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UNLOCKING THE EIGHTH AMENDMENT'S POWER TO MAKE INNOCENCE A CONSTITUTIONAL CLAIM: THE 'OBJECTIVE' VIEWS OF STATE LEGISLATORS

David Niven, Ph.D.*

In a long series of death penalty and other similar cases, the United States Supreme Court has repeatedly ruled that state legislative action shapes the operative meaning of the Eighth Amendment.¹ In short, if a particular punishment is acceptable to state legislators, then it does not offend our “evolving standards of decency,”² and therefore is not cruel and unusual. If, however, legislators have deemed a punishment unacceptable, it loses our evolving society’s imprimatur, and therefore violates the Eighth Amendment.³

Meanwhile, in a second series of cases, the Court has failed to identify a constitutional bar to executing an innocent person.⁴ Rather, the Court has held that a claim of innocence, indeed evidence of innocence, is insufficient to warrant remedy without an identified reversible error.⁵

Here, I assert that the Court need only apply the first line of cases to the second to produce a constitutional bar to executing the innocent. That is, my analysis of state legislation and of the survey responses of state legislators reveals an overwhelming aversion to executing the innocent. Thus, as the Court’s proxy for society’s conscience, legislators imbue the Eighth Amendment with the unmistakable power, and the Court with the clear duty, to prevent the execution of innocent people.

The paper proceeds as follows: Part I demonstrates that the Court has deemed legislative action as “objective” evidence of the Eighth Amendment’s meaning. Part II notes the Court’s position that innocence is not an actionable constitutional

* David Niven is a visiting assistant professor of political science at the University of Cincinnati. The author thanks Richard Paschal and Eric Kasper for their insightful comments on a previous draft.

1. See generally Kimberly Bliss, *The Supreme Court’s Rationale in Capital Cases: A One Way Street?*, 30 PACE L. REV. 1315 (2010); see also Chelsea Creo Sharon, Note, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 243 (2011).

2. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

3. As critics and several Justices have asserted, this is a rather circular proposition in which whatever the states choose to do is acceptable because they choose to do it. For examples see David Niven, Jeremy Zilber & Kenneth Miller, *A “Feeble Effort to Fabricate National Consensus”: The Supreme Court’s Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83 (2006).

4. See *Herrera v. Collins*, 506 U.S. 390 (1993); *House v. Bell*, 547 U.S. 518 (2006); Dist. Att’y’s Office for the Third Judicial Dist. v. *Osborne*, 557 U.S. 52 (2009); *In re Davis*, 130 S. Ct. 1 (2009). For a review see Joshua M. Lott, Note, *The End of Innocence? Federal Habeas Corpus Law After In re Davis*, 27 GA. ST. U. L. REV. 443 (2010).

5. Craig M. Jacobs, Comment, *The Constitutionality of Collateral Post-Conviction Claims of Actual Innocence*, 42 ST. MARY’S L.J. 455 (2011).

basis for appeal. Part III describes a review of state capital punishment legislation and the results from a survey of state legislators. Part IV asserts that the legislation and the responses of state legislators represent the missing cog that animates the Eighth Amendment and renders innocence a constitutional claim.

I. LEGISLATORS DEFINE THE EIGHTH AMENDMENT

While the Court's holding that the Eighth Amendment reflects our society's "evolving standards of decency"⁶ remains a controversial assertion to some Supreme Court Justices, the means of measuring society's standards has produced an enduring consensus.

In *Coker v. Georgia* and subsequent cases, the Court repeatedly held that society's standards of decency must be measured with "objective factors," and chief among those factors is state legislative action.⁷ In *Coker*, the Court asserted that the "public judgment as to the acceptability" of punishment is "evidenced by the . . . legislative reaction in a large majority of the States."⁸

The Court noted in *Penry v. Lynaugh* that "legislation . . . is an objective indicator of contemporary values upon which we can rely."⁹ Indeed, "national consensus" can be found by scrutinizing "the operative acts (laws and the application of laws) that the people have approved."¹⁰

The Court has not only ceded this particular judgment to state legislators, it specifically rendered its own views irrelevant because "[i]t will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives."¹¹

II. INNOCENCE AS A CONSTITUTIONAL CLAIM

Attorneys representing Leonel Herrera argued that the Eighth Amendment's prohibition against cruel and unusual punishment prevents the execution of a potentially innocent person.¹² Mr. Herrera's counsel also argued that he was owed the chance to at least present his new evidence before a judge.¹³ The Court—as it had in numerous death penalty cases before—noted that it "exercis[es] substantial deference to legislative judgments in this area."¹⁴ However, rather than consider the degree to which legislators would accept the prospect of a potentially innocent defendant on death row, the Court limited its attention to the procedural rules in place.¹⁵

6. *Trop*, 356 U.S. at 100–01.

