
ADDRESSING THE EVIDENTIARY SOURCES OF WRONGFUL CONVICTIONS: CATEGORICAL EXCLUSION OF EVIDENCE IN CAPITAL STATUTES

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In an effort to provoke realistic remedial thinking,¹ this essay presents and discusses a proposed model statute that would ban any capital prosecution that is based primarily on the types of evidence we now know

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1. Contemplating what to say at a symposium on Wrongful Convictions, I was surprised to find nowhere in the mass of literature generated since 1989, any proposals to flat-out ban the sources of evidence that show up in case after case of demonstrated "actual innocence." I am not sure I would endorse the statute proposed here, were I legislator or judge. As a former prosecutor, I believe in the ideal of ethically exercised, and supervisorily reviewed, prosecutorial discretion. And I am not an abolitionist regarding the death penalty. See Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1597 (2004). Nevertheless, the revelation of so many "actual innocence" cases involving poorly exercised prosecutorial discretion must give anyone pause.

The idea of excluding known evidentiary sources of wrongful conviction, as opposed to merely reducing them, at least in capital cases, seems an obvious one that should be considered. If we really believe that particular types of evidence can, too easily, lead to wrongful convictions, why do we allow it, when a life hangs in the balance? One response is Justice Scalia's, in *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring): "One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation." This may be true generally; the question posed in this article is, are we willing to accept it in the capital context?

to be sources of convicting the innocent.² I focus solely on capital cases, as they are irremediable once the sentence is carried out, and thus (perhaps³) the most disturbing category of wrongful convictions.⁴ Moreover, this is an essay, not a tenure piece, and its brief discussion surely does not answer, or

2. Unsurprisingly in such an emotionally powerful area, the semantics of “wrongful convictions” are underlaid with deep disagreements and suspicion. See Adam Liptak, *Consensus on Counting the Innocent: We Can’t*, N.Y. TIMES, Mar. 25, 2008, at A14 (“[E]xoneration in the capital concept is a funny concept. It suggests complete vindication, but its real meaning is generally narrower.”). Thus Professor Gross and his co-authors use and define the term “exonerations,” and note that they do not propose “an independent judgment on the factual innocence of each” of the 340 defendants who they say have been exonerated. Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 526 (2005). Others use the term “wrongful conviction” in a similar fashion, describing any case in which the conviction has been reversed for reasons of misconduct and/or in situations where innocence is strongly asserted. Still others include the “actually innocent” but also “those who are guilty of something, just not the crime of conviction.” Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1124 (2005). And yet others use the term “wrongful conviction” without defining it, likely considering the concept well enough settled to not merit a distracting definitional struggle. E.g., Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1413 (2007).

It now seems undisputable that DNA revelations have demonstrated beyond all doubt that some (whether a “few” or “many” is hotly disputed) convicted capital defendants have been factually, “actually,” innocent. See *Kansas v. Marsh*, 548 U.S. 163, 209-10 (2006) (Souter, J., dissenting) (“many” death row exonerees have been “cleared by DNA evidence”). Justice Scalia’s response to this is to claim only that there is “not a single verifiable case” of wrongful “execution”—not conviction—and that the death row error rate “has been reduced to an insignificant minimum,” not zero. *Id.* at 199 (Scalia, J., concurring). See also Gross, *infra* note 7 (detailing four wrongful conviction cases the author believes showcase not only “actual innocence” but actual executions).

At the other extreme, however, it is (I hope) equally undisputable that not all convictions are “wrongful.” Some (indeed, we hope, the great majority) are very “right” indeed. Nor are all convictions that are reversed on appeal “wrongful.” In our system of constitutionally enshrined Due Process, reversible error can be present even when all actors have attempted to perform in complete good faith. In addition, reversible error can be present even in the face of clear guilt, where significant rights of a criminal defendant are ignored or overridden. Yet among all the sharply opposed forces that care deeply about the criminal justice system, I consider it to be shared territory that conviction of the factually innocent is plainly “wrongful,” even when the fault for the conviction cannot clearly be laid on any one actor in the system. This essay has protection of the factually innocent capital defendant centrally in mind.

3. Cf. Gross et al., *supra* note 2, at 536 (asserting that “nobody, it seems, seriously pursues exonerations” for “routine” felonies and misdemeanors, and that innocents are wrongfully convicted in those categories “in numbers that dwarf” the 340 exonerations in very serious cases examined in Professor Gross’s article).

4. See Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587, 587 (2004). Professor Bedau’s immense body of work in this area over a half century places him at the forefront of the committed group of anti-death penalty researchers in the United States. See, e.g., Hugo A. Bedau, *Murder, Errors of Justice, and Capital Punishment*, in THE DEATH PENALTY IN AMERICA 434 (Hugo Adam Bedau ed., 1964).

even address, every possible aspect of the idea. But let's see how serious we really are about totally eliminating (rather than just reducing) wrongful convictions, by imagining a total ban on their known evidentiary sources—indeed, a ban that is immediately judicially enforceable—when the death penalty is at issue.

A. THE KNOWN EVIDENTIARY SOURCES OF WRONGFUL CONVICTIONS,
AND CURRENTLY PROPOSED REMEDIES.

Controversy regarding convictions of the innocent is not new.⁵ But in the wake of newly developed DNA science, beginning less than two decades ago,⁶ undisputable evidence of “actual innocence” convictions on America's death row is now well-accepted.⁷ After more than a decade of

5. The early history of “actual innocence” concern in this country has been largely forgotten. Almost a century ago, the Journal of Northwestern University's American Institute of Criminal Law and Criminology reported that a year-long survey of wardens of “every prison in the United States and in Canada,” conducted by the American Prison Congress, had revealed “not a single case” of “capital punishment wherein there was reasonable doubt as to the guilt of the victim.” Robert H. Gault, *Find No Unjust Hangings*, 3 J. CRIM. L. & CRIMINOLOGY 131, 131 (1912). In response, Edwin Borchard, then the Librarian of Congress, asserted “[t]hat there have been numerous cases of this kind besides the recent Toth case in Pennsylvania . . . there is no doubt, notwithstanding the unauthentic returns from wardens collected by the American Prison Congress . . .” Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 13 J. CRIM. L. & CRIMINOLOGY 684, 706 (1913). Borchard's article was reprinted, together with an introductory editorial by the famous evidentiary Dean Wigmore, to accompany the Senate introduction of a “Bill (S. 7675) to Grant Relief to Persons Erroneously Convicted in Courts of the United States.” EDWIN M. BORCHARD, STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE, S. DOC. NO. 974, at 1 (3d Sess. 1912). Twenty years later, Professor Borchard published his famed *Convicting the Innocent*, which is now often, if ahistorically, credited as being the “first” discussion of actual innocence in the United States. EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932); e.g., Daniel S. Medwed, *Looking Forward: Wrongful Convictions and Systemic Reform*, 42 AM. CRIM. L. REV. 1117, 1117 n.1 (2005).

