely limited circumstances where the death penalty may be morally compelling.

I often read accounts in the paper where evidence of guilt seems overwhelming. A defendant has confessed; all the evidence points towards his guilt; DNA evidence implicates him. True enough. And because I am not an absolutist on the issue, reading such accounts makes me wonder whether the reported case may be one where I could agree that death is an appropriate sentence.

But let's look at cases like Thompson's. If you read the news accounts and the opinions affirming his conviction, you would believe that evidence was overwhelming: he implicated himself to a fellow inmate, and eyewitnesses gave unequivocal testimony that Thompson was the robber.¹⁹ In this case, blood

¹⁶ State v. Thompson, 825 So.2d 552, 557 (4th Cir. 2002).

¹⁷ LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 242, 245 (2004) (stating that, based on the Supreme Court's 5-4 decision in *Schlup v. Delo*, "a defendant who claims both innocence and a constitutional error at trial must show only that it is *more likely than not* that no reasonable juror would have found the defendant guilty beyond a reasonable doubt").

¹⁸ *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (stating that the standard to be applied for excluding a juror in a capital case is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'").

¹⁹ State v. Thompson, 516 So.2d 349, 351 (La. 1987).

evidence saved Thompson. In many of the cases reported in the media, DNA evidence may implicate the death row inmate. What more can an agnostic ask for?

We should not lose our healthy skepticism when a life is at stake. Anyone familiar with the criminal justice system knows the limitations of the kinds of evidence I just cited.

1. Snitches are notoriously unreliable. Researchers who examine how our system convicts the innocent identify a confession to a jailhouse snitch as a common feature in such cases. The reason is obvious: a snitch, often a convicted felon—and therefore, of limited reliability already—may have a great deal riding on providing evidence for the state. Prosecutors may reduce charges against the cooperating witness or at least improve his conditions of confinement.²⁰

2. Harder to explain are false confessions. Apart from physical coercion, what would motivate someone to condemn himself to prison?

In the jailhouse snitch setting, the defendant may have an incentive to make himself sound mean. Stories of sexual or other assaults by fellow inmates are widely reported²¹ and no doubt give an inmate incentive to make himself look tough.

The reality is that some people confess to crimes they didn't commit. Some are driven by psychological motives.²² The police can often ferret out a psychologically-motivated innocent confessor because the confessor may lack information that only the perpetrator and police know about.²³

That does not always happen. Too frequently, though, if the police are convinced the defendant is guilty, officers may suggest information to the suspect. Disoriented or otherwise not fully competent, suspects confess despite their innocence.²⁴

3. The inadequacy of eyewitness identification is recognized widely. This problem is especially true in cases like Thompson's, where the suspect and victim

²⁰ Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, THE INNOCENCE PROJECT 3 (Winter 2004–05), <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf>.

²¹ HUMAN RIGHTS WATCH, U.S: FEDERAL STATISTICS SHOW WIDESPREAD PRISON RAPE (Dec. 15, 2007), <http://www.hrw.org/news/2007/12/15/us-federal-statistics-show-widespread-prison-rape> (U.S. Department of Justice report reveals widespread sexual abuse of prisoners by fellow inmates and staff.).

²² Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 338 (2009) (“Innocent suspects knowingly falsely confessed to avoid or end physical assaults, torture sessions, and the like.”).

²³ *Police Disclose Clue In Teen's 1985 Rape and Murder*, CBS CHICAGO (July 21, 2011, 4:46 PM), <http://chicago.cbslocal.com/2011/07/21/police-disclose-clue-in-teens-1985-rape-and-murder/>.

²⁴ See Leo, *supra* note 22, at 339 (discussing a three-step process in which innocent suspects come to believe they are guilty and confess); see also CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 36 (Gerald Uelman ed., 2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (discussing why false confessions happen and making recommendations to prevent their occurrence).

are not of the same race. Also, once a witness identifies a suspect, he may become even more committed to the identification over time.²⁵

Further, despite two landmark Supreme Court cases towards the end of the Warren Court years, the Constitution provides little protection against highly suggestive identification procedures. Police may show a witness the defendant in a highly suggestive one-on-one confrontation or show the witness the defendant's photo in a highly suggestive matter. Despite suggestive practices, the witness may be able to testify about making the out-of-court identification.²⁶ Even if not, the witness probably can make an in-court identification. And anyone who has seen such an identification knows its powerful effect on the jury.

