

# THE INNOCENCE PROTECTION ACT: A REVISED PROPOSAL FOR CAPITAL PUNISHMENT REFORM

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## I. INTRODUCTION

The Innocence Protection Act (IPA)<sup>1</sup> is a package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed by the State, and ensuring that wrongfully convicted inmates have access to evidence that can establish their innocence.<sup>2</sup> Since its introduction in both houses of Congress in early 2000,<sup>3</sup> the Act has gained considerable momentum and broad bipartisan support from both supporters and opponents of the death penalty. When Congress adjourned in 2002, the IPA was cosponsored by thirty-two senators and a majority of the House.<sup>4</sup> A version of the Act had also been reported out of the Senate Judiciary Committee, passing that Committee by a bipartisan twelve-to-seven vote.<sup>5</sup> The bill's sponsors have pledged to reintroduce the bill in the 108th Congress,<sup>6</sup> where, despite the Act's strong bipartisan support in both Houses and a recent

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1. S. 486, 107th Cong. (2001); H.R. 912, 107th Cong. (2001). A detailed account of the Act's legislative history appears in S. REP. NO. 107-315, at 2-6 (2002). To summarize briefly, the IPA was first introduced to the 106th Congress as S. 2073 on February 10, 2000, by Senators Leahy, Levin, Feingold, Moynihan, and Akaka. *Id.* at 2. A revised version of the bill was introduced as S. 2690 on June 7, 2000, by Senators Leahy, Smith of Oregon, Collins, Levin, Jeffords, Feingold, Moynihan, Akaka, Kerrey, and Wellstone. *Id.* Representatives William Delahunt, Ray LaHood, and nine cosponsors introduced the measure in the House of Representatives as H.R. 4167 on April 4, 2000. *Id.* In the 107th Congress, Senators Leahy, Smith of Oregon, Collins, and thirteen additional cosponsors introduced S. 486 on March 7, 2001, and on the same day, Representatives Delahunt, LaHood and 116 cosponsors introduced an identical version, H.R. 912, in the House of Representatives. *Id.* at 3.

2. Joint Statement, Senators Patrick Leahy, Gordon Smith and Susan Collins, and Congressmen William Delahunt and Ray LaHood [hereinafter Joint Statement] (Feb. 4, 2003), at <http://leahy.senate.gov/press/200302/020403b.html>.

3. S. REP. NO. 107-315, at 2.

4. See Joint Statement, *supra* note 2.

5. S. REP. NO. 107-315, at 6.

6. See Joint Statement, *supra* note 2.

groundswell of public opinion in favor of capital punishment reform,<sup>7</sup> its passage is not guaranteed. The Act's provisions have generated a fair amount of debate, and its most vocal opponent—Senator Orrin Hatch—now chairs the Senate Judiciary Committee.<sup>8</sup>

This piece focuses on the likely impact of the IPA's core reforms—Title I, which would increase access to DNA testing for people who claim they have been wrongfully convicted, and Title II, designed to improve state systems for providing legal representation to defendants in capital cases. After considering the strongest arguments offered for and against these two heavily debated reforms, this piece briefly discusses the Act's three miscellaneous provisions, which are more limited in scope and less controversial.

## II.

### THE INNOCENCE PROTECTION ACT

#### A. *Title I: Improving Access to DNA Testing*

##### i. *Provisions and Potential Impact*

The IPA would establish rules and procedures to control applications for post-conviction DNA testing by federal inmates. Through these provisions, the IPA seeks to prevent the unnecessary execution of wrongfully convicted individuals, to restore public confidence in the criminal justice system, and to prevent the threat to public safety that exists when violent felons remain at large.<sup>9</sup>

Noting a scarcity of judicial resources, the IPA sets several parameters on applications and orders for DNA testing. After a prisoner testifies upon application that she did not commit the federal crime for which she was convicted,<sup>10</sup> the court shall order DNA testing provided that:

- (A) the evidence is still in existence, and in such a condition that DNA testing may be conducted;
- (B) the evidence was never previously subjected to any DNA testing, or was not subject to the type of DNA testing that is now requested and that may resolve an issue

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7. See, e.g., Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1 (2002); Laurie Goodstein, *Death Penalty Falls From Favor as Some Lose Confidence in Its Fairness*, N.Y. TIMES, June 17, 2001, at A14.

8. The IPA's relevance may also be threatened by Attorney General John Ashcroft's recently announced plan to commit one billion dollars to DNA testing in the next five years. See Eric Lichtblau, *New Federal Plan for DNA Testing is Proposed*, N.Y. TIMES, Mar. 12, 2003, at A20; See also *infra* note 29.

9. See S. REP. NO. 107-315, at 7.

10. Innocence Protection Act, S. 486, 107th Cong. § 101(a) (2001) (reported).

not resolved by previous testing; (C) the proposed DNA testing uses a scientifically valid technique; (D) the proposed DNA testing has the scientific potential to produce new, noncumulative evidence which is material to the claim of the applicant that the applicant did not commit, and which raises a reasonable probability that the applicant would not have been convicted of (i) the Federal crime of which the applicant was convicted; or (ii) any other offense that a sentencing authority may have relied upon when it sentenced the applicant with respect to the Federal crime either to death or to an enhanced term of imprisonment as a career offender or armed career criminal; and (E) the identity of the perpetrator was or should have been a significant issue in the case.<sup>11</sup>

In addition, the Act prohibits the destruction of biological evidence without notice to the defendant while she is incarcerated.<sup>12</sup> Furthermore, as a condition of receiving federal funding for DNA-related programs, states are required to adopt procedures comparable to the federal procedures established by the Act.<sup>13</sup> Lastly, states are required to grant defendants access to biological evidence for the purpose of DNA testing.<sup>14</sup>

The potential impact of the IPA's DNA testing provisions is manifold. At its most fundamental level, this legislation seeks to prevent the execution of the wrongfully convicted.<sup>15</sup> Where possible, DNA testing is now standard procedure at criminal trials. However, despite its successes, many prisoners were tried and convicted before DNA testing was available.<sup>16</sup> As a result, more than one hundred wrongfully incarcerated individuals have been exonerated, twelve of

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11. *Id.*

12. *Id.* at § 102(a)(2). See *Innocence Protection Act of 2001: Hearing on H.R. 912 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Comm. on the Judiciary*, 107th Cong. 19 (2002) [hereinafter *Hearing on H.R. 912*] (statement of Peter J. Neufeld, Co-Director, Innocence Project, Benjamin N. Cardozo School of Law). Mr. Neufeld states that:

In seventy-five percent of the cases where the Innocence Project has determined that a DNA test on some piece of biological evidence would be determinative of guilt or innocence, the evidence is reported either lost or destroyed, and without laws specifically to prevent it, precious DNA evidence is surely being thrown away, wittingly or unwittingly, every day.