6. “[T]he period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.” *Kansas v. Marsh*, 548 U.S. 163, 207-08 (2006) (Souter, J., dissenting). As Professor Daniel Medwed describes, while the specter of wrongful convictions has haunted the literature for decades, it is “[t]he emergence of post-conviction DNA testing in the past sixteen years” that “has provided the scientific arrow to the scholar's theoretical bow . . .” Medwed, *supra* note 5, at 1117.

7. See *supra* note 2; Accord Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 526 (2006) (DNA and the “innocence revolution has rocked the entire criminal justice system”). This essay does not seek to resolve the debate regarding whether an innocent capital defendant has actually been executed—the fact of a number of death row exonerations before execution is sufficient to give strong concern. The longstanding debate about the *execution* of innocents, see *supra* note 5, has continued in recent times. See, e.g., Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988)

revelatory jurisprudence,⁸ six evidentiary sources of wrongful convictions are actually well known⁹: faulty eyewitness identifications;¹⁰ false confessions;¹¹ jailhouse snitches;¹² “junk” science (meaning unreliable or

(contesting Bedau and Radelet’s claim that 23 innocent defendants have, in fact, been executed); MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (Northeastern 1992) (repeating their claim). The debate has extended recently into the United States Supreme Court. *See Marsh*, 548 U.S. 163, 188-92 (2006) (Scalia, J., concurring) (noting prior comments by Justices Stevens, Souter and Blackmun suggesting that “[i]nnocent persons *have* been executed . . .,” *id.* at 193 n.4, and asserting in response that there is “not a single case—not one—in which it is clear that a person was executed for a crime he did not commit”). *Id.* at 188. *See also* Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 71 (2006) (responding to Justice Scalia by describing four cases in which an innocent defendant may have been executed, noting that “there is no generally available procedure for securing an exoneration after execution,” and stating “[w]e know it happens”); Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501 (2005).

8. The paradigm-shifting concept of “actual innocence” in the criminal justice system—that is, criminal defendants who have been convicted, sentenced, and affirmed on appeal, yet are later determined to have been not guilty—was brought to the popular (as well as judicial and legal) consciousness in undebatable form by the 2000 publication of the book of the same title, detailing the new DNA testing science for the first time. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (Doubleday 2000) (published in paperback as BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (New Am. Library 2003)). With the 2006 publication of *The Innocent Man* by best-selling novelist John Grisham, “actual innocence” has now penetrated the popular American consciousness.

9. Of course, the “revelation” of wrongful convictions in the United States goes much further back than *Actual Innocence*. The seminal authority remains the 1932 presentation by Yale Law Professor Edwin Borchard of 65 cases in which innocent defendants were convicted. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE, *supra* note 5. Borchard’s writing on this topic dates back to 1912, *see supra* note 5, and the history in European countries goes back even further. *See Borchard, European Systems of State Indemnity for Errors of Criminal Justice, supra* note 5. Indeed, it seems safe to say that so long as human society engages in accusation and punishment for wrongdoing, wrongful convictions will also occur. *See, e.g., RADELET ET AL., supra* note 7. Today, the most comprehensive sources for “actual innocence” examples and information are found on the web (of course), at the Northwestern Law School’s Center on Wrongful Convictions, www.law.northwestern.edu/wrongfulconvictions, and Cardozo Law School’s Innocence Project, www.innocenceproject.org. *See also* Death Penalty Information Center, www.deathpenaltyinfo.org.

10. *See, e.g.,* Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487 (2008); Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court’s Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Reality*, 31 LAW & PSYCHOL. REV. 21 (2007); Kathy Pezdek, Kathryn Sperry & Shana M. Owens, *Interviewing Witnesses: The Effect of Forced Confabulation on Event Memory*, 31 LAW & HUM. BEHAV. 463 (2007); NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION (West Group 2002) (1981); BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995).

11. *See, e.g.,* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); Boaz

unverified forensic evidence);¹³ bad lawyering (whether by the prosecution or the defense)¹⁴ and general witness misconduct (whether by law enforcement, victims, experts, or other witnesses). The great multitude of “actual innocence” case histories, and the secondary literature, converge on these evidentiary sources of error.¹⁵

In response, a multiplicity of procedural protections have been proposed: improved eyewitness identification procedures and independent corroboration;¹⁶ protective jury instructions;¹⁷ videotaped interrogations and

Sangero, *Miranda is Not Enough: A New Justification for Demanding “Strong Corroboration” to a Confession*, 28 CARDOZO L. REV. 2791 (2007); Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43 (2007); Dale E. Ives, *Preventing False Confessions: Is Oickle Up to the Task?*, 44 SAN DIEGO L. REV. 477 (2007); Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275 (2007). The leading authority on false confessions, among many, is professor Richard Leo. See, e.g., Richard A. Leo et al., *supra* note 7; Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

12. See Raeder, *supra* note 2.

13. See Roger C. Park, *Signature Identification in the Light of Science and Experience*, 59 HASTINGS L. J. 1101, 1101 (2008) (“The example of DNA has shown what real science can do, and has highlighted the shortcomings of other forms of forensic science.”); Jessica D. Gabel & Margaret D. Wilkinson, *“Good” Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L.J. 1001 (2008). See also DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 147 (2002); DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: STANDARDS, STATISTICS AND RESEARCH ISSUES 93 (2002).