7. 433 U.S. 584, 592–95 (1977).

8. *Id.* at 594.

9. 492 U.S. 302, 335 (1989).

10. *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989).

11. *Thompson v. Oklahoma* 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).

12. *Herrera v. Collins*, 506 U.S. 390, 393 (1993).

13. *Id.*

14. *Id.* at 407.

15. *Id.* at 407–08.

Thus, without aid of any legislative perspective on the issue at hand, the Court found that actual innocence was not grounds for federal relief, and that defendants have no constitutional right to make use of newly available evidence that casts doubt on a conviction.¹⁶

Writing for the majority in *Herrera*, Chief Justice Rehnquist asserted that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”¹⁷ Innocence, then, “is not itself a constitutional claim,” but rather a “gateway” to having a “constitutional claim considered on the merits.”¹⁸ Emphasizing this point, the Court noted, “This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”¹⁹

In other words, an error of fact—even an error of fact pertaining to an actually innocent defendant in a capital case—is not a matter of constitutional concern. It is, as Justice Scalia explained in his *Herrera* concurrence, an “unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be.”²⁰

Scholars have raised concerns that the *Herrera* decision—and subsequent affirmations of the principle that innocence is not a constitutional claim²¹—elevates the achievement of finality over the pursuit of justice.²² Indeed, the *Herrera* Court

16. *Id.* at 393.

17. *Id.* at 400 (emphasis added). In a concurring opinion in *Herrera*, Justice Scalia went even further by stating: “There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.” *Id.* at 427–28. In the dissent, Justice Blackmun wrote that the prospect of executing an innocent person was “shocking to the conscience.” *Id.* at 430. Justice Scalia replied with unalloyed sarcasm, “If the system that has been in place for 200 years (and remains widely approved) ‘shock[s]’ the dissenters’ consciences . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of ‘conscience shocking’ as a legal test.” *Id.* at 428.

18. *Herrera*, 506 U.S. at 404.

19. *Id.* at 400 (emphasis added).

20. *Id.* at 428 (citing Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 352 (1981)).

21. See generally *House v. Bell*, 547 U.S. 518 (2006); *District Attorney’s Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009); *In re Davis*, 130 S. Ct. 1 (2009). In *House*, the Court set an all but impossible to meet evidentiary standard required to assert innocence, then affirmed that if that standard is met, the appellee must still advance a constitutional claim. See generally 547 U.S. 518. In *Osborne*, the Court found that a defendant has no right to access DNA evidence in the state’s possession that could prove his innocence. 557 U.S. 52. In *Davis*, the Court demonstrated some unease at the prospect of a potentially innocent person facing execution. 130 S. Ct. 1. Troy Davis’ appeal drew international attention and support from an array of strange political bedfellows including President Jimmy Carter, Representative Bob Barr, Nobel Laureate Desmond Tutu, and former FBI director William Sessions. *Id.* at 1. Davis was granted an evidentiary hearing by the Court. *Id.* However, in *Davis*, and in other capital cases in which innocence is asserted, the Court has failed to articulate a constitutional principle that bars the execution of the innocent and grants associated rights to appellees. *Id.* In that regard, author Joshua Lott labels the *Davis* decision “hollow.” Lott, *supra* note 4, at 446; see also Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329 (2010); Jacobs, *supra* note 5.

