



The Death of Innocence

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WILKIE COLLINS'S *THE DEAD ALIVE: THE NOVEL,*
THE CASE, AND WRONGFUL CONVICTIONS
NORTHWESTERN UNIVERSITY 2005

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WILKIE COLLINS' *THE DEAD ALIVE* opens with a scene that could be taken from the life of many a modern law firm associate. Young London barrister Philip Lefrank faints at his desk. A doctor's examination reveals that overwork is damaging his health. With a dedication suggestive of seriously misplaced priorities, Lefrank insists on returning to the job. "Look at the briefs waiting for me on that table! Rest means ruin in my case."¹ But exhaustion overwhelms him; he finds himself unable to recall crucial information and is led out of the courtroom "thoroughly terrified."²

The immediate sequel is perhaps less typical of the modern world: rather than obtaining a prescription for Ritalin or Adderall, Lefrank takes the suggested vacation. (Still more unlikely, his immediate destination in the search for relaxation is New York.) The body of the book is concerned with the events that Lefrank witnesses after his arrival in America. And it is whether those

events are typical or extraordinary that the book invites us to ponder – a question perhaps more timely now than it was in 1874, the year of the book's first publication.

After a brief restorative sojourn in New York, Lefrank proceeds to Morwick Farm, the residence of his mother's relative Isaac Meadowcroft. All is not well at the farm. Tensions run high between Isaac's sons, Silas and Ambrose, and the peculiar overseer, John Jago. The source of the strife is a young (and, one hopes, distant) Meadowcroft cousin, Naomi Colebrook. Naomi plans to marry Ambrose but has also inadvertently won the heart of John Jago. Jago and the brothers quarrel, at times violently, and the poisonous atmosphere threatens Lefrank's plans for a tranquil convalescence – as does the growth of his own inevitable affection for Naomi.

Then John Jago disappears, and the story pivots into the criminal justice system. Neighbors assume foul play, and when a search turns up Jago's knife and what might

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1 Wilkie Collins, *The Dead Alive* (2005) 4.

2 *Ibid.*

be the remnants of his bones and clothing in a lime kiln, the suspicions seem confirmed. Silas and Ambrose are arrested and confess their guilt, first one and then the other. Both are sentenced to death. And then, in a twist I feel little compunction about revealing, John Jago reappears. The brothers are spared; justice prevails; even the romantic quadrilateral resolves itself in conventional fashion.

The reason to read this book is not the story itself. Wilkie Collins is no Scott Turow, nor even a John Grisham, though it may well be that without him neither of those gentlemen would have written the books they did. (Turow contributes a graceful Foreword describing Collins's place in literary history.) *The Dead Alive* was reprinted by the Northwestern University Press, and the proceeds from its sales go to benefit the Northwestern Law School Center on Wrongful Convictions. It was reprinted because it tackles a topic – wrongful convictions, particularly in capital cases – that is experiencing what may be a unique moment of attention in the public mind.

The concern over erroneous convictions is not new, as the existence of *The Dead Alive* itself shows. Collins was inspired to write it by, and based it on, the actual 1819 case of two Vermont brothers, convicted of murder and then saved from execution by the reappearance of their supposed victim. But the present moment is distinctive because recent advances in forensic science have made it possible to re-examine many convictions

from a perspective unavailable at the time of trial.

The 20–20 hindsight of proverb has revealed a disturbing vista. As of July 12, 2006, the Cardozo Law School-based Innocence Project reports, 181 convicts have been exonerated by DNA evidence.³ Other studies (some coming too early to make much use of DNA) purport to identify hundreds of wrongful convictions and even a number of mistaken executions.⁴ Perhaps most notoriously, when the Governor of Illinois imposed a moratorium on executions in that state in 2000, he confronted a situation in which the past 23 years had seen a higher number of death row inmates proved innocent than executed.

There is, of course, some dispute over the figures and over the meaning of “innocent” in particular cases. The reversal of a conviction or the release of an inmate need not mean that he did not commit the crime of which he was accused.⁵ And Justice Antonin Scalia was right when in a recent Supreme Court opinion he triumphantly proclaimed that the recent DNA work has not yet shown us a clear case of wrongful execution.⁶ But the data does suggest that the absolute number of wrongful capital convictions is substantial, and it requires the self-deceit of optimism or indifference to believe that we have detected every one. Science has, if you'll pardon the phrase, killed our innocence about the death penalty. It has told us that it is very, very likely that we have executed innocent

3 See <http://www.innocenceproject.com> (last visited July 12, 2006).

4 See, e.g., Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 *Psychology, Public Policy & Law* 577, 593 (2004); see generally *Kansas v. Marsh*, 548 U.S. – –, – (Souter, J., dissenting) (summarizing studies). *The Dead Alive* itself has as an appendix listing of 235 wrongful convictions in U.S. capital cases, a list obviously attributable not to Wilkie Collins but to the republisher.

5 See, e.g., *Kansas v. Marsh*, 548 U.S. – –, – (2006) (Scalia, J., concurring) (arguing that few, if any, actually innocent defendants have been executed).