14. See, e.g., DWYER ET AL., *supra* note 8, at 172-92.

15. See, e.g., Samuel R. Gross, *supra* note 7, at 70-71 (reacting to the *Kansas v. Marsh* decision by detailing wrongful conviction cases that foundered on such evidentiary sources, and resulted in actual execution); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399 (2006); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

16. Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271 (2007) (arguing for the complete removal of eyewitness identification); Thompson, *supra* note 10 (arguing for strong corroborating evidence rule); Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109 (2006); BUREAU OF TRAINING AND STANDARDS FOR CRIMINAL JUSTICE, WIS. DEP’T OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (Sept. 12, 2005), available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf> (recommending improved eyewitness identification procedures); TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (Oct. 1999), available at www.ncjrs.gov/pdffiles1/nij/178240.pdf (suggesting the double-blind administration of both photo spreads and corporeal line-ups); Gary L. Wells et al., *Recommendations for Properly Conducted Lineup Identification Tasks*, in ADULT EYEWITNESS

Daubert-like “reliability hearings”;¹⁸ strongly regulated forensic labs and examiners;¹⁹ independent case reviews;²⁰ limiting “anecdotal” forensic testimony;²¹ better lawyer training, funding and oversight²² and stronger lawyer ethics rules.²³ Indeed, the American Bar Association, a sometimes slow-moving but powerful representative force in American law, has adopted 11 different resolutions advocating a large number of reforms.²⁴

TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 223 (David Frank Ross et al. eds., 1994).

17. Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 561 (2008); Alexander G.P. Goldenberg, *Interested, But Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745 (2007); WILLIAM J. PALMER, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL: A COMPANION BOOK TO CALIFORNIA JURY INSTRUCTIONS 625 (1946).

18. Leo et al., *supra* note 7; Lisa Lewis, *Rethinking Miranda: Truth, Lies, And Videotape*, 43 GONZ. L. REV. 199 (2007); Saul M. Kassir, Richard A. Leo, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy-May Leach & Dana La Fon, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381 (2007); Slobogin, *supra* note 11.

19. E.g. Paul C. Gianelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007); Brian Witte, *State Legislation: Crime Labs and Forensic Evidence Reform: Md. Puts Teeth in Bill to Regulate Crime Labs*, May 7, 2007, available at http://www.nacdl.org/sl_docs.nsf/issues/CrimeLab; 42 U.S.C. § 3797k (4) (Supp. IV 2007) (requiring that DNA laboratories receiving federal grants create mechanisms for external independent investigations); sources cited *supra* note 13.

20. E.g. Raeder, *supra* note 2, at 1417; Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1366 (2007).

21. David L. Faigman, *Anecdotal Forensics, Phrenology, and Other Abject Lessons from the History of Science*, 59 HASTINGS L.J. 979, 996-1000 (2008).

22. E.g. Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 371-74; Jodi L. Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator*, 24 J.L. ECON. & ORG. 45, 64 (2008).

23. E.g. Raeder, *supra* note 2, at 1416-17; Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839 (2005). In addition, the American Bar Association recently agreed to revisions to Model Rule of Professional Responsibility 3.8 (“Special Responsibilities of a Prosecutor”) to address actual innocence claims and the author (Professor Little) is currently Reporter for an ABA Task Force to revise the ABA’s *Criminal Justice Standards for the Prosecution Function and Defense Function* that is expressly focusing on stronger model rules to address actual innocence issues.

24. See AM. BAR ASS’N, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* (Paul Gianelli & Myrna Raeder eds., 2006).

B. THE PROPOSAL: STATUTORY EXCLUSION OF KNOWN EVIDENTIARY SOURCES OF WRONGFUL CONVICTIONS.

There is no doubt that the problem of wrongful convictions is a complex one, with multiple sources and no perfect resolution, given inevitably flawed human processes.²⁵ Moreover, although simplicity is a virtue, solutions to complex problems are also usually complex. Certainly a mosaic of solutions and protections are necessary to address the problem of wrongful convictions. Moreover, the problem cannot be “solved” so much as managed, since the challenge to fairly address crime in a free society will never disappear.²⁶ I offer my model statutory idea below as a supplement to, not a substitute for, all the remedial thinking that has preceded it.

Nevertheless, this essay proposes an approach to the problem of wrongful convictions different from those heretofore proposed, one that I have not seen previously suggested.²⁷ It is different from—perhaps supplemented by, but substantively different from—procedural protections that still allow questionable types of evidence to be used in capital prosecutions.²⁸ The proposal here is to categorically exclude such types of evidence from capital prosecutions (possibly with an exception saying “unless strongly corroborated by evidence that is independent of the questionable sources”). The idea is to accomplish this statutorily: amend all capital statutes to exclude, categorically, the known evidentiary sources of wrongful conviction from capital cases. Alternatively one could propose that capital statutes be written to explicitly exclude, from capital eligibility, any case that is based primarily on the known sources of wrongful conviction. Additionally, any such categorical exclusion standard should be judicially enforceable, and immediately reviewable. To bring this idea down to a concrete level of discussion (and criticism), a “model statute” is appended to the end of this essay.

25. See Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1207 (2005); Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1224 (2005).

26. See PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

27. Although the title of a recent article sounds like my own, it addresses the Supreme Court’s “categorical exclusion” of juveniles and the mentally retarded from capital eligibility, and advances ideas quite different from those found here. See Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211 (2007).

28. Professor Leo and his colleagues propose, for example, that very stringent rules be used to “screen out” possibly false confessions. Leo et al., *supra* note 7, at 512. It is possible that their proposals would eliminate all false confessions. Nevertheless, their proposals do not amount to a categorical exclusion of the use of confessions, when a confession is the primary evidence against the accused, in death penalty cases.

C. WHY GAMBLE WITH THE POSSIBILITY OF WRONGFUL CAPITAL CONVICTIONS?

To date, the statutory or rules response to wrongful convictions has a bit of a casino gambling character. What we say is: we know the sources of wrongful conviction. But we can't ban them entirely, because they (confessions, eyewitness identifications, so-called expert forensic evidence, and criminal informants) are often essential, and entirely reliable, ingredients of many acceptable criminal prosecutions. Not all eyewitness identifications, confessions, expert testimony, or even criminal informant testimony, are wrong or unreliable.²⁹ We can't remove things like confessions, identifications, forensic testimony, or dirty witnesses from criminal prosecutions entirely: they are sometimes the backbone of the overwhelming majority of criminal convictions that we believe are accurate, and are necessary to the societal protection that criminal prosecution provides.³⁰

So instead (we say), let's set up some "screens" to filter out some questionable evidence or convictions: improved identification and interrogation techniques, tighter evidentiary rules, aggressive jury "counter-instructions," more stringent capital-eligibility "aggravators."³¹ That is, since we can't ban the known evidentiary sources of wrongful conviction, let's instead set up "screens" and then hope—bet—that nothing "wrongful" gets through.

