

White Paper: Innocent or Inconclusive? Analyzing Abolitionists' Claims About the Death Penalty

*Michael Conklin*¹

*This is a brief analysis of the death penalty innocence issue, using the July 2018 book *The Death Penalty (part of the Concepts and Insights Series)*² as a reference point.*

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¹ Business law instructor, Colorado Mesa University; JD from Washburn University School of Law 2007; MBA from Oklahoma City University 2004; postgraduate certificate in law from University of London 2010; masters in philosophy of religion from Biola University 2015. I can be reached at: mconklin@coloradomesa.edu.

² BRANDON L. GARRETT & LEE B. KOVARSKY, *THE DEATH PENALTY* (2018).

The authors, Brandon L. Garrett and Lee Kovarsky, dedicate a chapter to the topic titled, “Innocence and the Death Penalty.” They start off with a good clarification of the often-confused relationship between “guilt” and “innocence” and go on to explain how innocence is usually a probabilistic determination rather than an ultimate determination. The authors also explain the difference between “innocent” and “wrongfully convicted.” This is an important distinction that is often lost by most media outlets. This is understandable, as the headline, “The state executed an innocent man” is more succinct and sensational than, “The state executed a man whose guilt no longer rises to the level of beyond a reasonable doubt.”

The innocent/wrongfully-convicted distinction is not limited to lay audiences, however. Supreme Court Justice David Souter even served an example of how conflating the two terms is deceptive. In his *Kansas v. Marsh* dissent, he claimed that over 110 death row inmates had been released since 1973, “upon findings that they were innocent of the crimes charged.”³ In a concurring opinion, Justice Scalia aggressively pointed out that most of these 110 allegedly “innocent” people were released from death row due to technical issues, such as inadmissible evidence, double jeopardy, or the death of key witnesses.⁴

The authors of *The Death Penalty*, after explicitly avoiding some of the common mistakes regarding innocence and the death penalty, go on to make some more nuanced errors regarding innocence. They state, “The conclusion that innocent people [in the modern era] are executed seems inescapable”⁵ Note that the word choice of “innocent people” instead of “an innocent person” means that the authors are claiming it is nearly certain that multiple innocent

³ *Kansas v. Marsh*, 548 U.S. 163, 209–10 (2006) (Souter, J., dissenting).

⁴ *Id.* at 185–99 (Scalia, J., concurring).

⁵ GARRETT & KOVARSKY, *supra* note 2, at 207.

people have been executed in the modern era. Shockingly, the authors then admit that “no executed offender has been shown conclusively to be innocent.”⁶

Without a single conclusive example of an innocent person being executed in the modern era, how can the authors be so certain that it has happened multiple times? They do so by implementing a “statistical case.” Remarkably absent from this statistical case is any use of statistics. The authors simply assert that “in light of the likelihood of error that we can discern from other parts of the criminal process,”⁷ it is “inescapable” that an innocent person has been executed in the modern era. The authors’ lack of specificity forces the reader to speculate as to exactly what is meant.

The best conclusion seems to be that the authors grouped together everyone who was sentenced to death and calculated an innocence ratio based on exonerations due to innocence (this ratio is not provided so, for illustrative purposes, I will imagine it is 1 in 100). Then they applied that ratio to the nearly 1,450 people executed in the modern era. It is true that *if* there was a 1 in 100 chance of innocence for all of the 1,450 people executed, it would be highly likely that two or more innocent people have been executed. However, this is not a valid finding, because the group used to calculate the innocence ratio (everyone sentenced to death) is not the same group that ratio is being applied to (executed inmates). Namely, the people in the latter group have unsuccessfully gone through the appeals process—the same process that resulted in the findings of innocence for some of those in the former group.

Instead of producing an example of an innocent person being executed, the authors are content to sit back and downplay the significance of when the other side discredits a claim of innocence. For example, Roger Coleman was frequently presented by abolitionists as an innocent

⁶ *Id.* at 210.

⁷ *Id.* at 207.

man who was executed. However, the authors admit that a later DNA test “confirmed Coleman’s guilt.”⁸ The authors then attempt to downplay this result by posing the question, “But how much does the Coleman affair really prove?” While it is true that demonstrating a single executed person was not innocent does not foreclose the possibility that some innocent person has been executed, it is certainly not evidence that there has been. The burden is not on death penalty proponents to prove one-by-one that every person executed in the modern era is not innocent. The burden is on the abolitionist, who claims there are multiple innocent people who have been executed, to give examples.