Concern about the inaccuracy of in-court identifications has led to some non-constitutional reforms. For example, New Jersey has mandated elaborate procedures governing securing eyewitness identifications, including requiring the use of an officer who does not know which defendant is the suspect.²⁷ Elsewhere, courts allow the use of experts to explain the unreliability of eyewitness identification to the jury.²⁸ Still other courts allow a jury instruction on that point.²⁹ No national consensus has emerged, and the risk of misidentification remains a serious one across the nation.

4. What about DNA evidence? After all, as the *Thompson* case proves, such evidence can be powerful evidence of innocence. And surely, it is powerful evidence of guilt when a defendant's DNA is found at the scene. Yes and no.

We have seen recent scandals involving contamination in labs.³⁰ The popular perception of technicians as highly-trained professionals is not entirely accurate. Many technicians are not well trained and may make mistakes, tainting or misreading evidence.³¹

But apart from negligence, what about intentional misconduct?

²⁵ CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 24, at 25; *see also Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification*, *supra* note 14, at 13 ("With each identification or new bit of information, the witness becomes more and more confident in the identification, probably without realizing it. By the time of the trial, the witness takes the stand and provides very convincing testimony that a jury will often not question.").

²⁶ *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 537–38 (5th ed. 2010) ("In practice, however, trial courts rarely find that a police identification procedure offends due process, so both the pretrial and in-court identifications are allowed.").

²⁷ *Id.* at 531.

²⁸ *Id.* at 531–32.

²⁹ Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 654 (2011).

³⁰ *E.g.*, Peter Jamison, *SFPD Crime Lab's DNA Evidence Could be Tainted by Mistakes*, SF WEEKLY NEWS (Dec. 15, 2010), <http://www.sfweekly.com/2010-12-15/news/sfpd-s-troubled-crime-lab-more-evidence-of-screwups-and-coverups/>; *see also* Mandy Locke & Joseph Neff, *Witness for the Prosecution: Lab Loyal to Law Enforcement*, NEWSOBSERVER.COM (Aug. 12, 2010), <http://www.newsobserver.com/2010/08/12/625107/witness-for-the-prosecution-lab.html>.

³¹ J. PATRICK O'CONNOR, SCAPEGOAT 130 (2012).

As I said, here, the blood evidence saved Thompson's life. But he ended up on death row because a prosecutor or prosecutors were corrupt. Anyone familiar with the criminal justice system knows that, like humans all over, prosecutors and law enforcement are as good and bad as the rest of us. Some prosecutors are extremely mindful of their duty to do justice and are not simply trying to get convictions. That is not always true.

So back to why I used a personal story. I knew Gerry Deegan. He was a student of mine early in my career. Since learning about his role in the *Thompson* case, I have speculated how he could have rationalized what he did. Various explanations come to mind.

In two recent books about wrongfully convicted defendants, the authors speculate about the role of racism.³² That is, police and perhaps prosecutors act out of sheer animosity because the defendant is black. I do not discount the possibility of such motivation, but I suspect that instances where police and prosecutors proceed against an individual simply because he is black are aberrational. No doubt, race plays some less obvious role, perhaps unconscious.

Back to Gerry Deegan: as I recall, he was cynical. But I cannot believe he would have acted simply out of racial animus. Thus, I have to consider other possible motives for him to have acted illegally and, at the very least, unethically.

Some police and prosecutors may think as follows: as did Thompson, a suspect has a criminal record and is guilty of crimes for which he was never prosecuted. So what if he is found guilty of this crime? Defense attorneys have charged police with planting evidence on targets of their investigations and speculate that the police do so because of their belief that they are dealing with bad guys.³³ Here again, I have trouble believing that Gerry would have withheld blood evidence with the knowledge that an innocent man might be executed as a result of his conduct. I have even more difficulty believing that Mike Riehlmann would have withheld the information simply based on the belief that Thompson might have been guilty of some other crimes. I remember Mike, though not well. But my recollection was that he was a public-spirited, moral man.