Unfortunately, as experienced capital defense counsel recognize, the heinous facts of many (indeed, most) capital-eligible murders can overwhelm any protective screens. As Professor Andrea Lyon, who has tried 132 murder cases, has written, "we can all intellectualize all we want [t]o, but [in the face of heinous facts,] we vote with our hearts first and then our heads"³² The problem of wrongful convictions thus persists: some

29. For example, the eyewitness identification made by a victim of rape, identifying her husband of many years, is highly unlikely to be mistaken (as opposed to possibly perjurious). In fact, proposals designed to increase our confidence in certain types of questioned evidence might, in fact, screen out all the inaccurate instances. If we had confidence that this were true, then a categorical exclusion statute might, perhaps, decide to exclude only "stranger" eyewitness identification, or *unrecorded* confessions or those that fail a heightened "reliability" test. See Leo et al., *supra* note 7. Both Professor Chris Slobogin and Professor J. L. de Wijkerslooth (of the University of Leiden) have offered me suggestions along this line.

30. Thus, for example, Professors Radelet, Bedau, and Putnam dismiss out of hand the idea that a defendant's confession could, by rule, be excluded from capital trials. See RADELET ET AL., *supra* note 7, at 279 (doing so "would require such drastic revision . . . as to be impossible to enact").

31. See *supra* notes 16-24 and accompanying text; *Kansas v. Marsh*, 548 U.S. 163, 206-08 (2006) (Souter, J., dissenting).

32. Andrea D. Lyon, *The Negative Effects of Capital Jury Selection*, 80 IND. L.J. 52, 52

bad evidence will still get through, and be relied upon despite its unreliability, no matter what procedural screens we can imagine.

Because the “procedural improvement” gamble will still sometimes fail, and because “death is different,” the prospect of wrongful convictions haunts the capital case landscape.³³ This is because, obviously, an innocent capital defendant who is executed cannot be revived or recompensed if error is later detected. We can pay millions of dollars as some form of “compensation” to a person wrongfully imprisoned for decades.³⁴ But the wrongfully convicted capital defendant whose sentence is carried out is, to be blunt, dead. When errors we know are bound to occur cannot be corrected, it is qualitatively more important to strive to prevent them.

Currently, our wrongful conviction “screens” in capital cases address either improved investigative techniques—trying to prevent the evidentiary errors in the first place—or more stringent eligibility criteria—only those accused of truly heinous murders should be exposed to the death penalty. But if known sources of error (confessions, eyewitness IDs, junk science, and snitches³⁵) still arise (indeed, arise more often, some would argue³⁶) in particularly heinous cases, these screens do not prevent the death penalty from being wrongfully imposed, once the screens are passed. They may lessen the risks (at least in the case of improved investigative techniques), but where a heinous offense is death-eligible, and involves a confession, eyewitness identification, a criminal informant or (just for example) expert “bite mark” testimony,³⁷ then they do not eliminate it.

The proposal here is different from a procedural screen. Rather than saying “you may use known evidentiary sources of wrongful conviction if you pass our screens,” this proposal says “you may not seek (let alone impose) a death penalty at all, if your case is based primarily on the known

(2005). *Accord* Kennedy v. Louisiana, 128 S.Ct. 2641, 2661 (2008) (barring death penalty for even aggravated child rape because, inter alia, the facts of such a rape will describe “a crime that in many cases will overwhelm a decent person’s judgment”).

33. The “death is different” rationale was first coined by Justice Stewart in *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), and adopted by the Court in *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

34. See BORCHARD, STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE, *supra* note 5; see also John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property,”* 59 HASTINGS L.J. 515 (2008).

35. See *supra* notes 10-15 and accompanying text.

36. So argue Professor Gross and his co-authors. See Gross et al., *supra* note 2, at 532 (for a number of reasons, “false convictions are more likely to occur in murder cases, and [are] much more likely in death penalty cases, than in other criminal prosecutions” (emphasis omitted)).

37. See, e.g., *Bite Mark Evidence Disputed in Murder Cases*, ASSOCIATED PRESS, Feb. 29, 2008, available at http://www.ottawamenscentre.com/news/20080229_evidence.htm (last visited Sept. 1, 2008) (DNA exoneration of two men on Mississippi death row, whose rape and murder convictions were based, in part, on testimony from an alleged “authority on forensic odontology”).

evidentiary sources of wrongful conviction.” This would be true even if “we” had little doubt about the defendant’s actual guilt. My proposal is not a screen—it is a categorical exclusion.

When, in 2004, the Massachusetts Governor’s Council proposed its ten “bold recommendations” for a Model Death-Penalty Code,³⁸ its authors asserted that “the statutory list of ‘aggravating circumstances’ is the one and only place, in the entire death-penalty system, where substantive limits can be imposed on the death penalty that are not discretionary.”³⁹ Not so. This essay proposes a different type of substantive limit on death penalty prosecutions: exclusion of reliance on the types of evidence known to, sometimes, lead to wrongful convictions.⁴⁰ This would place a statutory, nondiscretionary, substantive limit on those cases in which a death penalty may be sought, based on the type of evidence the prosecution proffers. It would categorically exclude the type of murder prosecutions that have been most troubling in the wrongful conviction context: those based primarily on eyewitness identifications, confessions, criminal “snitches,” and unreliable (“junk”) forensic evidence.

D. WHAT ARE THE OBJECTIONS TO THIS PROPOSAL?

The arguments in favor of my proposal are relatively simple: it would reduce or eliminate wrongful capital convictions, while still allowing clear instances of capital guilt to go forward. Because capital cases seem particularly prone to the dangers of wrongful conviction evidence, they are an appropriate category in which to try a categorical exclusion remedy.

But what objections are likely to my proposed categorical evidentiary exclusion statute? There would be many, no doubt. In fact, the response of prosecutors at Southwestern’s Wrongful Conviction Symposium was basically “are you kidding?” and (rhetorically) “what is left?” Here I will try to sketch and briefly respond to the objections that seem most apparent. Please review the Model Statute presented at the end of this essay before continuing.

38. Symposium, *Report of the [Massachusetts] Governor’s Council on Capital Punishment*, 80 IND. L.J. 1 (2005) [hereinafter *Massachusetts Report*].

39. *Id.* at 9.

40. Note that this proposal does not ban the known evidentiary sources of wrongful conviction entirely. That, too, would be a substantive limit on capital prosecutions. However, it seems too over inclusive to prohibit all eyewitness identifications or confessions, for example, even in death penalty prosecutions. When such evidence seems particularly reliable and/or is strongly corroborated by other reliable evidence *that is independent of the questionable evidence*, the normal evidentiary presumption of all criminal trials (*i.e.*, that all reliable, probative, and nonduplicative evidence should be admitted) is too strong to ignore.