*Id.*

13. S. 486 § 102(a) (reported).

14. *Id.*

15. S. REP. NO. 107-315, at 1 (2002).

16. Since the Supreme Court's ruling in *Gregg v. Georgia*, 428 U.S. 153 (1976), that the death penalty is constitutional, many states have continued to carry out executions. However, wary of the reliability of DNA testing, state courts were reluctant to admit DNA evidence until the mid-1990s. See, e.g., *Dodge v. State*, 723 So.2d 322, 322-23 (1998) (W. Sharp, J., dissenting). As a result, from 1976 through the early 1990s, capital defendants were convicted without access to DNA evidence.

whom were on death row.<sup>17</sup> From these numbers, congressional sponsors, perhaps propelled by the testimony of those appearing at committee hearings,<sup>18</sup> have concluded that many individuals have been executed, are awaiting execution, or have spent a great portion of their lives in prison for crimes they did not commit.<sup>19</sup>

While at its most basic level the IPA seeks to prevent the wrongful execution of innocent individuals, sponsors contend that the use of DNA test results would also benefit the community.<sup>20</sup> As Senator Leahy has noted, every time an innocent person is incarcerated, the real murderer is out free and is able to commit more murders.<sup>21</sup> When an innocent person is convicted, law enforcement acquires a false sense of closure. The investigation ceases, and the case is considered solved. Meanwhile, to the public's detriment, the real assailant continues to roam the streets. However, when DNA evidence is used to exonerate an inmate, the testing results are typically entered into the Combined DNA Index System (CODIS), a national database containing DNA profiles from both unsolved crimes and convicted offenders.<sup>22</sup> Where the submitted DNA matches a profile in the database, law enforcement officers can reduce the threat to the community by apprehending the true offender.<sup>23</sup>

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17. See *Death Penalty Information Center: Innocence: Freed From Death Row*, at <http://www.deathpenaltyinfo.org/Innocentlist.html> [hereinafter *Innocence: Freed From Death Row*] (stating that DNA evidence has conclusively led to reversal of 12 capital convictions) (on file with the *New York University Journal of Legislation and Public Policy*); *Innocence Project Case Profiles*, at <http://www.innocenceproject.org/case/index.php> (indicating that 123 innocent individuals have been exonerated through use of DNA evidence) (on file with the *New York University Journal of Legislation and Public Policy*).

18. See, e.g., Jodi Wilgoren, *Citing Issue of Fairness, Governor Ryan Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1 (stating that Governor Ryan commuted sentences of 167 condemned inmates because "our capital punishment system is haunted by the demon of error: error in determining guilt"). See also *Innocence Protection Act of 2000: Hearing on H.R. 4167 Before the Subcomm. on Crime of the House Comm. of the Judiciary to Consider H.R. 4167*, 106th Cong. 68 (2000) (testimony of Gov. George Ryan of Illinois) (commenting on the death penalty).

19. S. REP. NO. 107-315, at 7.

20. *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing on S. 486 Before the Sen. Comm. on the Judiciary*, 107th Cong. 14 (2001) [hereinafter *Hearing on S. 486*] (written statement of Sen. Patrick Leahy, Chairman, Senate Judiciary Comm.).

21. *Id.*

22. S. REP. NO. 107-315, at 10.

23. See *Id.* at 10-11. For instance, in 1995, Rolando Cruz was cleared of abducting and murdering a ten-year-old girl based on DNA testing results. Armed with this evidence, law enforcement officials were able to point toward Brian Dugan as the true assailant. However, because Cruz's conviction was not questioned until the early 1990s, Dugan was able to commit another murder during this time. See Steve Mills &

Lastly, in the wake of former Illinois Governor George Ryan's well-publicized commutations and pardons,<sup>24</sup> sponsors contend that public exposure to the failings of this country's criminal justice system has reduced confidence in the adequacy and fairness of the judicial process.<sup>25</sup> By the early 1990s, few new anti-death penalty arguments surfaced, and public support for capital punishment remained strong; however, recent accounts of innocent people on death row have, in part, swayed public opinion.<sup>26</sup> Where no remedy is implemented, sponsors contend that such a looming omission will "diminish that public confidence in the criminal justice system upon which the successful functioning of that system continues to depend."<sup>27</sup>

Generally, both opponents of the IPA and its sponsors agree that DNA testing is so crucial to ensuring justice that convicted defendants should have reasonable access to such testing.<sup>28</sup> To expedite passage of the DNA provisions, opponents such as Senator Hatch have suggested divorcing Title I from Title II, which relates to the improvement of state capital defense systems.<sup>29</sup> He contends that the minor

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Gary Washburn, *Ryan Sifts Clemency Bids; Cruz Fate Sealed*, CHI. TRIB., Nov. 27, 2002, Metro at 1. In the cases of Clark McMillan (Tennessee), Ray Krone (Arizona), Robert Miller (Oklahoma), and Kevin Green (California), the DNA evidence used to exonerate each defendant ultimately led to the incapacitation of the true assailant. The real offender in each of these cases had previously been charged with rape or homicide. In addition, the 2001 exoneration of Jerry Frank Townsend resulted in the conviction of Eddie Lee Mosely, who had committed at least sixty-two rapes and several homicides. "Mosely might have been identified much earlier if prosecutors had acceded to a request for testing by another wrongfully convicted Florida inmate, Frank Lee Smith, who died on death row before testing was ordered." See S. REP. NO. 107-315, at 11 (citing Steve Mills & Gary Washburn, *Requiem for Frank Lee Smith*, (PBS Frontline television broadcast, Mar. 11, 2002); *NBC Nightly News* (NBC television broadcast, June 18, 2001); Amy Driscoll et al., *DNA Test Clears 'Killer' After His Death*, MIAMI HERALD, Dec. 15, 2000, at A1).