Again, as with pure racist animosity, I do not doubt some police and prosecutors act out of the belief that, even if a suspect is innocent of this charge, he is a bad man and deserves punishment. I have trouble accepting that was so in Thompson's case. Most likely, Gerry acted with the belief that Thompson was guilty, despite the blood evidence. That is what Mike Riehlmann claimed when he

³² See *id.* at 84–86, 94 (“... creating a culture that could easily lead to many sorts of abuses, including framing a black man for a crime three white men committed”); see also RAYMOND BONNER, ANATOMY OF INJUSTICE 39, 45–46 (2012) (discussing possible racial bias of prosecutor and judge).

³³ See Thomas J. Martinelli, *Unconstitutional Policing: The Ethical Challenges in Dealing with Noble Cause Corruption*, THE POLICE CHIEF MAGAZINE, Oct. 2006, available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1025&issue_id=102006 (defining “noble cause corruption” as that “committed in order to get bad guys off the streets”).

told investigators about Deegan's confession shortly before his death.³⁴ One might reasonably ask how that can be.

In a powerful book about a death row inmate in California, author J. Patrick O'Connor speculates that San Bernardino County sheriffs framed an innocent man largely out of racist motives. The Sheriff's Department was attempting to solve three brutal murders that took place in a rural home. O'Connor lays out a strong case that the Sheriff's Department was corrupt and that racism played some role in the response of some members of the department and the public when Kevin Cooper became the prime suspect. Substantial evidence, as laid by O'Connor, supports Cooper's innocence. But apart from racist attitudes, law enforcement agents were not irrational to focus on Cooper as a suspect. Cooper was a career criminal who had recently escaped from a nearby prison. Cooper was hiding in a home only about 125 yards away from the murder scene when the murders occurred. The two homes were located in a remote rural area with few other homes in the vicinity.³⁵ Ignoring him as a suspect would have been irresponsible (apart from whether law enforcement agents demonstrated racial animus and whether they conducted a competent investigation of the crime scene).

Apart from and in addition to racial animus, law enforcement officials could not ignore the coincidence that a fleeing felon was within a short distance of the crime scene. But what followed, at least according to credible sources, demonstrated incompetence and willful blindness on the part of many officials.³⁶ At least in some cases, police and prosecutors may ignore exculpatory evidence once they have developed a theory of their case. Social science research supports the conclusion that such framing influences our decisions.³⁷

Thus, in Thompson's case, Gerry Deegan may have concluded that Thompson was guilty. He may have speculated that the blood sample came from a different source (not the robber). He may have concluded that the one robber-murderer theory was wrong and that Thompson was somehow implicated. Perhaps I am overly generous to my former student. But I find it more plausible to believe that a prosecutor would act out of a settled belief in a suspect's guilt than he would out of sheer racism or cynical belief that it was acceptable to convict a suspect because he must have committed some other uncharged crimes.

I have known many prosecutors and sometimes surprise my students in Criminal Law and Criminal Procedure when I tell them that I worked in the Philadelphia District Attorney's Office for a year beginning in the summer before my last year in law school. I had great respect for prosecutors in that office. I

³⁴ Associated Press, *Prosecutors Concealing Evidence*, FIGHT THE DEATH PENALTY IN USA (June 1, 1999), <http://www.fdp.dk/uk/art/art-16.htm>.

³⁵ O'CONNOR, *supra* note 31, at 12, 69–71.

³⁶ *Id.* at 47–53.

³⁷ See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2133–34 (2010) (“More specifically, cognitive scientists have documented the human tendency for people to interpret evidence through the lens of their existing beliefs.”).

cannot imagine an ethos in that office that would have tolerated such practices: after all, at least since the Supreme Court's decision in *Brady v. Maryland*,³⁸ prosecutors are required to hand over exculpatory material. That begs the question why a prosecutor like Gerry Deegan might have been willing to ignore his legal and ethical obligation under *Brady*.