1. *It Effectively Eliminates the Death Penalty.*

Interestingly, a number of folks who have considered my proposal have voiced the initial objection “but that wouldn’t leave any death penalty cases at all!” When a seemingly solid two-thirds of Americans still support the death penalty, despite the now-common knowledge of actual innocence exonerations, such a result could be described as, at least, undemocratic.⁴¹

I find this initial objection revealing. Are we so dependent on questionable evidence in capital cases—eyewitness “stranger” identifications, unrecorded confessions or confessions from the mentally deficient, unproven “science,” or jailhouse snitches—that we cannot prosecute capitally without it? That some intelligent observers would think so seems telling in itself. But I doubt that it is so. Obvious capital prosecutions—Timothy McVeigh, the Oklahoma City Federal Building bomber is my favorite posterchild⁴²—would go forward without hindrance from my proposal.⁴³ The most compelling cases for the death penalty, with guilt clearly established in reliable ways, would remain. Meanwhile, eliminating those capital cases that lack independent reliable evidence is the very point of the proposal.

2 *It Would Dramatically Reduce the Number of Capital Prosecutions.*

I do not know the empirical impact that my proposal, if enacted, would have. But of course some reduction in capital prosecutions would result: that is the very point of the idea, to eliminate those capital prosecutions that are based primarily on evidentiary sources we know to have sometimes caused wrongful convictions. So, would such a categorical exclusion mean that some accurate capital convictions would be “lost” by virtue of their evidentiary basis? Yes. But that is, fundamentally, not a persuasive objection to a categorical exclusion system enacted for prophylactic purposes.

First, of course, a categorical exclusion from capital eligibility avoids only the death penalty, not conviction and lengthy imprisonment.⁴⁴ But

41. See *Kansas v. Marsh*, 548 U.S. 163, 187 (2006) (Scalia, J., concurring) (many European countries would “still have it [the death penalty] if the democratic will prevailed.”); Rory K. Little, *Why a Federal Death Penalty Moratorium?*, 33 CONN. L. REV. 791, 798 (2001).

42. See Little, *supra* note 1.

43. Other prominent examples would include the D.C. sniper murders from 2002 and the Atlanta courthouse murders in 2006, *see infra* note 73.

44. Note that this response exposes a different objection to my proposal, in the opposite direction: why limit it to just *capital* cases? If we know that certain evidentiary sources sometimes (albeit perhaps not frequently) produce wrongful convictions, why not categorically

more fundamentally, when a risk of error cannot be entirely eliminated, the question becomes on whom should that risk fall. A capital case solution of categorical evidentiary exclusion simply chooses to never allow the risk of questionable evidence to fall on the capital defendant. As Justice Harlan wrote in *Winship*,⁴⁵ even though the “beyond a reasonable doubt” standard for criminal cases results in some “lost” convictions that would have been, nevertheless, factually accurate, we accept the rule. The unusually high standard of proof is a constitutional requirement, for criminal cases, because it is “a fundamental value determination of our society” that a number factually guilty criminal offenders should go free, rather than risk even a few wrongful convictions.⁴⁶

The point is that, ultimately, our concern about wrongful convictions has to do with substantive guilt, not merely the fairness of the process. This is why the Supreme Court has always reserved an “actual innocence” exception for capital cases.⁴⁷ No matter how procedurally fair and evidentiarily unobjectionable a trial and conviction may appear, we will not allow an actually innocent defendant to be executed. Thus procedural screens and stringent capital eligibility criteria are not enough. We need, I propose, categorical capital exclusions for the known evidentiary sources of wrongful convictions.

exclude *all* criminal prosecutions based primarily on those sources? Other than the shibbolethic response that “death is different,” I do not consider further responses to this argument here. Given the difficulty of actually enacting anything like this essay’s proposal even in the capital context, it is premature to consider its pros and cons outside that context. But it is a fair question, as all the literature surrounding the controversial evidentiary sources, not limited to capital cases, attests.

45. *In re Winship*, 397 U.S. 358, 369 (1970) (Harlan, J., concurring).

46. *Id.* at 372. Justice Harlan also pointed out that we do not similarly unbalance the scales in civil cases. *Id.* Yet it is immediately obvious that some civil cases are more “serious” than some criminal cases—a civil effort to take away someone’s home, children, or life savings, can seem more serious than a misdemeanor criminal prosecution that will result in probation. When I ask my criminal law students every year whether they would take a million dollars in return for one night in jail, they unanimously say “yes” (such is the force of large student loans)—at least until I remind them that they might not get to choose which jail. The point being that we apply the high *Winship* standard to all criminal cases, even non-serious ones, for shared policy reasons.

47. See *House v. Bell*, 547 U.S. 518, 520 (2006) (“the Court assumed without deciding”); *Herrera v. Collins*, 506 U.S. 390, 417 (majority opinion) (1993) ; *Herrera*, 506 U.S. at 419, 427 (O’Connor, J., concurring). It is true that the Supreme Court has never actually applied this exception to block an execution, and that the two newest Justices (Chief Justice Roberts and Justice Alito) have yet to speak on the subject. Chief Justice Roberts did, however, also note the exception and reserve decision on the question, in *House*. 547 U.S. at 555-56 (Roberts, C.J., concurring in part and dissenting in part).

3. *Such Categorical Evidentiary Exclusion is Unprecedented.*

Some may argue that in no other context do we categorically exclude the filing of criminal charges based on the character of the evidence the prosecution proposes to use. This is close to accurate; it is difficult (though not impossible) to come up with similar categorical exclusions in the criminal context. However, originality is hardly a substantive objection. All new ideas have to start somewhere. Originality may often signal crackpot-ness, but not always. The idea needs to be examined on its merits.