22. See JENNIFER CULBERT, *DEAD CERTAINTY: THE DEATH PENALTY AND THE PROBLEM OF JUDGMENT* (2008); Janet C. Hoefel, *The Roberts Court’s Failed Innocence Project*, 85 CHI.-KENT L. REV. 43 (2010). Jacobs encapsulates a widely-held scholarly view: “There are certainly wise and just reasons to limit the availability of habeas review, such as finality, comity, and the like, but to suggest that the Constitution does not recognize actual innocence as a valid claim on habeas review is to circumscribe the essential mandate of the Eighth Amendment—that the state respect human dignity when it punishes.” Jacobs, *supra* note 5, at 492.

explicitly warns, “Few rulings would be more disruptive of our federal system than to provide for federal *habeas* review of freestanding claims of actual innocence.”²³

The window for death penalty appeals—whether grounded in innocence or any other grounds—closed even tighter with the passage of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).²⁴ For those appealing a capital sentence, AEDPA created new time limits and procedural limits, such as the number of petitions and the grounds for *habeas* relief.²⁵ AEDPA also mandated that federal courts operate with deference to state courts.²⁶

The combined weight of the Court’s rulings and the implementation of AEDPA provide strong foundation to Justice Scalia’s unremitting assertion that “this Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a *habeas* court that he is ‘actually’ innocent.”²⁷

To scholars, the Court’s rulings on innocence represent a rather callous limitation on the practical value of the Eighth Amendment.²⁸ Under this formulation, the Eighth Amendment protects procedural integrity while offering nothing more than indifference to personal injustice.²⁹

This apparent “tension between procedure and substance”³⁰ could potentially be resolved by turning to the Court’s designated arbiters of the Eighth Amendment—the state legislators. Logically, the Court must apply the same state

23. *Herrera*, 506 U.S. at 401 (emphasis added). The *Herrera* case would resurface as an issue at the confirmation hearings for Chief Justice nominee John Roberts. See generally *Second Day of Hearings on the Nomination of Judge Roberts*, N.Y. TIMES (Sept. 13, 2005), <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=all>. Roberts faced a series of questions about his brief in support of the prosecution in the *Herrera* case. *Id.* Senator Leahy and Senator Durbin both pressed Roberts to explain whether the Constitution permits the execution of an innocent person. See generally *Third Day of Hearings on the Nomination of Judge Roberts*, N.Y. TIMES (Sept. 14, 2005), <http://www.nytimes.com/2005/09/14/politics/politicsspecial1/14text-roberts.html?pagewanted=all>. Even when repeatedly challenged, Roberts refused to deny the assertion. *Id.*

24. Antiterrorism and Effective Death Penalty Act (AEDPA) OF 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of Title 28 U.S.C.).

25. *Id.*

26. Justice Stevens, in his *In re Davis* concurrence, argues that AEDPA may be unconstitutional as it applies to the innocent on death row. *In re Davis*, 130 S. Ct. 1. Numerous scholars have articulated concerns regarding AEDPA, suggesting that it is productive mainly of injustice. See Krystal M. Moore, *Is Saving an Innocent Man a “Fool’s Errand”? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus Petition*, 36 U. DAYTON L. REV. 197 (2011); Jacobs, *supra* note 5; Angela Ellis, “Is Innocence Irrelevant” to AEDPA’s Statute of Limitations? Avoiding a Miscarriage of Justice in Federal Habeas Corpus, 56 VILL. L. REV. 129 (2011).

27. *In re Davis*, 130 S. Ct. at 3 (Scalia, J., dissenting).

28. See generally Joseph L. Hoffman, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court’s Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817 (1993). Indeed, many scholars have forcefully called for a broadening of defendants’ rights in capital cases. See Stefanie Lindeman, *Because Death is Different: Legal and Moral Arguments for Broadening Defendants’ Rights to Discovery in Federal Capital Cases*, 73 ST. JOHN’S L. REV. 541 (1999); Robert Hardaway, *Beyond a Conceivable Doubt: The Quest for a Fair and Constitutional Standard of Proof in Death Penalty Cases*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 221 (2008).

29. While the Supreme Court has averred that commutation offers protection against any potential miscarriage of justice in capital cases, scholars warn that the practical political costs of leniency are too much to bear for most governors. See Victoria J. Palacios, *Faith in Fantasy: The Supreme Court’s Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996).