24. Jodi Wilgoren, *After Sweeping Clemency Order, Ex-Gov. Ryan is a Celebrity, but a Solitary One*, N.Y. TIMES, Feb. 7, 2003, at A16.

25. S. REP. NO. 107-315, at 7.

26. See Goodstein, *supra* note 7.

27. *Mickens v. Taylor*, 535 U.S. 162, 211 (2002) (Breyer, J., dissenting). See also *Globe Newspaper Co. v. County of Norfolk*, 457 U.S. 596, 606 (1982) (stressing importance of obtaining public respect for judicial system, which is served by granting public access to criminal trials).

28. *Hearing on S. 486*, *supra* note 20, at 61 (statement of Sen. Orrin Hatch, Member, Senate Judiciary Comm.). During this hearing, Senator Hatch stated, "DNA legislation enjoys nearly universal support in this [bipartisan] committee." *Id.*

29. *Id.* In a move that could detract from the IPA's momentum, Attorney General John Ashcroft recently proposed a plan to commit a total of \$1 billion to DNA testing over the next five years. See Lichtblau, *supra* note 8. Only \$5 million of the proposed funding would support postconviction DNA testing, but it would mark the first time that any such funding has been provided. *Id.* Peter Neufeld of the Innocence

kinks in Title I's provisions could be resolved easily in the House and Senate, thereby leading to the immediate passage of the DNA provisions.<sup>30</sup> While Title I enjoys greater support, disagreement nonetheless remains.

*ii. Standard for Permitting DNA Testing*

Perhaps the most divisive issue is who should qualify for DNA testing. Senator Hatch contends that the Act's post-conviction DNA testing procedures are "too broad" and "unfairly skewed in favor of convicted defendants who have no reasonable chance to establish their innocence" in that the procedures do too little to protect against frivolous claims made solely for purposes of delay.<sup>31</sup> He has proposed limiting DNA testing to those prisoners whose results would determine guilt or innocence *conclusively*.<sup>32</sup>

The Act's current sponsors reject these standards as unnecessarily harsh. They contend that the Act, in its present form, has the safeguards necessary to avoid inundating the judiciary with frivolous motions for DNA testing. First, by requiring an inmate to swear to her innocence under oath, a prosecution for perjury may follow if test results are inculpatory.<sup>33</sup> Second, because the results are disclosed simultaneously to both parties, an inmate is unable to conceal potentially inculpatory evidence.<sup>34</sup> In addition, the Judiciary Committee majority notes that "[i]n balancing competing concerns, the Committee was guided by the principle that the justice system should err on the side of permitting testing in nonfrivolous cases, in light of the low cost of testing and the high cost of wrongful convictions."<sup>35</sup>

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Project has criticized Ashcroft's plan as giving "the Justice Department and prosecutors too much authority to decide who should have access to DNA testing." *Id.* Senator Leahy, however, has expressed support for Ashcroft's proposal, calling the funding "long overdue." Press Release, Reaction of Senator Patrick Leahy to Department of Justice's DNA Initiative, Mar. 11, 2003, at <http://leahy.senate.gov/press/200303/031103b.html> (on file with the *New York University Journal of Legislation and Public Policy*).

30. *Id.* at 61–62.

31. S. REP. NO. 107-315, at 48 (2002).

32. *Id.* at 74. In an effort to deter frivolous inmate testing, Senator Hatch would also impose substantial penalties on inmates whose assertions of innocence are proven false by the DNA testing they demand. *See id.*

33. *Id.* at 12.

34. *Id.*

35. *Id.* at 11.

*iii. Federalism Concerns*

Noting that thirty-one states have established their own DNA testing provisions, Senator Hatch objects that federally imposed provisions represent an unconstitutional restriction on state sovereignty,<sup>36</sup> and that the “bill intrudes on the responsibility of the states to define crimes, their punishment and the procedures to be followed in their courts.”<sup>37</sup> Furthermore, critics reject the statistical data the Act’s proponents cite, contending instead that exceedingly few inmates have actually been exonerated through DNA evidence.<sup>38</sup> Such low numbers, they argue, do not warrant such a massive intrusion upon state sovereignty.<sup>39</sup>

Proponents of Title I assert that the IPA does not infringe unduly upon the states. Rather, they state, “just as it is an appropriate use of Federal funds to assist the States in processing DNA evidence for law enforcement purposes, it is also appropriate to require that this truth-seeking technology be made available to both sides.”<sup>40</sup> In addition, they note that the Act intentionally affords the States flexibility in creating DNA laws and, thus, respects notions of federalism.<sup>41</sup> However, proponents contend that the failure of nineteen states to provide for

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36. *Id.* at 75–83.

37. *Id.* at 83 (quoting from June 8, 2000, letter signed by thirty state attorneys general expressing concern for bill’s intrusion on these specific states’ rights). *But see id.* at 17 n.10 (noting that many of specific concerns expressed in June 8, 2000, letter have been addressed in reported version of bill).

38. *See id.* at 64–69. Opponents have devoted significant energy to deconstructing the list of the 100-plus exonerated death row inmates, asserting that the statistics are misleading. Much of the disagreement in this area centers upon the distinction between actual innocence and legal innocence—the latter defendant being one who is freed not because she is actually innocent, but because the prosecution was unable to prove her guilt beyond a reasonable doubt. *See, e.g., Reducing the Risk of Executing the Innocent: The Report of the Illinois Governor’s Comm’n on Capital Punishment: Hearing Before the Senate Judiciary Comm., 107th Cong. (2002)* [hereinafter *Hearing on Reducing the Risk of Executing the Innocent*] at [http://www.senate.gov/%7Ejudiciary/testimony.cfm?id=256&wit\\_id=623](http://www.senate.gov/%7Ejudiciary/testimony.cfm?id=256&wit_id=623) (statement of John J. Kinsella, First Assistant State’s Attorney, Du Page County, Illinois) (on file with the *New York University Journal of Legislation and Public Policy*); Ramesh Ponnuru, *Not So Innocent*, NAT’L REV. ONLINE, available at <http://www.nationalreview.com/ponnuru/ponnuru100102.asp> (Oct. 1, 2002) (on file with the *New York University Journal of Legislation and Public Policy*). Supporters of the Act, however, contend that any attempt to draw such distinctions among exonerated inmates dismisses the constitutional guarantees of the criminal justice system, where defendants are entitled to a presumption of innocence until proven guilty by a fair trial. *See S. REP. NO. 107-315*, at 9 n.4.