After Thompson's acquittal, attorneys from Morgan, Lewis & Bockius pursued a § 1983 claim on his behalf. In a 5-4 decision, the Supreme Court reversed a substantial judgment in Thompson's favor. A close look at the record suggests this kind of behavior was all too common in the Orleans Parish District Attorney's office.³⁹ Many organizations suffer similar lax enforcement of rules, often leading to bad results. Similar examples are not hard to find. Above, I cited O'Connor's *Scapegoat*, where the author identifies systematic malfeasance. Former New York Times correspondent Raymond Bonner levels similar charges against Greenwood, South Carolina officials in *Anatomy of Injustice: A Murder Case Gone Wrong*. Other examples are easy to find.⁴⁰

Here, social science research helps explain why otherwise good people may do profoundly bad things. In the 1950s, Swarthmore Professor Solomon Asch carried out a ground-breaking social science experiment: a researcher showed a group of eight people sets of lines. One line was clearly longer than the other; but each of the seven people who were in on the experiment claimed the shorter line was the longer line. After initially disagreeing, the test subject began to agree with the other participants. The test subject dissented more often when one of the other participants also stated that the longer line was in fact the longer line.⁴¹ Asch's research has been expanded on in more recent years.

In 1961, Stanley Milgram, a Yale psychologist, conducted a study in which test subjects were allowed to give "learners" electric shocks when the "learners" gave incorrect answers. In deference to authority, most of the subjects continued to give what they believed were high voltage shocks to the "learners."⁴²

³⁸ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that prosecutors must disclose evidence to the defense when it is "material either to guilt or to punishment").

³⁹ *Connick v. Thompson*, 131 S. Ct. 1350, 1370, 1373-74 (2011) (Ginsburg, J., dissenting).

⁴⁰ See BONNER, *supra* note 32, at 192 ("The state had not only failed to turn over the evidence, it had, Holt now realized, essentially dissembled in order to hide it . . ."); see also Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, THE INNOCENCE PROJECT, 6-12 (Aug. 2010), http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf (citing examples of cases where prosecutorial misconduct has been found).

⁴¹ Solomon E. Asch, *Opinions and Social Pressure*, SCI. AM., Nov. 1955, at 31, 32-33, available at http://www.edmondschools.net/Portals/3/docs/Terri_McGill/READ-AschStudy.pdf.

⁴² Thomas Blass, *The Man Who Shocked the World*, PSYCHOL. TODAY, Mar./Apr. 2002, at 68, available at <http://www.psychologytoday.com/articles/200203/the-man-who-shocked-the-world>.

In 1971, Stanford psychologist Philip Zimbardo conducted a study in which students were randomly assigned the roles of prisoners and guards. Almost immediately, the “guards” began conducting themselves sadistically.⁴³

More recently, when commenting on soldiers’ behavior at Abu Ghraib, Zimbardo observed in a Boston Globe editorial that certain conditions, including the lack of accountability and diffusion of responsibility, “implicitly give[] permission for suspending moral values.”⁴⁴

Enron and other corporate scandals have evoked considerable interest: are they the result of morally corrupt individuals or do otherwise good people go bad in specific situations? Some commentators identify a “waterfall” effect in such moral meltdowns. Often starting at the top, when “overseers” fail to do what is right, their subordinates follow suit: “When others are cheating and getting away with it, the norm of fairness says it must be all right.”⁴⁵

One writer echoed Zimbardo’s critique in an article concerning Enron’s failure. Enron used a system called the “rank and yank” to encourage performance. Managers ranked employees and fired or pressured to leave the bottom fifteen percent. The survivors rationalized their subsequent illegal conduct and convinced themselves that they were not doing anything wrong.⁴⁶

Similar breakdowns of group ethics almost certainly take place in prosecutors’ offices. There, attorneys may feel under pressure to get convictions. They may forget their dual obligations: they are not merely advocates who measure success by winning cases. They are public officials sworn to uphold the interests of justice. The latter obligation often conflicts with the former. Especially in offices where the district attorney faces re-election pressure and must get convictions in high profile cases, convictions may seem to matter more than just results. Prosecutors who raise ethical concerns may be seen as weak. Without clear guidance from supervisors, assistant district attorneys may go along to get along and rationalize that they are doing the right thing in convicting the guilty.