30. Hoffman, *supra* note 28, at 820.

legislative test of the Eighth Amendment here that the Court has used to determine if rapists can be executed,³¹ if the mentally retarded can be executed,³² and if minors can be executed.³³

III. LEGISLATORS' VIEWS ON INNOCENCE

Researchers have studied state legislators' death penalty policy positions and policymaking priorities from a number of angles. Legislators have mostly been found to be supportive of the death penalty and to align themselves on the issue in similar proportion to the general public.³⁴ However, legislators have also demonstrated a susceptibility to alternatives and counter arguments on the death penalty.³⁵ What has not been established in previous work is the degree to which innocence issues affect legislators' considerations.

To assess state legislators' beliefs about innocence in death penalty cases, I have reviewed capital punishment statutes in the thirty-two states with the death penalty and conducted a survey of legislators to record their personal views on the matter.

A. Legislation

A review of capital punishment statutes in the states that impose death sentences reveals unanimity in the intention of these states' legislators to apply the sentence only to those who are factually guilty.³⁶ Indeed, of the thirty-two death penalty states, thirty-two permit a sentence of death only for the *commission* of an act of murder, the *perpetration* of the act, or for *killing* another.³⁷ No state permits a capital sentence based solely on a *conviction* of murder.³⁸

31. See generally *Coker v. Georgia*, 433 U.S. 584 (1977).

32. See generally *Atkins v. Virginia*, 536 U.S. 304 (2002).

33. See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

34. Timothy J. Flanagan, Pauline Gasdow Brennan & Debra Cohen, *Conservatism and Capital Punishment in the State Capitol: Lawmakers and the Death Penalty*, 72 PRISON J. 37 (1992).

35. See John T. Whitehead, 'Good Ol' Boys' and the Chair: *Death Penalty Attitudes of Policy Makers in Tennessee*, 44 CRIME & DELINQ. 245 (1998); Jeffrey Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1 (2006–2007); David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 U. KAN. L. REV. 443 (1988–1989).

36. See Table 1.

37. *Id.*

38. *Id.*

TABLE 1

DEFINING A CAPITAL OFFENSE IN STATE STATUTES

Death Penalty States Using "Committed" Language	22	AL: "committed by the defendant." ³⁹ AZ: "defendant committed the offense" ⁴⁰ AR: "A person commits" ⁴¹ CO: "A person commits the crime of murder" ⁴² DE: "The murder was committed" ⁴³ FL: "The capital felony was committed" ⁴⁴ GA: "murder was committed" ⁴⁵ ID: "murder was committed" ⁴⁶ KY: "The offense of murder or kidnapping was committed by a person with" ⁴⁷ LA: "The killing was committed" ⁴⁸ MO: "A person commits the crime of murder" ⁴⁹ MT: "A person commits the offense of deliberate homicide" ⁵⁰ NV: "Murder . . . [p]erpetrated . . . committed" ⁵¹ OH: "The offense was committed" ⁵² OK: "The murder was committed" ⁵³ OR: "death of the decedent was committed deliberately" ⁵⁴ PA: "The defendant committed" ⁵⁵ SC: "The murder was committed" ⁵⁶ SD: "The offense was committed" ⁵⁷ TN: "The murder was committed" ⁵⁸ TX: "A person commits an offense if the person commits murder" ⁵⁹
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39. ALA. CODE 1975 § 13A-5-40(1-4) (2012).
40. ARIZ. REV. STAT. ANN. § 13-751(F)(5-7, 11-12) (2012).
41. ARK. CODE ANN. § 5-10-101(a) (West 2012).
42. COLO. REV. STAT. § 18-3-102(1)(a) (2012).
43. DEL. CODE ANN. 11 § 4209(e)(1)(a-f) (2012).
44. FLA. STAT. § 921.141(5)(a) (2012).
45. GA. CODE ANN. § 17-10-30(b)(2) (2012).
46. IDAHO CODE ANN. § 19-2515(9)(b, d) (2012).
47. KY. REV. STAT. ANN. § 532.025(2)(a)(1) (2012).
48. LA. REV. STAT. ANN. § 14:30(A)(9)(a-b) (2012).
49. MO. ANN. STAT. § 565.020(1) (2012).
50. MONT. CODE ANN. § 45-5-102(1) (West 2012).
51. NEV. REV. STAT. ANN. 15 § 200.030(1)(a-b) (West 2011).
52. OHIO REV. CODE ANN. § 2929.04 (2012).
53. OKLA. STAT. ANN. 21 § 701.12 (2012).
54. OR. REV. STAT. ANN. 16 § 163.150(1)(b)(A) (2012).
55. 42 PA. CONS. STAT. ANN. § 9711(d)(13) (2012).
56. S.C. CODE ANN. 1976 § 16-3-20(C)(a)(1) (2012).
57. S.D. CODIFIED LAWS § 23A-27A-1(1) (2012).
58. TENN. CODE ANN. § 39-13-204(i)(1) (2012).
59. TEX. PENAL CODE ANN. § 19.03(A) (2011).