39. *See S. REP. NO. 107-315*, at 75.

40. *Id.* at 17.

41. *Id.* at 17–18.

post-conviction DNA testing is patently unacceptable.<sup>42</sup> With respect to those states that have no statutory right to DNA testing, death row inmates are often denied access to testing because prosecutors typically oppose authorization, citing state procedural bars.<sup>43</sup> As for those states that have DNA testing laws, they often erect unjustifiably high procedural hurdles to testing, rendering their statutes obsolete.<sup>44</sup> In this regard, to the extent that states have attempted to remedy this problem, proponents contend that their efforts have been unproductive.

*iv. Notions of Finality*

Opponents also fear that Title I's provisions will undermine notions of finality in criminal convictions, stating that:

[F]inality is important not only to the police and prosecutors who should not be required to reassemble criminal cases years after trial and conviction. It is also vitally important to crime victims [and their families where] "closure" would be delayed or denied altogether if the perpetrator has the unlimited right to challenge that conviction in perpetuity.<sup>45</sup>

In response, sponsors cite a complex web of unduly harsh state and federal procedural rules as limiting, and at times completely prohibiting, access to DNA testing for many prisoners.<sup>46</sup> In turn, they assert that "deadlines [only] make sense when society has an interest in the finality of the judgment [and] there is no interest in the finality of an incorrect judgment, especially one that would result in the execution of an innocent person."<sup>47</sup> As a result, the IPA's sponsors elected not to include time limitations within Title I's provisions.<sup>48</sup>

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42. *Id.* at 17.

43. *Id.* at 16–18.

44. *See id.*

45. *Id.* at 84.

46. *See, e.g.*, FED. R. CRIM. P. 33 (stating that motion must be filed within three years after verdict or finding of guilt); ALA. CODE § 15-17-5 (1975) (stating that motion must be filed within thirty days of entry of judgment). While some states impose no time limits on motions for newly discovered evidence, many states have statutes of limitations that severely restrict the introduction of claims of newly discovered evidence. *See, e.g.*, ALA. CODE § 15-17-5 (1975). In addition, only thirty-one states have passed legislation providing for post-conviction DNA testing. *See* S. REP. NO. 107-315, at 16.

47. S. REP. NO. 107-315, at 15.

48. Innocence Protection Act, S. 486, 107th Cong. § 102 (2001) (reported).

## B. Title II: Improving State Capital Defense Systems

### i. Provisions and Potential Impact

Because biological evidence is unavailable in many capital cases,<sup>49</sup> and because incompetence of counsel is the root cause of a majority of wrongful convictions,<sup>50</sup> Title II's provisions consist of a variety of safeguards designed to prevent wrongful convictions by improving the reliability of state capital defense systems.<sup>51</sup>

The House and Senate versions of Title II consist of a series of incentives for states to develop more exacting standards for capital defense counsel. Section 201 establishes a grant program to be administered by the Department of Justice.<sup>52</sup> The grant program would provide federal funds to states agreeing to create an "effective system"—one which would compensate attorneys at a rate comparable to the federal rate,<sup>53</sup> and would include an independent (non-judicial) authority to establish minimum qualification standards for capital de-

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49. *Hearing on H.R. 912, supra* note 12, at 18 (written statement of Peter J. Neufeld, Co-Director, Innocence Project, Benjamin N. Cardozo School of Law) (stating that vast majority (probably 80 percent) of felony cases do not involve biological evidence that can be subjected to DNA testing); S. REP. NO. 107-315, at 20–21. *See also Hearing on S. 486, supra* note 20, at 36 (statement of Stephen B. Bright, Director, Southern Center for Human Rights). Mr. Bright states:

In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system—in which the defense lawyer scrutinizes the prosecution's case, consults with the client, conducts a thorough and independent investigation, consults with experts, and subjects the prosecution case to adversarial testing—to bring out all the facts and help the courts find the truth.

*Id.*

50. *See Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. (2002)* at [http://www.senate.gov/%7Ejudiciary/testimony.cfm?id=290&wit\\_id=634](http://www.senate.gov/%7Ejudiciary/testimony.cfm?id=290&wit_id=634) [hereinafter *Hearing: Proposals to Reform the Death Penalty*] (testimony of James S. Liebman, Simon H. Rifkind Professor of Law, Columbia Law School) ("The single most common reason for capital reversals at the state post-conviction and federal habeas stages of review—accounting for over a third of the reversals at those stages—is egregiously incompetent defense lawyering.") (on file with the *New York University Journal of Legislation and Public Policy*); *Hearing on H.R. 912, supra* note 12, at 18 (statement of Peter Neufeld) ("DNA technology is no substitute for competent counsel, and nothing guarantees the conviction of the innocent more than incompetent, ill-trained or ineffective defense counsel.").

51. S. REP. NO. 107-315, at 20–21. *See also Hearing on S. 486, supra* note 20, at 62 (testimony of Senator Patrick Leahy, Chairman, Senate Judiciary Comm.) (stating that competent counsel is necessary "to know when and how to ask for DNA evidence and determine whether it is available").

52. Innocence Protection Act, S. 486, 107th Cong. § 201 (2001) (reported).

53. *See* S. REP. NO. 107-315, at 21–23 (criticizing several capital cases where attorneys were paid hourly rates between \$11.84 and \$20 per hour, and one case where counsel received a total of \$500); *id.* at 29 (describing North Carolina's system, which

fense attorneys and to train and monitor the attorneys' performance.<sup>54</sup> Section 202 authorizes enforcement lawsuits by any private party against the state to ensure that federal requirements are being met.<sup>55</sup> Finally, if a state does not qualify for a grant under § 201 or chooses not to apply, § 203 authorizes qualifying private capital defense organizations in that state to receive grants to supplement their programs.<sup>56</sup>

Congressional debates have confronted three main points of contention with respect to Title II: first, whether incompetence of counsel is indeed a pervasive national problem in capital cases; second, assuming incompetent representation is a problem, whether it can be addressed by Title II's minimum standards for competency and increased compensation; and third, whether the Constitution, or at least federalism concerns, forbids Congress from intervening and forcing states to either forego funding or adopt federal standards. Considering each of these points in turn reveals the pervasive disagreement among legislators that will likely be the main obstacle to the Act's passage in the 108th Congress.