One should ask why prosecutors like Gerry Deegan and other lawyers in the Orleans Parish District Attorney’s Office were not afraid of legal ramifications of their unethical and often illegal conduct. If a professor were to use a case like Thompsons’s on a criminal law exam, and if an innocent man was executed as a result of a prosecutor’s illegal conduct, students would argue that the prosecutor was guilty of murder. That is the hypothetical world of law school, not the real

⁴³ Philip G. Zimbardo, Editorial, *Slide Tour*, STANFORD PRISON EXPERIMENT, <http://www.prisonexp.org/psychology/1> (last visited May 25, 2012) (details the experiment from beginning to end).

⁴⁴ Philip G. Zimbardo, *Power Turns Good Soldiers Into ‘Bad Apples’*, BOSTON GLOBE, May 9, 2004, at D11.

⁴⁵ Trevor Cole, *Why Good People Do Bad Things*, UNIVERSITY OF TORONTO MAGAZINE, Winter 2005, at 18, 24, available at <http://www.magazine.utoronto.ca/cover-story/why-good-people-do-bad-things-are-corporations-evil-trevor-cole-article/>.

⁴⁶ *Id.*

world of criminal prosecution. One would be hard-pressed to find a real case of a prosecutor facing serious criminal charges based on similar conduct.

What about sanctions by the bar? Riehlmann was eventually disciplined by the state bar. Initially, the disciplinary board recommended a six-month suspension from the practice of law. The Louisiana Supreme Court reduced the sanction to a public reprimand.⁴⁷ With Deegan dead, Riehlmann was the only person who was sanctioned, despite the fact that a number of other DAs also suppressed the evidence. One of them, Eric Dubelier, became a member of Ken Starr's legal team that investigated Bill Clinton and is now a partner at a major Washington D.C. law firm.⁴⁸

Cases in which a state has prosecuted a prosecutor are hard to find. Prosecutors tried in the Rolando Cruz case in Illinois were acquitted. That night, some of the defendants went out with jurors for a celebratory dinner.⁴⁹ Durham, North Carolina, District Attorney Mike Nifong was held in contempt of court for withholding evidence in the prosecution of members of the Duke Lacrosse team. He spent one day in jail.⁵⁰ United States Attorneys who were involved in the prosecution of the late Senator Ted Stevens were sanctioned. One of them committed suicide, apparently in response to the intensive investigation of his involvement in withholding evidence.⁵¹

Imposing liability on errant prosecutors implicates important policy concerns. Some defenders of the Stevens' prosecution team believed that the lawyers were unfairly treated.⁵² For example, in a complex case, an attorney may have trouble understanding the significance of a piece of evidence or even remembering that it exists. Making it too easy to pursue criminal charges against a prosecutor may

⁴⁷ *In re Riehlmann*, 891 So.2d 1239, 1246–49 (La. 2005).

⁴⁸ John Hollway, *No More Disincentives for Prosecutorial Misconduct*, AM. CONST. SOCIETY BLOG (Apr. 11, 2011), <http://www.acslaw.org/acsblog/no-more-disincentives-for-prosecutorial-misconduct>; Mike Feinsilber, *Travel Probe Revs Up with New Lawyers*, SOUTHCOASTTODAY.COM (May 2, 1996, 12:00 AM), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/19960502/NEWS/305029993&cid=sitesearch>; REED SMITH, http://m.reedsmith.com/eric_dubelier/ (last visited Nov. 4, 2013).

⁴⁹ Ellen Almer, *Cruz Critical of Dupage 5 Jury*, CHI. TRIB., June 7, 1999, http://articles.chicagotribune.com/1999-06-07/news/9906100386_1_jeanine-nicarico-rolando-cruz-acquitted.

⁵⁰ Aaron Beard, *Ex-Duke Lacrosse Prosecutor Leaves Jail*, USA TODAY, Sept. 8, 2007, http://www.usatoday.com/news/nation/2007-09-07-2722365523_x.htm.

⁵¹ Charlie Savage & Michael S. Schmidt, *An Alaska Senator Calls for Firing of Prosecutors in Botched Stevens Trial*, N.Y. TIMES, Mar. 17, 2012, available at <http://www.nytimes.com/2012/03/17/us/politics/calls-for-dismissal-of-prosecutors-in-stevens-trial.html>; Jeffrey Toobin, *Casualties of Justice*, THE NEW YORKER (Jan. 3, 2011), http://www.newyorker.com/reporting/2011/01/03/110103fa_fact_toobin.