		WY: “The murder was committed by a person...” ⁶⁰
Death Penalty States Using “Perpetrated” Language	3	CA: “murder which is perpetrated by means of” ⁶¹ MS: “Murder which is perpetrated by” ⁶² NC: “A murder which shall be perpetrated by” ⁶³
Death Penalty States Using “Killing”/ “Causes the Death” Language	7	IN: “A person who: knowingly or intentionally kills another human being” ⁶⁴ KS: “Capital murder is the: Intentional and premeditated killing” ⁶⁵ NE: “he or she kills another person” ⁶⁶ NH: “A person is guilty of capital murder if he knowingly causes the death of” ⁶⁷ VA: “willful, deliberate, and premeditated killing” ⁶⁸ UT: “actor intentionally or knowingly causes” ⁶⁹ WA: “he or she causes the death” ⁷⁰
States without Death Penalty	18	

Table 1 encapsulates this requirement based on the text of the thirty-two capital punishment statutes. Most typical is language requiring the defendant to have “committed” the act.⁷¹ Among the twenty-two states with similar language is Indiana, which provides for a death sentence if the defendant “kills another human being while committing or attempting to commit,” and then enumerates a list that includes arson, burglary, rape, etc.⁷² Three states substitute the word “perpetrated” for committed.⁷³ The remaining seven death penalty states include language directly referencing the act of killing.⁷⁴ Typical formulations include Virginia’s approach that makes a death sentence available for the “willful, deliberate, and premeditated killing” of several categories of victims including “law enforcement officer[s],” “more than one person,” and “any person in the commission of robbery.”⁷⁵

60. WYO. STAT. ANN. 1977 §6-2-101(a) (2012). [6-2-102(i)]

61. CAL. PENAL CODE § 189 (West 2012).

62. MISS. CODE ANN. § 97-3-19(2)(a) (West 2012).

63. N.C. GEN. STAT. ANN. § 14-17(A) (West 2012).

64. IND. CODE ANN. § 35-42-1-1(1) (West 2012).

65. KAN. STAT. ANN. § 21-5401(a)(1) (West 2012).

66. NEB. REV. STAT. ANN. § 28-303 (West 2012).

67. N.H. REV. STAT. ANN. § 630:1(I) (2013).

68. VA. CODE ANN. § 18.2-31(1) (West 2012).

69. UTAH CODE ANN. 1953 § 76-3-207(2)(a) (2012).

70. WASH. REV. CODE ANN. § 9A.32.030(1)(a) (West 2012).

71. See Table 1.

72. IND. CODE ANN. § 35-42-1-1 (West 2012).

73. See Table 1.

74. *Id.*

75. VA. CODE ANN. § 18.2-31(1, 4, 5) (West 2012).

A handful of states do make at least some mention of imposing capital sentences on those “convicted” of murder.⁷⁶ However, in every one of these instances the law explicitly defines the aggravating circumstances necessary to sustain a death sentence in terms of the commission of the act.⁷⁷ All told, legislators in all fifty states have set their statutes in opposition to executing a defendant merely upon conviction for a capital crime. That is, as shown in table 1, eighteen states do not impose the death penalty and all thirty-two death penalty states require the actual commission of the charged act, rather than a mere conviction.⁷⁸

Legislative revulsion to seeing capital sentences imposed on the innocent is apparent in other legislative efforts as well. Legislators in forty-eight of the fifty states, and all thirty-two death penalty states, have recently passed a version of a DNA evidence access bill, providing some measure of post-conviction access to DNA evidence in the hopes of preventing the incarceration or execution of an innocent defendant.⁷⁹ Meanwhile, Idaho’s legislature so abhors the possibility of executing an innocent person that it has elevated the act of *perjury in a capital case* that results in the execution of an innocent person into a capital offense.⁸⁰

