Changing Views on the Death Penalty in the United States

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Introduction

The death penalty has been a firmly established institution in the United States since its inception. Dating back to the colonial period of the early 1600s, through the establishment of the United States under its present constitution in 1787, right through to the present day, the death penalty has been part of U.S. law and practice. During that time, there have been over 15,000 executions in the U.S. The period from 1900 to 1950 represented the most prolific use of the death penalty in our history for any comparable period of time.[1]

Executions were halted briefly between 1967 and 1977 as the U.S. Supreme Court considered and then ruled on the constitutionality of the death penalty. The Court held in 1972 that the existing practice of capital punishment was so arbitrary and unpredictable that it violated our constitutional prohibition against cruel and unusual punishments.[2] But states quickly revised their statutes, and some of these new laws met the Court's approval in 1976.[3] Executions resumed and slowly rose to a level of almost 100 in one year.

However, since the start of the new millennium in 2000, the death penalty has taken a very different course, and that change is the principal subject of this paper. To put these changes in perspective, it is helpful to review more closely the direction that capital punishment was heading in the U.S. just 10 years ago.

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Reversal in Death Penalty Trends

In the mid-1990s, the death penalty seemed to be finally achieving what it had been designed to do. The number of executions went steadily up, reaching 98 executions in 1999. The number of people on death row increased every year from when the death penalty was reinstated in 1976 until 1999 as more and more people were sentenced to death.[4] New states, such as Kansas and New York, added the death penalty to their laws in 1994 and 1995 respectively. In 1994, the federal government, whose laws affect all 50 states, but which had not been a significant participant in the country's death penalty for thirty years, expanded its capital punishment statute, making 60 offenses eligible for the death penalty, instead of the one capital offense of the previous law.

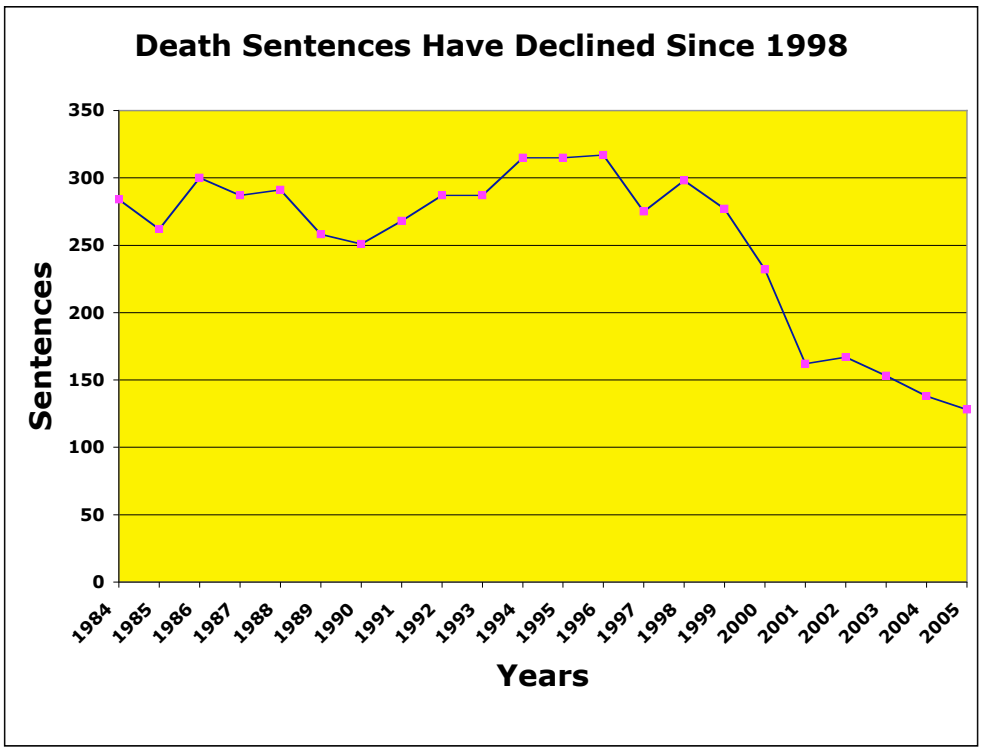
Generally, the public wanted the death penalty applied more often and more quickly. Moreover, the country had just experienced a deadly act of terrorism in 1995 by one of its own citizens in the Oklahoma City bombing. In the wake of that attack, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 to speed up the death penalty. The death penalty was supported by 80% of the American public in 1994.

Conditions were ripe for a continuation of this expansion of the death penalty in the current decade. In 2000, the U.S. elected a president, George Bush, who as governor of Texas had presided over 152 executions, the most of any modern governor at the time. He was not elected *because* of those executions or because of his death penalty position, but the election certainly symbolized that the U.S. was a country that supported capital punishment.

But contrary to many expectations, the use of the death penalty in the U.S. has significantly declined over the past six years.[5] Executions in 2006 dropped to their lowest level in 10 years as many states grappled with problems related to wrongful convictions and the lethal injection process. The number of death sentences and the size of death row also decreased. And public support for the death penalty has markedly declined.