## ii. *Competence of counsel*

Critics argue that the protections of Title II are simply unnecessary, pointing out that the Sixth Amendment already guarantees competent counsel, and that therefore the provisions of the IPA are superfluous.<sup>57</sup> But others point out that capital defendants—who have life, the greatest liberty interest, at stake—are often afforded some of the least experienced and most incompetent attorneys.<sup>58</sup> Indeed, at

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authorizes rate of \$85 per hour for in-court and out-of-court work, as one example of "effective system").

54. S. 486 § 201(d).

55. *Id.* at § 202.

56. *Id.* at § 203.

57. See, e.g., *Hearing on S. 486*, *supra* note 20, at 57 (statement of Kevin Brackett, Deputy Solicitor, 16th Circuit, S. Carolina) (noting that a remedy for this problem is already in place). *But see id.* at 39 (statement of Stephen B. Bright, Director, Southern Center for Human Rights) (quoting Judge Alvin Rubin of U.S. Fifth Circuit Court of Appeals as observing in his concurrence in *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986), that "[t]he Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel."). Bright also quotes a Houston trial judge as saying that while the Constitution guarantees a lawyer, "[t]he Constitution doesn't say the lawyer has to be awake." *Id.* at 39 (citing John Makeig, *Asleep on the Job; Slay Trial Boring, Lawyer Said*, Hous. CHRON., Aug. 14, 1992, at A35).

58. See Stephen Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); *Hearing on S. 486*, *supra* note 20, at 38–40 (statement of Stephen B. Bright, Director, Southern Center for Human Rights) (stating that "representation provided to poor people in capital cases is often a scandal," and citing decisions from several states upholding

least one bipartisan committee report has characterized the lack of competent counsel as “the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error including the real possibility of executing an innocent person.”<sup>59</sup> As noted by *The New York Times*, Justice Sandra Day O’Connor expressed concern about these issues in a 2001 speech, stating not only that defendants with more money receive better legal defense, but also that “[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed.”<sup>60</sup>

For empirical support, proponents of the Act’s competent counsel provisions rely heavily on the influential studies led by Columbia Law School Professor James S. Liebman.<sup>61</sup> In two studies conducted over eleven years, Liebman and a team of researchers undertook an extensive review of the occurrence of serious, reversible error in state capital verdicts, focusing on common causes of such error and ways to remedy it.<sup>62</sup> Evaluating the seriousness of the errors and the conditions that produced them, Liebman reported to the Senate Judiciary Committee that “[t]he single most common reason for capital reversals

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convictions and death sentences where attorneys were asleep, intoxicated, or otherwise infirm during important phases of trials). Bright also cites one court-appointed capital counsel who, when pressed by a judge, could only name one criminal case, and of another attorney who had never hired an investigator in forty years of providing court-appointed defense. *See id.* at 39.

59. The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty*, available at [www.constitutionproject.org/dpi/MandatoryJustice.pdf](http://www.constitutionproject.org/dpi/MandatoryJustice.pdf) (on file with the *New York University Journal of Legislation and Public Policy*).

60. Editorial, *O’Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9. O’Connor also stated that “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.” *Id.*

61. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002), available at <http://www.law.columbia.edu/brokensystem2/> (on file with the *New York University Journal of Legislation and Public Policy*); JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1975 (2000), available at <http://www.law.columbia.edu/instructionalservices/liebman/> (on file with the *New York University Journal of Legislation and Public Policy*). The study’s inspection of the 5,826 state capital verdicts delivered from 1973 to 1995 revealed reversible errors in at least 68% of the verdicts. *Id.* at 9. While DNA exonerations may account for some of these cases, such evidence is only available in 20% of all felony cases. *See Hearing on H.R. 912, supra* note 12, at 18 (statement of Peter J. Neufeld, Co-Director, Innocence Project, Benjamin N. Cardozo School of Law). In addition, it would be inaccurate simply to state that 48% of the reversals were a result of ineffective lawyering. Rather, the previously mentioned 20% figure accounts for all felony cases, and capital cases only constitute a certain percent of all felony cases. Nor may one presume that reversals were granted in all cases where DNA evidence was available.

62. *Hearing: Proposals to Reform the Death Penalty, supra* note 50 (statement of James S. Liebman, Simon H. Rifkind Professor of Law at Columbia Law School).

at the state post-conviction and federal habeas stages of review—accounting for over a third of the reversals at those stages—is egregiously incompetent defense lawyering.”<sup>63</sup> The Liebman study supports the belief shared by Professor Stephen Bright and Justice O’Connor that as the system currently exists, individuals are not sentenced to death because they committed the worst crimes, but because they were appointed the worst attorneys.<sup>64</sup>

Senator Hatch dismisses the findings of the Liebman study,<sup>65</sup> simply disagreeing with the idea that the system is “broken.”<sup>66</sup> Hatch points out that the high number of reversals suggests that the appellate and habeas systems for review have been effective in identifying and ultimately rectifying errors at the trial and appellate levels.<sup>67</sup> Representative Delahunt disputes the suggestion that because so many errors have been discovered and reversed, the system is working: “We cannot tolerate a system that relies on reporters and journalism students<sup>68</sup> to develop new evidence that was never presented at trial, a system in which luck or chance plays such a profound role in determining whether a defendant lives or dies.”<sup>69</sup>

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63. *Id.* Liebman’s study also found that error and innocence rates were much higher in the states and counties imposing the death penalty more frequently (per 1000 homicides) than in jurisdictions that reserved the penalty for the most extreme cases. *Id.* The Columbia researchers also noted a strong positive correlation between states that spend the least on their capital trial courts (an important part of which is the compensation of defense lawyers) and higher rates of capital reversals at the direct appeal stage, finding a lower rate of reversals in states that spend more on capital trials. *Id.*

64. *See* Bright, *supra* note 58.

65. S. REP. NO. 107-315, at 69–74 (2002).

66. *Id.* at 49.

67. *Id.* at 51.

68. This and other references to journalism students refer generally to the work done by the more than thirty United States journalism and law schools belonging to the Innocence Network. *See* Medill Innocence Project at <http://www.medill.northwestern.edu/specialprograms/innocence/> (on file with the *New York University Journal of Legislation and Public Policy*). The Center for Wrongful Convictions at Northwestern University Law School, along with the Innocence Project in New York, has helped exonerate more than a hundred prisoners nationally over the last decade and led the call for blanket clemency in Illinois. *See* Jodi Wilgoren, *Illinois’ Longest-Serving Inmate’s New Hope of Freedom*, N.Y. TIMES, Apr. 4, 2002, at A16.