Moreover, upon brief consideration, at least two similar and well-accepted, evidentiary exclusions do present themselves in the criminal context. First, as we all know, in virtually all U.S. jurisdictions, evidence from so-called “lie-detector” or “polygraph” devices is categorically excluded from *all* criminal prosecutions.⁴⁸ Why is lie detector evidence generally excluded? Because it is viewed as unreliable.⁴⁹ Even though a lie detector machine may sometimes (even often) be accurate, we distrust it sufficiently to categorically exclude it.⁵⁰

In addition, the U.S. Constitution enshrines a substantive, categorical ban on a particularly serious type of criminal prosecution, unless the government can produce particularly reliable evidence. In Section 3 of Article III, the Framers placed a categorical evidentiary ban on certain types of Treason prosecutions:

No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.⁵¹

As Professor Akhil Amar notes, this Constitutional command creates evidentiary requirements for Treason cases “above and beyond those of all other [criminally] accused persons”⁵² Interestingly, this constitutional

48. The famous *Frye* case excluding polygraph evidence was, in fact, one of the leading precursors for our current suspicion of un-validated “junk” science. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that the lie detector test at issue had not gained enough “scientific recognition,” or general acceptance among the scientific community to justify admission). See also *People v. Kelly*, 549 P.2d 1240 (Cal. 1976) (holding that experts testifying must be qualified to do so and when experts testify, the correct scientific procedures must be used in the particular case).

49. James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363 (1996); see also Martin A. Hewett, *A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington*, 96 GEO. L.J. 273 (2007).

50. See also *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2663 (2008) (noting that the “special risks of unreliable testimony” should be considered in evaluating the constitutionality of death penalty statutes).

51. U.S. CONST. art. III, § 3, cl. 1.

52. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 244 (2005). *Accord*

direction evinces a suspicion of two of the evidentiary sources often found in the modern actual innocence cases: confessions (excluding all confessions, in treason cases, except those made “in open Court”), and perjury (requiring two witnesses to the overt act required to prove treason).

When the Constitutional Convention revised the Treason clauses to require the two-witnesses rule, James Madison’s notes indicate that “Doctr [Benjamin] Franklin wished this amendment to take place – prosecutions for treason were generally virulent; and perjury too easily made use of *against innocence*.”⁵³ As Professor Gross and his co-authors indicate, perjury (particularly perjurious eyewitness accounts) is a major evidentiary source of wrongful convictions.⁵⁴ Ben Franklin and his Framing peers anticipated this problem—questionable evidence used “against innocence”—and sought to address it, by a categorical ban on the evidence of single eyewitnesses to treason’s overt acts.⁵⁵

Treason was, of course, a capital offense then (and it remains so today).⁵⁶ If the Framers saw fit to categorically prohibit certain capital

Hamdi v. Rumsfeld, 542 U.S. 507, 560 (2004) (Scalia, J., dissenting) (constitutional Treason clause “establishes a heightened proof requirement”); Willard Hurst, *Treason in the United States, Part II: The Constitution*, 58 HARV. L. REV. 395, 399 (1945) (noting “the framers’ preoccupation with limiting the scope of the crime.”). See also JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971). Recent examinations of the Treason clauses appear in Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006), and Benjamin A. Lewis, Note, *An Old Means to a Different End: The War on Terror, American Citizens . . . and the Treason Clause*, 34 HOFSTRA L. REV. 1215 (2006).

53. Hurst, *Treason in the United States, Part II: The Constitution*, *supra* note 52, at 403 (emphasis added). Professor Hurst also notes that James Wilson, who had been on the defense team in the Pennsylvania treason trials in 1778, “recognized the dangers of putting an impractical burden on the prosecution” when the two-witness rule was discussed at the convention. Nevertheless, he apparently voted for it. *Id.* at 404-05.

54. Gross et al., *supra* note 2, at 543.

55. Of course, Dr. Franklin and the Framers were operating on a strong common law and British statutory tradition, incorporating a two-witness rule for treason (and, at times, other serious offenses) that can be traced back to the thirteenth century. See L. M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95, 96 (1968). But such an historical lineage does not provide a rationale to undercut the rule—rather, it supports it.

56. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 1, 1 Stat. 112 (1790); see Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 362-63 (1999). Today: 18 U.S.C. § 2381 (2008); accord *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2659 (striking down death penalty for aggravated child rape, but noting that “[o]ur concern here is limited to crimes against individual persons” and “[w]e do not address, for example, . . . treason, espionage, terrorism, and drug kingpin activity”). It is still within the memory of the living that two persons convicted of espionage (a form of treason) against the United States (Julius and Ethel Rosenberg) were executed in 1953. See *United States v. Rosenberg*, 109 F. Supp. 108 (S.D.N.Y. 1953) (reaffirming death sentences).

criminal prosecutions unless based on particularly reliable evidence, we should at least consider doing no less today.

4. *We Don't Need It, Since the Existing System Catches All Wrongful Convictions.*

In his remarkable 2006 concurrence in *Kansas v. Marsh*, Justice Scalia asserts that the recent revelation of actually innocent exonerees “demonstrates not the failure of the system but its success.”⁵⁷ This characterization is, of course, debatable. But even assuming its accuracy, the proposal here would block wrongful capital *prosecutions*, not just convictions. It seems self-evident that protecting a defendant, particularly an innocent one, from the special anxieties of a death penalty prosecution and years or even decades on death row, before innocence is finally detected, is a better system.⁵⁸

But this objection also suggests that there is an absence of empirical demonstration that any wrongful capital prosecutions have occurred *since* 1989, when DNA-supported actual innocence evidence brought the issue to popular, and legislative, attention. That is, aren't all the “actual innocence” convictions old, pre-dating the adoption of newer reforms? Why not give all the recent reforms time to “kick in,” before implementing a more radical idea that might not, in light of other recent improvements, be necessary?

An absolute rebuttal to this suggestion is impossible, because perhaps it is correct—most wrongful conviction cases are not recent. So we may not know for 20 years. Perhaps recent reforms will eliminate all future wrongful capital convictions. On the other hand, perhaps not—and then we can reverse the rhetorical objection. Why wait? Why wait, when we know what the evidentiary sources of wrongful conviction have been? As noted above, none of the recent reforms purport to entirely eliminate these evidentiary sources (eyewitness identifications, confessions, un-validated science, and criminal informants). Why do we want to continue to allow them in death penalty prosecutions? The only answer is that we want to avoid a “windfall” (that is, not giving a deserved death penalty) to actually guilty capital defendants. This goes back to objection number 2 above, and is rebutted only if Justice Harlan's “fundamental value determination” is

57. 548 U.S. 163, 193 (2006) (Scalia, J., concurring).

58. Relevant here is the concern expressed repeatedly by Justices Stevens and Breyer that spending many years on death row might, by itself, be unconstitutional under the Eighth Amendment. See *Foster v. Florida*, 537 U.S. 990, 991-93 (2002) (Breyer, J., dissenting from denial of certiorari) (citing prior dissents).

accepted here.