Remorse over punishing the innocent has inspired numerous other legislative responses, including one Pennsylvania state representative’s bill that would compensate victims of wrongful conviction at a rate of \$141 per day of incarceration—a sum that happens to be the per diem rate paid to state legislators.⁸¹

B. Survey Responses

While sentencing statutes suggest state legislators unambiguously intend to reserve the death penalty exclusively for those who committed the offense at hand, the degree to which legislators abhor the prospect of sending an innocent person to death row can most clearly be documented by simply asking them.

Fortuitously, to a surprising degree, state legislators have proven themselves accessible to scholarly inquiries.⁸² Scores of studies have been published based largely on the willingness of legislators to share their views on politics and

76. See DEL. CODE ANN. 11 § 4209 (2012); IDAHO CODE ANN. § 19-2515 (2012); OHIO REV. CODE ANN. § 2929.02 (2012); OKLA. STAT. ANN. 21 § 701.9 (2012); S.C. CODE ANN. 1976 § 16-3-20 (2012); UTAH CODE ANN. 1953 § 76-3-207 (2012); WYO. STAT. ANN. 1977 § 6-2-101 (2012).

77. See DEL. CODE ANN. 11 § 4209 (2012); IDAHO CODE ANN. § 19-2515 (2012); OHIO REV. CODE ANN. § 2929.02 (2012); OKLA. STAT. ANN. 21 § 701.9 (2012); S.C. CODE ANN. 1976 § 16-3-20 (2012); UTAH CODE ANN. 1953 § 76-3-207 (2012); WYO. STAT. ANN. 1977 § 6-2-101 (2012).

78. See Table 1.

79. *DNA Testing and the Death Penalty*, A.C.L.U. (Oct. 3, 2011), <http://www.aclu.org/capital-punishment/dna-testing-and-death-penalty>.

80. IDAHO CODE ANN. § 18-5411 (2012).

81. Press Release, Penn. House of Representatives, McGeehan, Waters want Compensation, Exoneration Plans for Wrongfully Imprisoned (Jan. 25, 2011). State representative Mike McGeehan introduced HB199 on January 25, 2011. *Id.* It did not win approval.

82. Maestas and her colleagues found more than 14,000 state legislative respondents to scholarly queries in their survey of the literature. See Cherie Maestas, Grant W. Neeley & Lilliard E. Richardson, *The State of Surveying Legislators: Dilemmas and Suggestions*, 3 ST. POL. & POL’Y Q. 90 (2003).

process.⁸³ Here, I construct two samples of state legislators to inquire about innocence and the death penalty.

In conventional social science research, a survey of legislators might target a random sample in order to provide a fair representation of legislators more generally. However, Justice Scalia and the conservative wing of the Court have boldly claimed that while the Eighth Amendment is defined by state legislators, only the views of legislators from death penalty states are pertinent. For example, when the Court counted how many states rejected the execution of the mentally retarded, Justice Scalia objected to including states without capital punishment in the tally. As he colorfully explained in his *Atkins v. Virginia* dissent,

Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. *Of course* they don't like it, but that sheds no light whatever on the point at issue.⁸⁴

To satisfy the preferred methodological standards both of social scientists and of Justice Scalia, here I employ two separate samples. First, I constructed a random sample of state legislators from the fifty states. Second, I constructed what I am calling my "Scalia sample" by removing members of the random sample who hail from non-death penalty states and replacing them with a random selection of like numbers from among the then thirty-four death penalty states.

Both samples include a total of 400 legislators. To maximize participation rates (as demonstrated in previous state legislative surveys),⁸⁵ legislators were contacted both by phone and email. Members of the sample were first alerted of my interest in speaking to them by email one week before I attempted to reach them by phone to request a brief interview. If a telephone interview could not be arranged, I sent the questions in a second email message. Up to five email reminders were then sent if a response was not received.

In total, 287 legislators in the random sample and 313 from the Scalia sample responded between November 1, 2011 and April 16, 2012. The response rates for the two groups were 71.8% and 78.2% respectively.⁸⁶

In order to maximize the likelihood of responses, legislators were told that their participation in this study would require no more than five minutes of their time

83. *Id.*

84. 543 U.S. 551, 610–11 (2005) (Scalia, dissenting).

