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## Symposium Foreword

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# SYMPOSIUM: THE DEATH PENALTY AND THE QUESTION OF ACTUAL INNOCENCE

## SYMPOSIUM FOREWORD

Lyn Entzeroth\*

As the Justices of the United States Supreme Court have reminded us, “the death penalty must be reserved for ‘the worst of the worst.’”<sup>1</sup> Presumably, the worst of the worst means individuals who are both guilty of a capital crime and deserving of death under the law. Indeed, underlying many discussions on the fairness, efficacy, and constitutionality of the death penalty lies the question of whether or to what extent we should protect against the execution of innocent people or individuals undeserving of death. Justice Souter in his dissent in *Marsh v. Kansas*<sup>2</sup> suggests that the Eighth Amendment’s guarantee that a punishment shall not be imposed in a cruel and unusual manner should be informed by the increasing number of death-row residents who have been exonerated in the past ten to fifteen years. Even if one accepts the proposition that the death penalty advances legitimate social and penological goals of deterrence and retribution, it is hard to make a case that these goals are advanced by executing one who is innocent or not deserving of death.

However, while almost all would agree that we should not execute someone who is innocent or undeserving of death, that is just the beginning of the discussion. The controversy surrounding the danger of executing an innocent person is multifaceted, raising a number of complex concerns that are truly at the heart of the death penalty debate. Among the questions tackled by the authors of this symposium are: who are these wrongfully convicted capital defendants and, if they are innocent, how did they end up on death row? Professor Randall Coyne describes the poignant cases of three men who were convicted and sentenced to die by lethal injection in Oklahoma; years later and after multiple post-trial proceedings, these capital defendants had their convictions and

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1. *Marsh v. Kan.*, 126 S. Ct. 2516, 2543 (2006) (Souter, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

2. 126 S. Ct. 2516.

sentences set aside based on compelling evidence of actual innocence.<sup>3</sup> Many factors conspired to convict these innocent men including inadequate counsel and police misconduct. These are not uncommon elements in capital cases, and, as Professor Kenneth Williams demonstrates, inadequate counsel makes it more likely that a jury will convict an innocent man and may make it more difficult to pursue later exoneration. The story of Johnny Ray Conner, which Williams relates, provides a stark and chilling example of how attorney incompetence may result in the execution of a man with a strong and colorable claim of innocence.<sup>4</sup>

However, the who and the how are only one part of the question of the actual innocence controversy. The articles in this symposium further look at the extent to which state or federal courts should delve into the factual and legal errors that occur at trial and consider how much these post-trial courts must defer to the findings of the jury. As revealed in Professor Celestine McConville's article, the lack of or unwillingness of states to provide able, reasonably funded, constitutionally effective counsel plagues many capital cases from indictment through post-conviction and federal habeas review.<sup>5</sup> The result of this deficit in counsel is often that an innocent man will be wrongfully convicted, and neither the state nor federal systems of review provide a safety net big enough or strong enough to catch all of these individuals. Professor David Dow details the federal procedural process and to what extent an innocent man can seek a writ of habeas corpus to escape the hangman's noose or, as is the case in almost all states today, the executioner's needle.<sup>6</sup> The appendices to Dow's article also provide an important resource in which he compiles state procedures for raising claims of actual innocence in state habeas proceedings.

Another facet of the debate surrounding the execution of innocent defendants is the reality that some defendants claiming innocence receive extensive media coverage and attention while others struggle to make their cases in relative obscurity. Professor Jeffrey Kirchmeier describes the celebrated case of Roger Coleman and the less well-known case of Larry Griffin, and he wrestles with the procedural and ethical questions as one sorts through the procedural morass that was played out in each case.<sup>7</sup>

Further, in the death penalty context, innocence can also be a question as to punishment. Although a defendant may be guilty of murder under the law, he may not be among those individuals that the state is constitutionally allowed to execute. As Professors Ellen Kreitzberg and Linda Carter explain, assuring that such individuals are not wrongfully executed is an important constitutional guarantee that underlies much of the post-1976 death penalty jurisprudence, and "innocent of the death penalty" is a vital part of the death penalty debate.<sup>8</sup>

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3. *Dead Wrong in Oklahoma*, 42 *Tulsa L. Rev.* 209 (2006).

4. *Why It Is So Difficult to Prove Innocence in Capital Cases*, 42 *Tulsa L. Rev.* 241 (2006).

5. *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel*, 42 *Tulsa L. Rev.* 253 (2006).

6. *Is It Constitutional to Execute Someone Who Is Innocent (and If It Isn't, How Can It Be Stopped Following House v. Bell)*, 42 *Tulsa L. Rev.* 277 (2006).

7. *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 *Tulsa L. Rev.* 403 (2006).

8. *Innocent of a Capital Crime: Parallels between Innocence of a Crime and Innocence of the Death*

No question is more difficult than the question of how to deal with the danger of executing the wrong person. The articles contained herein provide provocative and thoughtful analysis of many of the issues that arise in this dilemma.