5. *Why Not at Least Narrow the Proposal?*

The fact is, we don't actually question all eyewitness accounts, or confessions, or science or even criminal informants.⁵⁹ Why not narrow the proposal to allow at least those capital prosecutions based on identifications made in blind, sequential lineups? Why not allow at least videotaped confessions not involving deception or lengthy interrogations? Validated science? Fully corroborated criminal informants?

Of course, any adopted "categorical exclusion" capital statute could—and, realistically, probably would—allow some such evidence. But this objection is really not so much an objection as it is an endorsement of my proposal, with suggestion of "friendly amendments." Certainly if we are convinced that more reliable types of evidence are not going to lead to wrongful convictions, we ought not exclude them.⁶⁰ Thus the appended Model Statute presents an option that would allow evidence that has "strong and independent" corroboration, as well as validated science (which is by definition, not "junk" science⁶¹).

However, it is important to note how vital the "independent" requirement for such evidence is. It means something like "entirely unconnected to the questionable evidence or the sources for that evidence." And if you have such evidence, query why you would also need the questionable evidence at all? Because of the recognized "interlocking corroboration" phenomenon in wrongful conviction cases—where one type of questionable evidence is used to "corroborate" another (a jailhouse snitch "corroborates" a single eyewitness, for example)—any corroborating evidence used to support an exception to the statute must be *truly independent* of the presumptively excluded evidentiary sources. The meaning of "independent" would have to be worked out over time, but the

59. See *supra* note 2 ("undisputable" that "not all convictions are 'wrongful'") and *supra* note 29 (noting possible reliable sources of such evidence).

60. There is some recent evidence, however, that we really do not know what types of evidence within the questionable categories are "more reliable." See Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 LAW & HUM. BEHAV. 6 (2008) (asserting that sequential lineups may be, empirically, less reliable than contemporaneous lineups). *But cf.* Wendy Alberts, *Steering in the Eyewitness Identification Procedure* 25 (May 2008) (unpublished Masters Thesis, University of Leiden, Law Faculty, on file with author) (criticizing the Wells study because it failed to control for "blind" officers as it compared sequential versus contemporaneous line-ups).

61. See Faigman, *supra* note 21; David E. Bernstein, *Junk Science in the United States and the Commonwealth*, 21 YALE J. INT'L L. 123 (1996).

concept is vital to preventing wrongful conviction evidentiary sources from infecting capital cases.

Thus, in general, if more sophisticated, narrowing, definitions of the known evidentiary sources of wrongful conviction are possible, and leave us with great confidence in the accuracy of the evidence, then by all means they should use them in the statute. Section 2 of the model statute has been modified since my initial draft to try to capture this idea. If the legislature enacts other statutes requiring eyewitness identifications and confessions to be obtained only in recognizably reliable ways, then that evidence could be used in a capital prosecution. However, the model statute might also reasonably be endorsed without the exception provided in Section 2.

6. *The Proposed Statutory Language is Unmanageably Vague and Manipulable.*

“Primarily” based on? “Strongly corroborated”? Come on! What prosecutor or judge can’t manipulate that language toward the unjust conviction? Of course, this is the objection to virtually any written statute that seeks to limit governmental discretion. It objects generally to the limited power of language to effectively regulate, rather than to the substance of this particular statute.⁶² Lawyers are semanticists, and it is human nature to stretch language in the face of hard cases.⁶³ As in all statutory contexts, we will have to depend on the good faith of interpreting courts, and prosecutors, and accept that human failings will occur. Nevertheless, suggestions for more clear, precise, and unavoidable language are welcome. I am merely putting the ball in play. Others will have to put it in the hoop.

7. *The Prosecution Shouldn’t Have to Expose Its Evidence Before Charging.*

This objection seems somewhat quaint, in today’s world of relatively generous pretrial criminal disclosure requirements and the intensive review that death penalty prosecutions now receive in most jurisdictions.⁶⁴ The

62. See Little, *supra* note 56, at 490 (discussing “The Inevitable Manipulability of Language”).

63. Thus Justice Holmes’ famous aphorism about hard cases making bad law. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

64. “For example, some prosecutors’ offices employ committees of experienced prosecutors to make death penalty decisions.” Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys*

fact is, most effective capital defense lawyers today know the government's evidence before charges are filed, and certainly well before trial begins (if they don't, they are ineffective, which is its own constitutional objection). A prosecutor who seeks to take on the large challenge of a capital prosecution, with such serious implications and at such great public expense, should not be fearful of exposing his or her primary evidence to public inspection.

Moreover, my sketched model statute would allow the prosecution alternatives: the government could either review its evidence internally, and then file charges if it believed it was compliant with the statute, or seek pre-charge judicial approval. Thus a prosecutor could file charges without exposing his or her primary evidence to pre-filing examination; but the evidence would be subject to speedy judicial scrutiny soon thereafter. If you accept the idea of categorical evidentiary exclusions, then this is as it should be: we ought not endorse capital cases going forward, at great public expense, if based primarily on types of evidence we know have led to wrongful capital convictions in the past. See Objection number 2, above.

8. *It's the Jury's Job to Evaluate the Prosecution's Evidence, Not a Judge's.*

More powerful, perhaps, is the objection that it is the jury that evaluates the probative value of evidence in the American criminal justice system, not lawyers. The defense is permitted to attack the reliability of all evidence upon which the prosecution relies. Specific evidence that is shown to be unreliable can certainly be excluded, upon a particularized motion and proof in an individual case. But the defense cannot exclude evidence simply by asserting that it "might" be unreliable, let alone that it has been shown to be unreliable in other cases, but not in this one. The jury is entitled to view all the relevant evidence, once it passes muster under the evidentiary rules of general application.