85. See Edmund F. McGarrell & Marla Sandys, *The Misperception of Public Opinion Toward Capital Punishment: Examining the Spuriousness Explanation of Death Penalty Support*, 39 AM. BEHAV. SCIENTIST 500 (1996); Nell H. Gottlieb et al., *State Legislators' Beliefs about Legislation that Restricts Youth Access to Tobacco Products*, 30 HEALTH EDUC. & BEHAV. 209 (2003).

86. These response rates are not inconsistent with the results other researchers have achieved when contacting legislators on policy-centered topics. For example, in a study of legislators' perceptions of public views on the death penalty, McGarrell and Sandys reached 75% of their sample. See McGarrell & Sandys, *supra* note 85. In a study of views on tobacco sales restrictions, Gottlieb and his colleagues reached 84% of their sample. See Gottlieb et al., *supra* note 85.

and they were assured that they would not be personally identified. Indeed, the survey itself consisted of only three questions on the death penalty.

Question One

Do you support the continued use of the death penalty in XX state? [Or, would you support legislation creating a death penalty in XX state?]

Question Two

In your opinion, what is an acceptable error rate when determining the guilt of defendants facing a potential death sentence?

Question Three

Do you believe it is permissible under the Constitution to execute someone if there are doubts regarding his guilt?

The survey results paint a picture of legislators' views that aligns quite closely with the text of state statutes.⁸⁷ That is, they do not intend to impose death sentences on innocent defendants and are, in point of fact, repulsed by the notion.⁸⁸

Both the overall sample and the Scalia sample report majority support for the death penalty.⁸⁹ When asked whether they support maintaining the death penalty in their state (or creating a death penalty if not currently in place), the overall sample responded with 58% in support.⁹⁰ The Scalia sample—drawn exclusively from death penalty states—produced 63% support for the death penalty.⁹¹

Between two samples with no shortage of support for the death penalty, however, there was no support for executing the innocent.⁹² When asked what the acceptable error rate is for imposing death sentences, the mean response for the overall sample was .02.⁹³ That is, one error per 5,000 cases. Moreover, the modal response, in fact the near universal response, was zero.⁹⁴

87. See Table 1.

88. Death Penalty Survey Results (Apr. 16, 2012) (on file with author).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Survey Results, *supra* note 88.

TABLE 2
SURVEY OF STATE LEGISLATORS

	Overall Sample (n=287)	Scalia Sample (n=313)
Support the Death Penalty	58% yes	63% yes
Acceptable Error Rate	.02 mean (96% responded: zero/none)	.03 mean (93% responded: zero/none)
Constitution Permits Execution with Doubt	95% no	94% no

The Scalia sample was similarly inclined, with a mean response of .03.⁹⁵ That equates to one error per 3,333 cases.⁹⁶ Again, the modal response was still zero errors.⁹⁷

When asked if the Constitution permits the execution of someone whose guilt is in doubt, the overwhelming majority of legislators in both samples responded negatively.⁹⁸ Many legislators were incredulous that the acceptability of imposing the death sentence on an innocent defendant could even be debated.⁹⁹

**“You can’t unring a bell.”*

**“You see this and you just have to say ‘Whoa.’”*

**“We shouldn’t use it if there is a chance of executing an innocent person.”*

**“Civilized society cannot—should not—accept this.”*

**“What have we gained when we pile a wrong on top of a wrong? Who is served by that? No one is served, not the victim, not society, and surely not the new victim of a bad prosecution.”*

Several legislators were quick to underscore that there is a world of difference between being a supporter of the death penalty and being indifferent to questions of innocence.¹⁰⁰

**“I’m not soft on crime. But we cannot undo an execution.”*

**“I want to make sure we put the right people to death.”*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Survey Results, *supra* note 88.

*“It would be wrong if we didn’t learn a lesson from these exonerations. We’d be weakening the whole criminal justice system.”

*“If you do the crime, you do the time. But I am also a firm believer that we must be sure he has done the crime.”

*“I have to be certain, myself, that we’re not taking innocent peoples’ lives. Otherwise, just what are we allowing to happen?”