6 *Id.* at – –. In response, it might be ventured that post-execution DNA analysis is relatively rare. The most recent highly publicized occurrence, in the case of Roger Coleman, did, however, confirm Coleman's guilt. See *ibid.*

people.

The relevance of that fact to future policy choices is somewhat less clear. DNA analysis may suggest that we have made mistakes in the past, but it should also reduce the number of mistakes in the future. Our verdicts will probably become more accurate.

But it is unlikely that they will become perfect. Many cases do not provide the sort of forensic evidence that allows guilt or innocence to be determined with certainty. Our other paths to truth are fallible. False confessions occur with disturbing frequency.⁷ They can be expected when police convince a vulnerable or suggestive suspect of his guilt, or when a hardened suspect decides that confessing is the best strategic choice, even if he is in fact innocent. Both situations can be created when police falsely inform suspects that irrefutable evidence links them to the crime – a tactic that standard interrogation manuals endorse.⁸ Eyewitness testimony is also proving unreliable, or at least not as reliable as jurors tend to think.⁹ And even forensic science is only as good as the scientists. Mistakes occur, and so do deliberate fabrications.¹⁰

The incidence of these errors may not be large in percentage terms. But they exist, and it defies credulity to suppose that we

will eliminate them all. The upshot is simple. It is very, very likely that we will continue to execute innocent people.

This fact might put the debate over the death penalty in a slightly different light, at least for the substantial portion of the population (including me) that has few qualms about the execution of the guilty. That no “civilized” country employs the death penalty is a moderately accurate generalization; on this issue the United States finds itself in the unlovely company of Afghanistan, Iran, and North Korea, though also that of Japan, India, Thailand, and the Russian Federation.¹¹ But we are also an outlier on the First Amendment, and sometimes American exceptionalism has its merits. And if the question is, as some ask, why we kill people who kill people to show them that killing people is wrong, the answer is presumably for much the same reason that we fine thieves or imprison kidnappers: it’s punishment, and for punishment one uses unpleasant things.

But what the focus on wrongful convictions suggests is that the right question really isn’t the one constructed by rhetorical iteration. The right question is what we get from the death penalty and how that compares to what we pay for it. Neither of these quantities can be measured with absolute

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- 7 The most highly publicized recent occurrence is probably the December 2002 exoneration of the five youths who confessed and were convicted of the 1989 attack on a jogger in Central Park. See, e.g., Sharon L. Davies, *The Reality of False Confessions – Lessons of the Central Park Jogger Case*, 30 N.Y.U. Rev. L. & Soc. Change 209 (2006).
 - 8 See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791, 808–816 (2006) (reviewing manuals). A similar effect – a literal prisoner’s dilemma – occurs when police falsely inform each of multiple suspects that the others have incriminated him and suggest that he would do well to give his side of the story. It is this situation that elicits the second confession in *The Dead Alive*.
 - 9 See, e.g., William David Gross, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 Tex. Wesleyan L. Rev. 307, 309 (1999) (noting “unreliability of eyewitness testimony”).
 - 10 See, e.g., *Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501 (W. Va. 1993) (concluding that serologist had intentionally falsified reports); see generally J. Herbie DiFonzo, *The Crimes of Crime Labs*, 34 Hofstra L. Rev. 1 (2005) (discussing errors and fraud in crime labs).
 - 11 See http://en.wikipedia.org/wiki/Use_of_death_penalty_worldwide (last visited July 12, 2006).

certainty. The argument over the deterrent effect of the death penalty is longstanding and bitter, and it shows no signs of abating soon. The only thing that can be said with confidence is that the issue is unclear.¹² We cannot be sure that the death penalty has any deterrent effect at all.

In addition to the possibility of deterrence, the death penalty offers some retributive fulfillment. Retribution is not nothing – there is a satisfaction in knowing that the perpetrator of a hideous offence has paid the ultimate price. Neither, however, is it the highest expression of our humanity. And

against that must be weighed the cost of the death penalty – which, as *The Dead Alive* seeks to warn us, is the execution of innocents.

So one reasonable way to phrase the question of the death penalty is this: How many innocent people is it worth killing to satisfy a taste for vengeance? If the answer is “Some, but not too many,” then we need to start talking about ways to improve the accuracy of verdicts. But if the answer is “None,” we need to have a different conversation entirely. In either case, *The Dead Alive* is a good place to start. *GR*

12 A recent wave of studies purported to show significant deterrent effects. See generally, e.g., Cass Sunstein & Adrian Vermeule, *Is the Death Penalty Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *Stan. L. Rev.* 703, 706–09 (2005) (discussing studies). But critics have made plausible claims that these studies are flawed. See, e.g., Richard Berk, *New Claims about Executions and General Deterrence: Déjà vu All Over Again?*, 2 *J. Empirical Legal Stud.* 303 (2005); Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 *Annual Rev. L. & Social Sci.* 151 (2005). I do not attempt to resolve that debate; as Sunstein and Vermeule offer thoughts for those who do think deterrence exists, I offer some thoughts for those who do not – a position that seems reasonable in the face of inconclusive data. See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 *J. Econ. Persp.* 163, 175 (2004) (“it is hard to believe that fear of execution would be a driving force in a rational criminal’s calculus in modern America”).