Of course, the "evidentiary rules of general application" are, in fact, categorical exclusions based on experienced evaluation of unreliable types of evidence. For example, we seek to generally ban hearsay evidence, because it can be unreliable, even though it may be entirely accurate in an

Scandal" and the Allocation of Prosecutorial Power, 69 Ohio St. L.J. 187, 195 n.35 (2008) (and citing authorities). See also Little, *supra* note 56, at 407-28 (detailing federal Department of Justice death penalty review process). This is increasingly necessary given the skyrocketing costs of capital cases. See *infra* note 73.

individual case.⁶⁵

But the serious and unusual impact of a rule that categorically excludes some serious criminal prosecutions based on a type of evidence cannot be denied. At bottom, there is no doubt that endorsing this essay's proposal requires a "fundamental value determination" ala Justice Harlan.⁶⁶ If we are unwilling to make the decision that capital cases are too serious, and fundamentally different, from other criminal cases, then different evidentiary rules probably ought not apply.⁶⁷

However, the evidence that we do consider death penalty cases to be "different" is increasingly abundant. There is no American jurisdiction that has considered the death penalty that does not have a special statute, or set of statutes, to address capital prosecutions.⁶⁸ Moreover, many of those statutes are under intensive review in many jurisdictions, since Illinois' Governor commuted the death sentences of all 170 of Illinois' death row occupants in 2000⁶⁹ and Massachusetts' Governor created a blue-ribbon Commission to propose a "model" best-practices death penalty statute in 2003.⁷⁰ As Justice Souter has recently observed, in light of the recent and undisputed DNA exonerations in capital cases, "[w]e are . . . in a period of new empirical argument about how 'death is different.'"⁷¹ This essay simply presents one more possible statutory revision that could serve to reduce the number of wrongful convictions in the capital arena.

9. *This Won't Eliminate All Wrongful Capital Convictions.*

No doubt this is true. So long as bad prosecutorial and defense lawyering, law enforcement corruption and witness misconduct persists to any degree, all the statutes in the world will not prevent all wrongful

65. And just as with the two-witness Treason rule, *see supra* notes 51-56 and accompanying text, the hearsay rules are ultimately constitutionally based in the due process concerns of the Framers, as expressed in the Confrontation Clause of the Sixth Amendment. *See Crawford v. Washington*, 540 U.S. 964 (2003).

66. *See supra* note 46 and accompanying text.

67. Although this point just raises the broader question that was raised, and then put aside in note 44, *supra*.

68. Rather than provide another horribly long footnote to support this assertion, the author swears that the results of a fifty-State survey performed by his research assistant Todd Daloz (Hastings Class of 2009) are on file with the author.

69. *See Marquis, supra* note 7, at 503 (presenting a somewhat uncharitable account of Governor Ryan's actions).

70. *See Massachusetts Report, supra* note 38.

71. *Kansas v. Marsh*, 548 U.S. 163, 219 (2006) (Souter, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

convictions. This proposal seeks only to reduce, in a categorical way, such convictions, and eliminate the spectacle of death penalty prosecutions going forward based on evidence that objective observers *know* is of questionable value. Yet some ineffective defense lawyers (if sleeping, for example⁷²) will not enforce even the proposed statute, rendering it a substantive nullity in some cases.

On the other hand, if adequately compensated, experienced capital defense lawyers were required in every case—although how we will pay for that is a difficult question, see note 73 below—then bad prosecutorial lawyering, police corruption, and witness misconduct are all far more likely to be detected and rebuffed. And as noted above, an effective remedial regime to the problem of wrongful convictions is a mosaic, not a one-solution-beats-all situation.

CONCLUSION

Unless the death penalty disappears in the United States because it is too expensive to defend,⁷³ capital cases will continue to remain a particularly disturbing subset of all “actual innocence” cases. According to various sources, over 70 capital defendants have been sentenced to death in the past 20 years, only to be later exonerated.⁷⁴

This essay presents a simple idea: since we know what types of evidence have led to most “actual innocence” convictions, why not statutorily ban those evidentiary sources from capital prosecutions (except, perhaps, where other independent evidence strongly corroborates guilt)? Of course, as the Supreme Court once said of the Treason clauses, an idea with a “superficial appearance of clarity and simplicity” can nevertheless be “packed with controversy and difficulty.”⁷⁵ Perhaps that is the case here.

72. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

73. See *Baze v. Rees*, 128 S.Ct. 1520, 1548 (2008) (Stevens, J., concurring) (noting “the enormous costs that death penalty litigation imposes on society”); Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995). For one example, see Jeffrey Toobin, *Death in Georgia: The high price of trying to save an infamous killer's life.*, NEW YORKER, Feb. 4, 2008, at 32 (detailing the Brian Nichols capital case, in which the defendant undoubtedly killed a judge, court reporter and sheriff's deputy, but whose offer to plead guilty was rejected in order to pursue the death penalty, and in which the judge suspended all proceedings in late 2007 when Nichols' indigent defense costs rose to over \$1.2 million and the County ran out of money to pay). Nichols seems undeniably guilty of the murders (whether his mental condition is eligible for, or deserves, the death penalty, remains to be seen). But the County at issue is, so far, not able to pay for the effective defense he is entitled to under the Sixth Amendment.

74. Gross et al., *supra* note 2, at 529 tbl.1 (74 death sentence exonerations); *Kansas v. Marsh*, 548 U.S. 163, 209-10 (Souter, J., dissenting); *but cf.* Liptak, *supra* note 2.

75. *Cramer v. United States*, 325 U.S. 1, 46-47 (1945).

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But the seriousness of the question suggests that the idea should at least be fairly considered.

MODEL STATUTE FOR CATEGORICAL EXCLUSION OF KNOWN
EVIDENTIARY SOURCES OF WRONGFUL CONVICTIONS

1. No capital charge may be [filed] [prosecuted] in any case where the prosecution's case in chief rests primarily on
 - (a) eyewitness [stranger] identification testimony;
 - (b) a confession;
 - (c) a criminal informant; or
 - (d) unvalidated forensic evidence,
2. The only exception to Section 1 above is when there is *independent* evidence that strongly corroborates the evidence listed in (a) through (d) above [or perhaps "if the evidence has been reliably obtained under statutes governing eyewitness identifications and confessions"].
3. Absent such strong, independent corroboration, as specified in Section 2 above, a *combination* of evidence drawn from (a) through (d) above is also an insufficient basis on which to [file] [prosecute] a capital charge.
4. Upon request by counsel for any capital defendant, the prosecutor's case-in-chief evidence shall be reviewed independently for compliance with this statute by a separate capital case review unit within the prosecutor's office, and then either
 - (a) prior to the filing of the charge, by a judicial officer within the jurisdiction; or
 - (b) immediately after filing of the charge by the judicial officer to which the case is assigned.
5. Capital charges found to be primarily supported by evidence specified in Section 1 above shall be dismissed.
6. Any judicial order that dismisses capital charges under this statute may be immediately appealed by the prosecution on an expedited basis. There is no double jeopardy objection to such an appeal. The defense may also seek to immediately appeal a judicial order that allows the prosecution's capital charges to proceed, but such an appeal is authorized only if the trial judge, or an appellate court upon proper motion, certifies that the appeal presents a reasonably close question under this statute.