In the *Marsh* case, Scalia claimed that there had not been “a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If [there had been,] the innocent’s name would be shouted from the rooftops by the abolition lobby.”⁹ The authors present Cameron Todd Willingham as a name that is “shouted from the rooftops” by abolitionists as an innocent man who was executed. It is interesting to point out that the authors themselves never claim he was innocent, which is consistent with their earlier admission that there is no consensus as to the identity of an innocent person who was executed.

Cameron Todd Willingham was convicted of killing his three daughters by arson in 1992 and was executed in 2004. As the authors point out, his trial involved testimony from a jailhouse informant who has since wavered as to whether he was telling the truth. Testimony was also presented from a fire expert who claimed the fire was the result of arson. More experienced

⁸ *Id.* at 208.

⁹ *Marsh*, 548 U.S. at 188.

experts have since strongly disagreed with the rationale of the trial expert.¹⁰ For these reasons, Willingham was almost certainly wrongfully convicted. His innocence, however, is far less clear.

While the authors present the evidence for Willingham's innocence, they conveniently leave out evidence that seems to cast doubt on his innocence. Neighbors recount how Willingham constantly beat his wife and that they figured he would eventually kill her. Willingham never tried, in any way, to go back inside the house and save his daughters despite a neighbor pleading with him to do so. He told the police that he had gone into his oldest daughter's room to save her but couldn't find her. After being questioned about how he suffered no significant injury from the fire, he admitted that the story about trying to save his oldest daughter was a lie. The fire conveniently happened while his wife was out of the house. Willingham was out "partying" the night after his three daughters died. He also bragged about how the money was going to be rolling in since people felt sorry for him. An affidavit from his wife's brother stated that she told him Willingham confessed to her that he did it, and Willingham's wife also admitted this. After a decade of investigation by the Innocence Project, a jury found 11-1 that the prosecutor in the Willingham trial had not committed misconduct by making false statements, concealing evidence favorable to the defense, or obstructing justice.¹¹

It is important to note that errors in the innocent/wrongfully-convicted distinction are not universal in the media or among anti-death penalty groups. The Death Penalty Information Center, an adamantly abolitionist group, demonstrates great respect for accuracy when

¹⁰ It is important to note that the new fire experts did not conclude that the fire could not have been arson. Rather, they just refuted the rationale behind the original trial expert that there was conclusive evidence pointing to arson.

¹¹ Maurice Possley, *Jury Clears the Prosecutor Who Sent Cameron Todd Willingham to Death Row*, MARSHALL PROJECT (May 11, 2017, 11:32 AM), <https://www.themarshallproject.org/2017/05/11/jury-clears-the-prosecutor-who-sent-cameron-todd-willingham-to-death-row>.

discussing Cameron Todd Willingham. They claim only that “it is possible the fire was accidental,”¹² and Willingham is therefore “possibly innocent.”

Although the authors never explicitly state this, there seems to be an implication throughout this part of the book that if one innocent person has been executed in the modern era, the death penalty should be abolished. If that standard (that a punishment should be abolished if it has been imposed on a single innocent person) was consistently applied, it would result in the abolition of all punishments in the criminal justice system.

Here, the authors would likely give the common response that “death is different.” But after close examination, this seems to be special pleading. While it is true that an execution is irreversible in every instance, other punishments are irreversible in their own right. An exonerated forty-year-old who spent the last twenty years in prison can be freed and even given financial compensation, but he can never get his twenties back. Likewise, the prison sentence given to someone who dies in prison and is later found innocent is just as irreversible as the death penalty.

The creative ways abolitionists blur the lines between innocence and wrongful conviction are not limited to what is found in the book *The Death Penalty*. Prominent abolitionist Michael Radelet provides another excellent example. He claims that Ernest Dobbert is innocent of beating and choking his daughter to death (he also killed his son and tortured two other children). Radelet’s claim of innocence has nothing to do with the notion that Dobbert didn’t kill

¹² *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executed-possibly-innocent#cam> (last visited Aug. 17, 2018).

those people. Rather, Radelet says that “maybe” Dobbert did not deliberate long enough before doing so. In this sense, Radelet claims, “Florida executed an innocent man.”¹³

Overall, Garrett and Kovarsky provide a good overview of American death penalty jurisprudence. However, on the subject of executing the innocent, they seem to abandon the factual analysis applied elsewhere in the book and instead turn predominantly to speculation. Their claim of implementing a “statistical case” without providing the actual statistics leaves much to be desired. The authors also fail to give a compelling reason for why innocence should be framed differently when it comes to death penalty cases as opposed to non-capital cases.

¹³ Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43 (2000).