⁵² See Del Quentin Wilber, *Inquiry into Ted Stevens Case Cost Nearly \$1 Million*, WASH. POST (Mar. 27, 2012), http://www.washingtonpost.com/blogs/crime-scene/post/inquiry-into-ted-stevens-case-cost-nearly-1-million/2012/03/27/gIQAbSpEeS_blog.html (discussing cost to taxpayers in investigating prosecutorial misconduct, as well as the opinion of a defense attorney that “investigators have unfairly tarnished a number of professional prosecutors”).

make the prosecutor too timid. Those arguments apart, existing sanctions do not provide much deterrence in cases like Deegan's.

IV. LESSON FOUR: MAINTAINING THE SYSTEM IS SIMPLY TOO EXPENSIVE

Morgan, Lewis & Bockius's commitment of almost three million dollars to Thompson's case is admirable. The dogged efforts that saved Thompson's life are inspirational. But Thompson's case is not just a feel-good story.

What does the almost three million dollars that Morgan Lewis devoted to this case tell us about the death penalty? That one private law firm is committing enormous resources to a single case? Surely that is a poor allocation of resources, unless we are convinced that we are getting real benefits from the death penalty system.

Pro-death penalty advocates urge that we speed up executions.⁵³ That would reduce the cost of the system. In fact, states like Texas and Virginia spend far less per case than does California with its large death row population where inmates have a greater chance of dying of natural causes than they do of being executed.⁵⁴ But speeding up the process increases the risk of executing innocent people. In fact, conservatives are finally coming to the table on our failed criminal justice policies. They recognize the poor use of resources when we devote so much to a system that no one can love.⁵⁵

Some scholars point to econometric studies that claim that the death penalty deters. Indeed, some liberal scholars have argued that, if those studies are valid (indicating that each execution saves fourteen lives), our society is obligated to execute the murderers who receive the death penalty.⁵⁶ However, those studies

⁵³ Ken Dixon, *Death Penalty Supporters Push to Speed Up Executions*, CONN. POST (Apr. 13, 2011, 6:09 PM), <http://www.ctpost.com/news/article/Death-penalty-supports-push-to-speed-up-executions-1331786>.

⁵⁴ Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S41 (2011); see also Mary A. Fischer, *The Appeal of Death Row*, THE ATLANTIC, Nov. 2011, <http://www.theatlantic.com/magazine/archive/2011/11/the-appeal-of-death-row/8662/> (comparing the amount of time to carry out an execution in California with other states like Virginia and Texas); but see *The Death Penalty is Broken Beyond Repair*, SAFE CALIFORNIA, http://www.safecalifornia.org/downloads/2.6.C_noremedytofix.pdf (last visited Nov. 4, 2013) (discussing the increased chances of wrongful execution when speeding up the death penalty, specifically referring to Todd Willingham who was executed for a fire that killed his children, even though experts now agree the fire was an accident and he was innocent).

⁵⁵ *Conservatives and the Death Penalty*, ARK. COALITION TO ABOLISH THE DEATH PENALTY, http://www.acadp.org/contents/index.php?option=com_content&view=article&id=52:conservatives&catid=14&Itemid=100062 (last visited May 25, 2012).

⁵⁶ See Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705, 711 (2005) ("We suggest, in other words, that one certain empirical assumptions, capital punishment may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives.").

seem to fly in the face of multiple studies suggesting the opposite, that the death penalty has no deterrent effect.⁵⁷

Short of compelling evidence that the death penalty deters, many of us who are not absolutists believe that the risk of executing innocent defendants remains too high. Saving money by speeding up the process cannot, therefore, be the answer.

V. LESSON FIVE: IMPOSITION OF THE DEATH PENALTY REMAINS RANDOM AND ARBITRARY

In 1972, the Supreme Court came close to outlawing the death penalty. The effect of *Furman v. Georgia* was to render unconstitutional the death sentence imposed on then-current death row inmates. But the five justices forming the majority could not agree on a rationale. Justices Stewart and White were concerned about the arbitrary imposition of the death penalty.⁵⁸

Legislatures quickly responded by creating statutes intended to limit juries' discretion. Beginning in 1976, the Court upheld the death penalty against broad attacks.⁵⁹ The system in place is supposed to limit imposition of the death penalty and make it available only for the worst of the worst offenders.⁶⁰ Few observers believe that describes the way in which our system currently works.