In sum, state legislators are not sympathetic to the conclusion that the death penalty can be imposed without regard to factual guilt. Rather, they believe: (1) that the death penalty should only be imposed on those for whom guilt is not in doubt; and (2) that neither they *nor the Constitution* tolerates errors in capital cases.¹⁰¹

IV. INNOCENCE AND THE EIGHTH AMENDMENT

On its face, this presentation suggests an effort to knock down a straw man. Is there really anyone who would speak up for executing the innocent?¹⁰² Nevertheless, demonstrating that legislators do not think executing an innocent person is acceptable is a vital step toward asserting a constitutional bar to executing the innocent.

The Court has ruled “‘actual innocence’ is not itself a constitutional claim”¹⁰³ and state legislative action is a guide to the practical meaning of the Eighth Amendment.¹⁰⁴ Here I contend that legislators definitively reject the legitimacy of imposing capital punishment on innocent defendants—therefore, under the Court’s logic—the Eighth Amendment must be seen as providing constitutional relief against the execution of an innocent defendant. In both the text of enacted legislation and in the words of legislators, mistakes in capital punishment cases are seen as intolerable.¹⁰⁵ Any effort to execute someone based merely on a conviction defies the language, intent, and beliefs of state legislators, and therefore violates the Eighth Amendment.¹⁰⁶

101. *Id.*

102. Though Justice Scalia certainly seems to approach this position when he mocks his colleagues for “the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate.”¹⁰² *Herrera v. Collins*, 506 U.S. 390, 428 (1993) (Scalia, J., concurring). Similarly, in *Kansas v. Marsh*, Justice Scalia takes aim at those who would hold the capital punishment system to a standard of “100% perfection.” 198 U.S. 163, 198 (2006) (Scalia, J., concurring).

103. *Herrera*, 506 U.S. at 404.

104. *Coker v. Georgia*, 433 U.S. 584, 595 (1977).

105. See Table 1; Survey Results, *supra* note 88.

106. Also worth noting is Geimer and Amsterdam’s 1987 finding that the leading factor in whether jurors supported a death sentence was their confidence in the defendant’s guilt. See William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials*, 15 AM. J. CRIM. L. 1 (1989). Similarly, authors Soss, Langbein, and Metelko found support for the death penalty in general varied with the respondent’s confidence that government could correctly identify guilty defendants. See Joe Soss, Laura Langbein & Alan R. Metelko, *Why Do White Americans Support the Death Penalty?*, 65 J. POL. 397 (2003).

While scholars have pointed to the potential of innocence claims and innocence rates to redefine death penalty jurisprudence,¹⁰⁷ and have specifically asserted that the intersection of innocence and the Eighth Amendment is where this matter will be settled,¹⁰⁸ this analysis represents a unique effort to apply the conclusions of state legislators to the operative meaning of the Eighth Amendment.

Some hail the arrival of the “innocence revolution,”¹⁰⁹ even as critics assert that talk of innocence is nothing more than a workaround intended to advance the abolition of the death penalty.¹¹⁰ But as Soss, Langbein, and Metecko note, “The legal and political viability of capital punishment hinges on both its consequences in practice and its meaning in the public mind.”¹¹¹ More importantly, the Court defines the ‘public mind’ as the mind of legislators, and those minds support the death penalty only as it is exclusively applied to the factually guilty.

Legislators believe in their own responsibility to limit the death penalty to the factually guilty. And they believe in the Court’s responsibility to do no less. As one legislator in the survey put it: “*The courts don’t want to hear about a substantial claim of innocence! That’s unacceptable. We’re not racing to churn widgets off an assembly line here. There’s no question more important when we’re imposing a death sentence.*”¹¹²

107. See Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 PUB. INT. L. J. 195 (2007); Ursula Bentele, *Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359 (2003–2004); Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1 (2001).

108. Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and our ‘Evolving Standards of Decency’ in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265 (2003–2004).

109. Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2003–2004).

110. Ward A. Campbell, *Exonerations Inflation: Justice Scalia’s Concurrence in Kansas v. Marsh*, 2 J. INST. ADVANCEMENT CRIM. JUST. 49 (2008).

111. Soss et al., *supra* note 106, at 415.

112. Survey Results, *supra* note 88.