69. *Hearing on S. 486, supra* note 20, at 4 (testimony of Rep. William D. Delahunt) (citation added). *See also id.* at 71–72 (statement of Beth A. Wilkinson, Co-chair, The Constitution Project’s Death Penalty Initiative) (stating that fact that journalism students and pro bono lawyers come into a case at last minute and find facts—sometimes obvious facts—that free people from death row only shows that “with more diligence and better representation, we will find that there are more of these problems, not less”).

iii. *Effective Counsel and Reliability of Convictions*

The main argument advanced in favor of Title II is that particularly in cases where no biological evidence is available, a properly functioning adversary system is the best guarantee of reliability,<sup>70</sup> and that such a system cannot exist without what Title II seeks to provide: capital defense attorneys who have the experience and the resources to be effective advocates for their clients.<sup>71</sup>

Critics, including Alabama Attorney General William Pryor, charge that the Act would “lengthen and complicate an already byzantine system.”<sup>72</sup> Some prosecutors associate zealous defense attorneys with an endless stream of frivolous motions<sup>73</sup> that are even “deceitful and sadistic” and that serve only to prolong emotional trauma for victims’ families.<sup>74</sup> Beth Wilkinson, a lead prosecutor in the Oklahoma City bombing cases,<sup>75</sup> disagrees. Wilkinson testified before Congress that nothing is more important, especially in capital litigation, than the zealous representation of defendants; indeed, competent defense representation “makes the job of a prosecutor much easier” by ensuring fair trials with a minimum of post-conviction challenges, and by assur-

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70. In the extraordinary, but nonetheless compelling, case of Elmer “Geronimo” Pratt, where no DNA evidence was available, it took a highly qualified and dedicated team of attorneys, which included Johnnie Cochran, twenty-six years to prove Mr. Pratt’s innocence. See JACK OLSEN, *LAST MAN STANDING: THE TRAGEDY AND TRIUMPH OF GERONIMO PRATT* (2000). Indeed, Mr. Pratt would have been executed if the Supreme Court had not found the death penalty unconstitutional as applied in 1972. See *id.* at 475. For what might be classified as a more typical case, see *Hearing on S. 486, supra* note 20, at 42–45 (statement of Michael Graham).

71. S. REP. NO. 107-315, at 21 (“The adversarial system of justice depends on competent defense lawyers to hold the Government to its proof and uncover flaws in the Government’s case.”).

72. See *Hearing on S. 486, supra* note 20, at 21 (statement of Bill Pryor, Attorney General of Alabama).

73. See, e.g., *id.* at 65–66 (statement of Sen. Jeffrey Sessions) (quoting head of the Illinois Capital Resource Center that “[s]ometimes, counsel should file motions just to make trouble . . . [f]ile all kinds of motions . . . Constantly make a record and constantly make trouble.”).

74. See, e.g., Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1 (quoting Jennifer Joyce, St. Louis’s circuit attorney). See also S. REP. NO. 107-315, at 48. “[The Act] does not adequately protect against convicted criminals filing frivolous post-conviction applications in order to ‘game’ the system.”

75. One hundred sixty-eight people were killed when the Alfred P. Murrah Federal Building in Oklahoma City was bombed on April 19, 1995. Timothy J. McVeigh, who was executed on June 11, 2001, for his role in the bombing, was the first federal prisoner to be put to death since 1963. See Rick Bragg, *McVeigh Dies for Oklahoma City Blast*, N.Y. TIMES, June 12, 2001, at A1. Terry Nichols, McVeigh’s co-defendant, received a life sentence but now faces state capital murder charges in Oklahoma. See Jo Thomas, *Oklahoma Prosecutor to Seek Death for Bombing*, N.Y. TIMES, Sept. 6, 2001, at A14.

ing victims, families and society that justice has been served and the right person has been convicted.<sup>76</sup> Noting that overturned verdicts create suffering for victims' families and undermine public confidence in the justice system, Wilkinson testified that in her experience, "[h]aving a competent defense attorney . . . ensures that an appealable procedural error does not occur which could lead to reversal."<sup>77</sup>

Similarly, the ABA Standards for Criminal Justice and the Model Code of Professional Responsibility characterize the prosecutor's job as closer to a search for justice than a quest for convictions.<sup>78</sup> Because a prosecutor is ethically bound to avoid the prosecution of innocent defendants,<sup>79</sup> her goals are more likely to be advanced where counsel is competent enough to uncover exculpatory evidence during trial.

The Senate version of § 203 from the 107th Congress reflects a compromise in the form of an amendment that would allow the Attorney General to consider, in deciding which capital defender organizations to fund, "whether an organization has been found to have filed large numbers of frivolous claims in State capital cases, with the effect of unreasonably delaying or otherwise interfering with the State's administration of its capital sentencing scheme."<sup>80</sup>

The Act's provision for an independent authority to appoint and oversee counsel is also designed to support an effective adversary system, on the theory that allowing judges to make such appointments can be problematic. An attorney's ability to advocate zealously for an individual client can be constrained by fear of reprisals from a judge before whom she will have to appear in the future—a judge who can therefore withhold future appointments and reduce or refuse payments for the attorney's time.<sup>81</sup> Also, a judge's interests in re-election<sup>82</sup> and maintaining a clear docket can conflict with her knowledge that ap-

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76. *Hearing on H.R. 912, supra* note 12, at 29 (statement of Beth A. Wilkinson, Co-Chair, The Constitution Project's Death Penalty Initiative, Constitution Project).

77. *Id.* at 29. The federal government's prosecution of Timothy J. McVeigh resulted in a death sentence and no successful appeals. *Id.*

78. ABA STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function and Defense Function Standard 3–3.9(c) (3d ed. 1993); MODEL RULES OF PROF'L CONDUCT EC 7–13 (1981).

79. *See* STANDARDS, *supra* note 78.