Many death penalty states follow a system based on the original Model Penal Code death penalty provisions.⁶¹ Unable to agree whether to back the death penalty, the American Law Institute adopted a system whereby juries balanced aggravating and mitigating factors, leading to the imposition of the death penalty if aggravating factors outweigh mitigating factors.⁶² Such balancing processes do

⁵⁷ DEATH PENALTY INFO. CTR., DETERRENCE: STATES WITHOUT THE DEATH PENALTY HAVE HAD CONSISTENTLY LOWER MURDER RATES, available at <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates> (last visited Nov. 4, 2013); *The Death Penalty and Deterrence*, AMNESTY INT'L USA, available at <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/the-death-penalty-and-deterrence> (last visited Nov. 4, 2013).

⁵⁸ *Furman v. Georgia*, 408 U.S. 238, 414–15 (1972) (Powell, J., dissenting) (“It is the judgment of five Justices that the death penalty as customarily prescribed and implemented in this country today, offends the constitutional prohibition against cruel and unusual punishments. The reasons for that judgment are stated in five separate opinions, expressing as many separate rationales.”).

⁵⁹ CARTER & KREITZBERG, *supra* note 17, at 22–25.

⁶⁰ *Id.* at 11–12 (“Some scholars have pointed out, however, that the ‘eye for an eye’ concept was intended as a limitation on the severity of the punishment that could be imposed, rather than as a justification to increase the penalty.”).

⁶¹ FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 76 (2003); MODEL PENAL CODE § 210.6 (1962).

⁶² THE AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY Annex A, 1–3 (Apr. 15, 2009), available at http://www.ali.org/doc/Capital%20Punishment_web.pdf (listing aggravating and mitigating factors).

not lead to consistent results. Unable to have the Institute go on record in opposition to the death penalty, abolitionists within the Institute had a far easier job convincing the membership to withdraw support for its balancing process.⁶³

Many critics of the death penalty express concern about the role of race in the imposition of the death penalty. One widely cited study found a correlation between the two.⁶⁴ The most significant correlation was between the race of the victim and the imposition of the death penalty. In a provocative book, Charles Lane questioned whether racial disparity can still be explained by racist attitudes. He offered other more benign explanations for disparate racial imposition of the death penalty.⁶⁵ Whatever the explanation is, the data still present a picture of unequal imposition of the death penalty within the same state and around the country.

Observers who are close to the criminal justice system know that, even more important than race, quality of representation explains how many defendants end up on death row. Even if only some of the claims raised by defendants are true, some criminal defense lawyers representing death eligible defendants do little, if any, preparation, attend trial drunk, and do not follow even the most important leads on behalf of their clients.⁶⁶ The inadequacy of much representation helps explain the high rate at which courts reverse cases in which the death penalty has been imposed.⁶⁷

And to return to my earlier point, whether a defendant has competent counsel is often a matter of sheer luck. While Morgan, Lewis & Bockius is not the only firm making heroic efforts on behalf of death row inmates, their representation of John Thompson saved his life. One can only speculate whether another set of lawyers would have uncovered the blood evidence that saved his life a month before his execution date.

When I turned twenty-one, a friend took me to the race track. I learned quickly that I do not like to gamble. Anyone who shares my antipathy to gambling should recognize that as long as states continue to impose the death penalty, we are gambling with human life. Odds are strong that our society has executed innocent people.

⁶³ See *id.* at 4 (recommending that the ALI withdraw § 210.6 and “neither endorse nor oppose the abolition of capital punishment”).

⁶⁴ *McKleskey v. Kemp*, 481 U.S. 279, 286–87 (1987).

⁶⁵ CHARLES LANE, *STAY OF EXECUTION: SAVING THE DEATH PENALTY FROM ITSELF* 44–45 (Peter Berkowitz & Tod Lindberg eds., 2010).

⁶⁶ See, e.g., *BONNER*, *supra* note 32, at 47, 49; *Fisher v. State*, 206 P.3d 607, 610–11 (Okla.Crim.App. 2009).

⁶⁷ Andrew Gelman et. al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 219 (2004).