80. Innocence Protection Act, S. 486, 107th Cong. § 203(f) (2001); S. REP. NO. 107-315, at 33 (2002) (reported).

81. *See* S. REP. NO. 107-315, at 26 (referring to *Hearing: Proposals to Reform the Death Penalty, supra* note 50 (statement of Norman Lefstein, Dean of Indiana University School of Law, on behalf of American Bar Association) ("While there are obviously many fine judges who preside over criminal cases, there are occasions when judges are angered by motions filed by defense attorneys, resent arguments advanced by counsel, and rule against lawyers insistent on continuances.")).

pointing a zealous attorney may result in protracted litigation at the trial stage, as an experienced attorney will file whatever motions are necessary to ensure ample time and opportunity to investigate each case.<sup>83</sup> Opponents argue that judges are more neutral than adversaries on either side, and that any “independent” appointing authority will likely be entirely staffed by anti-death penalty advocates.<sup>84</sup> Some prosecutors also fear that in many jurisdictions, higher standards would cause the number of lawyers available for capital cases to be so reduced that significant front-end delays would result from efforts to assign counsel in capital cases.<sup>85</sup>

Proponents of Title II agree that zealous anti-death penalty advocates are likely to take over capital representations under an independent authority, but only because no one else is likely to step up for such emotionally exhausting, intellectually challenging, and low-paying work.<sup>86</sup> They assert that the resulting pool of skilled and experienced attorneys will benefit everyone in the process by streamlining litigation and avoiding reversible errors at trial.<sup>87</sup> As to the idea that standards will be too high, proponents also agree that only a small percentage of attorneys are equipped with the training, experience, and resources to handle a capital trial, but insist that raising standards is necessary to ensure that the system does not fail defendants and society.<sup>88</sup>

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82. See *Hearing on S. 486, supra* note 20, at 34–35 (statement of Stephen B. Bright, Director, Southern Center for Human Rights) (describing Alabama case where judge in charge of appointing attorneys sentenced man to death over jury’s recommendation of life in prison and then ran television commercials during his reelection campaign showing people he had sentenced to death).

83. See *id.* at 40 (statement of Stephen B. Bright, Director, Southern Center for Human Rights) (stating that almost half of judges in Texas, responding to survey, said that attorney’s reputation for moving cases quickly, regardless of quality of defense, was factor that entered into their appointment decisions).

84. See *id.* at 47 (statement of Ronald Eisenberg, Deputy District Attorney of Philadelphia).

85. *Id.* at 17 (statement of Sen. Orrin Hatch, Member, Senate Judiciary Comm.). See also *Hearing on H.R. 912, supra* note 12, at 25 (testimony of Robert A. Graci, Assistant Executive Deputy Attorney General, Law and Appeals, Criminal Law Division, Pennsylvania) (echoing concern about shortage of qualified counsel, and adding that setting such “impossible” standards could even amount to de facto abolition of death penalty).

86. See *Hearing on S. 486, supra* note 20, at 53 (statement of Beth A. Wilkinson, Co-chair, The Constitution Project’s Death Penalty Initiative).

87. See *id.* at 52–53; see also *supra* Part II.B.iii.

88. See *Hearing on S. 486, supra* note 20, at 4–5 (statement of Rep. William Delahunt); *id.* at 77 (statement of Stephen B. Bright, Director, Southern Center for Human Rights) (“[J]ust having any lawyer in town represent somebody in a death penalty case is sort of like if someone in town [needs] brain surgery, and you say, well, we

Compensation of counsel also plays a role in the effectiveness of the adversary system.<sup>89</sup> Wilkinson notes that defending a capital case is costly and time-consuming, and the fact that many states offer “shockingly low” compensation and often refuse to make available funds for the necessary expert and investigative support that is crucial to an adequate defense yields the result that “often the only attorneys willing to take on such cases are those with little experience and lacking the resources or desire to adequately investigate the facts.”<sup>90</sup> The main argument against increasing compensation is that it is both unnecessary and prohibitively costly. Those who support the measure argue that better representation, which necessarily entails better compensation, is so fundamental to correcting failures of the system that the justice system cannot afford *not* to increase compensation.<sup>91</sup>

#### IV.

##### FEDERALISM CONCERNS

The final main objection to the Act’s minimum standards for competency of counsel provisions mirrors an argument against the DNA provisions—that by legislating in this area, Congress would be interfering with states’ rights, and that indeed many states have already set appropriate standards.<sup>92</sup> Senator Hatch, who asserts that there is no significant, systemic problem in the quality of representation in state courts, believes that even if such a problem existed, it

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don’t have any brain surgeons in this town, but there’s a chiropractor down the street.”).

89. See S. REP. NO. 107-315, at 22 (2002) (citing *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992)). *Martinez-Macias*, who spent nine years on death row and came within two days of execution before his conviction was overturned, was represented by an attorney who did virtually nothing to prepare for trial: “We are left with the firm conviction that *Martinez-Macias* was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The State paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for.” *Martinez-Macias*, 979 F.2d at 1067. But see S. REP. NO. 107-315, at 211–12 (disputing notion that *Martinez-Macias* was actually innocent).

90. *Hearing on H.R. 912*, *supra* note 12, at 30 (statement of Beth A. Wilkinson, Co-chair, The Constitution Project’s Death Penalty Initiative).

91. S. REP. NO. 107-315, at 9 (“It has also been suggested that our society cannot afford to pay for the reforms proposed by this bill . . . [t]he truth, however, is that we cannot afford to do otherwise if our system of justice is to have the confidence of the American people.”).

92. See *Hearing on S. 486*, *supra* note 20, at 46–47 (statement of Ronald Eisenberg, Deputy District Attorney of Philadelphia) (“States . . . have been promulgating these standards on their own, without federal compulsion, for many years,” and also that “[i]f we’re going to trust the state courts are properly reversing in the cases where they are, then we should trust the results in the cases, where after years of review, they do not reverse those cases.”); see *supra*, Part II.A.iii.

could be solved simply by providing additional funding to the states without imposing federal standards.<sup>93</sup>

Senator Leahy, on the contrary, insists that “Congress has a duty to get involved because the crisis is national in scope,”<sup>94</sup> citing the staggering number of death row exonerations since 1973 and the number of state capital systems that have sent innocent people to death row.<sup>95</sup> Further, the IPA’s supporters note that sixteen of the thirty-eight states with capital punishment still do not have standards for competency of counsel at trial or post-conviction,<sup>96</sup> and state that federal intervention is justified because the problem “calls into question the legitimacy of criminal convictions and undermines public confidence in the integrity of the criminal justice system as a whole.”<sup>97</sup>

### C. *Miscellaneous Provisions*

The remaining provisions of the IPA have not generated nearly as much controversy as Titles I and II. Title III of the Act, § 301, would grant an immediate stay of execution to defendants whose cases have been granted certiorari and are awaiting review by the U.S. Supreme Court.<sup>98</sup> The provision would require the Court to treat motions for stays of execution as petitions for certiorari.<sup>99</sup> Chief Justice William Rehnquist asserted to the Committee that § 301 is unnecessary, because the Court’s practice is already to issue a stay when granting a petition for certiorari, and that in any event, such decisions are best left to the discretion of the Court.<sup>100</sup> Chief Justice Rehnquist also argued that the provision as drafted would limit the information available to the court when deciding whether or not to grant a petition, because motions for a stay often do not include as much information as petitions for certiorari.<sup>101</sup> Senator Arlen Specter asserts that the reform is nonetheless necessary, because a procedural idiosyncrasy

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93. S. REP. NO. 107-315, at 90–91.

94. *Hearing on S. 486, supra* note 20, at 14 (statement of Sen. Patrick Leahy, Chair, Senate Judiciary Comm.).

95. *See Innocence: Freed From Death Row, supra* note 17 (stating that as of January 2003, 107 inmates from twenty-five different states had been released from death row).

96. *Hearing on H.R. 912, supra* note 12, at 10–11 (testimony of Paul A. Logli, State’s Attorney, Winnebago County, Illinois, representing National District Attorneys Association).

97. *Hearing on S. 486, supra* note 20, at 14 (statement of Sen. Patrick Leahy, Chair, Senate Judiciary Comm.).

98. Innocence Protection Act, S. 486, 107th Cong. § 301 (2001) (reported).

99. *Id.*

100. S. REP. NO. 107-315, at 107 (2002).

101. *Id.*

created by the fact that four votes are required for a grant of certiorari and five votes for a stay of execution permits a prisoner receiving only the minimum four votes for certiorari to be executed before her case may be heard.<sup>102</sup> This is precisely what occurred in *Hamilton v. Texas*,<sup>103</sup> where the Court granted certiorari but not a stay; James Edward Smith was executed before his case was heard, and the Court subsequently denied Smith's petition as "moot."<sup>104</sup>

Title IV of the Act governs compensation in cases of unjust imprisonment. Section 401 would increase the amount of damages that may be awarded in federal unjust imprisonment cases, raising the maximum rate that the U.S. Court of Federal Claims may order the United States to pay, if the person proves she was factually innocent of the offense of which she was convicted, from \$5,000 per case to \$10,000 per year incarcerated.<sup>105</sup> Opponents agree that an increase in compensation may be warranted, but would limit compensation to capital cases.<sup>106</sup> Section 402 contains Congress' judgment that states should also provide reasonable compensation to persons found to have been convicted unjustly of state offenses and sentenced to death, noting that fewer than twenty states have statutes requiring such compensation now, and that due to caps in the statutes, such compensation as exists is, in most cases, unreasonably low.<sup>107</sup>

Finally, Title V of the Act would establish loan repayment for lawyers who agree to serve as full-time prosecutors or public defenders for a minimum of three years.<sup>108</sup> Section 501 would provide for repayment of Stafford loans and would extend forgiveness of Perkins loans (currently available only to prosecutors) to public defenders.<sup>109</sup> This provision has not engendered much, if any, opposition.<sup>110</sup>

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102. *Id.* at 33–34.

103. *Hamilton v. Texas*, 498 U.S. 908 (1990).

104. *Id.* at 911 (Stevens, J., concurring).

105. Innocence Protection Act, S. 486, 107th Cong. § 301 (2001) (reported).

106. S. REP. NO. 107-315, at 107 (2002).

107. *Id.* at 35–37; S. 486 § 402. When Michael Graham was released from Louisiana's death row on Dec. 28, 2000, he received only a \$10 check and a coat that was five sizes too big. *Hearing on S. 486, supra* note 20, at 43 (testimony of Michael Graham).

108. S. 486 § 501.

109. *Id.*

110. S. REP. NO. 107-315, at 107–08.

## III.

## CONCLUSION

Although this year marks the third straight Congress in which the Innocence Protection Act has been introduced, there is reason to believe that the social and political climate is now ripe for its passage. While public support for the death penalty remains high, it has steadily declined during the past few years.<sup>111</sup> This trend has been attributed largely to increasing media exposure to the failings of our criminal justice system as reflected by the growing number of exonerations.<sup>112</sup> With each innocent prisoner set free, the public has acquired a greater awareness of the errors embedded within this country's present capital punishment system.

In addition, various branches of both state and federal government have recently expressed an interest in remedying the system's inadequacies. Notably, less than a year ago, the Supreme Court significantly restricted the application of the death penalty by requiring jury imposition of a death sentence<sup>113</sup> and prohibiting the execution of the mentally retarded.<sup>114</sup> Furthermore, despite Governor George Ryan's recent departure as Illinois governor, the state's present governor, a pro-death penalty advocate, has opted to maintain Ryan's moratorium, noting the same concerns expressed by the prior administration.<sup>115</sup> Moreover, Maryland's Attorney General recently voiced his concern that the state's capital punishment system is unduly discriminatory.<sup>116</sup> Consequently, he has lobbied for the abolition of Maryland's death penalty.<sup>117</sup>

Perhaps prompted by these alarming events, the IPA has enjoyed increasing support even in a Republican-controlled Congress. Although the hesitation of several key members of Congress to embrace some of the Act's core provisions represents a clear threat to its momentum, the current climate is in many respects ideal for capital punishment reform, and the Innocence Protection Act's passage seems attainable in the 108th Congress.

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111. See Kirchmeier, *supra* note 7.

112. See *id.* at 3.

113. Ring v. Arizona, 536 U.S. 584 (2002).

114. Atkins v. Virginia, 536 U.S. 304 (2002).

115. See Jodi Wilgoren, *Illinois Prosecutors Assess Death Penalty's New Era*, N.Y. TIMES, Jan. 14, 2003, at A18.

116. See Adam Liptak, *Top Lawyer in Maryland Calls For an End to Executions*, N.Y. TIMES, Jan. 31, 2003, at A19.

117. See *id.*