In 2006, New Jersey became the first jurisdiction to formally bar executions through the legislative process. It appointed a study commission to review its capital punishment system, and that commission overwhelmingly recommended that the state abolish the death penalty.[6] In Illinois, an earlier ban executions established by the governor, continued for the seventh year. New York's legislature rejected attempts to re-instate the death penalty, which had been overturned in 2004. North Carolina and California, while not halting executions, began legislative studies of their capital punishment systems.

The annual number of death sentences is now at its lowest level in 30 years. The number of death sentences remained steady at about 300 per year in the 1990s, but began to drop in 1999, and has declined almost 60% since then. The Bureau of Justice Statistics recorded 128 death sentences in 2005, down from 138 in 2004.[7] The initial projection for 2006 is another decline to just over 100 death sentences. Even in Texas, the leading death penalty state, death sentences have dropped 65% in the past 10 years.



The 53 executions in 2006 was the lowest number since 1996, when there were 45 executions in the country.[8] With over 3,000 people still on death rows across the

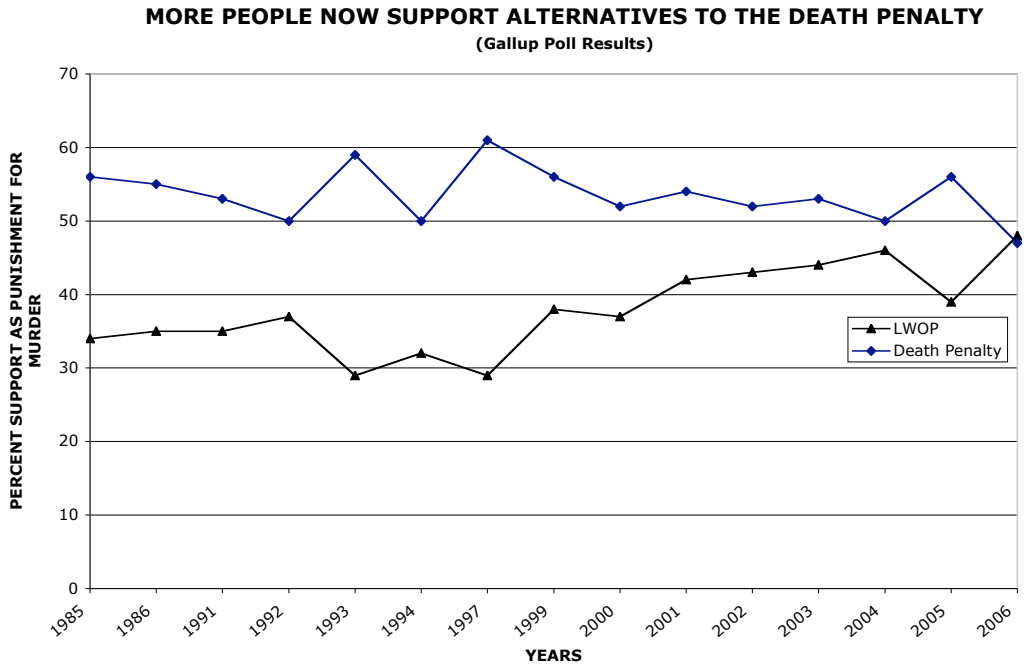
country, executions could increase in the near future. But eventually, the smaller number of death sentences should directly affect the number of executions.



Executions are down 45% since their highpoint in 1999. The size of death row also decreased in 2006, continuing an annual decline that began in 2000 after 25 years of steady increases. A sign of the death penalty's isolation even within the U.S. is that 83% of those executed in 2006 were from only one of our four geographical regions--the South; none were from the Northeast.

Life Without Parole and Public Support

Overall, public support for the death penalty remained about the same in 2006 compared to 2005, but it has dropped from 80% support in 1994. The Gallup Poll, which has consistently asked the U.S. public about their views on the death penalty for many decades, indicated that about 65% of the American public still supports the death penalty for murder. However, for the first time in the 20 years that the Gallup Poll has tested support for the death penalty as compared to a sentence of life-without-parole, more people chose the life-without-parole option as the proper punishment for murder (48% to 47%).[9] Virtually every state in the country now employs a sentence of life without parole, a significant change from 20 years ago.



The sentence of life in prison with no opportunity for early release, commonly referred to as life-without-parole or LWOP, is a relatively new sentence in American jurisprudence. When the Supreme Court struck down the death penalty in 1972, there were about 600 people on death row. All of those inmates' death sentences were reduced to life sentences, and in almost every case that meant that the inmate was eligible for parole at some point.[10] Today, that is no longer true.

Thirty-seven of the 38 death penalty states now employ a sentence of life-without-parole.[11] Texas was the most recent state to make this change, having done so in 2005.[12] In addition, 11 of the 12 states without the death penalty also have this sentence, as does the federal government and the military courts. Formerly, juries in capital cases were typically asked to choose a sentence of either life or death. The extent of a "life" sentence was not explained, and many jurors rightly believed that an inmate with a life sentence could still be released from prison at some point.

However, because of a series of U.S. Supreme Court rulings and because states have added LWOP as a sentence, juries in death penalty cases are now being told that they have the option of sentencing an inmate to life without parole instead of death.[13]

This sentence represents an attractive compromise for both jurors and the public at large. A sentence of LWOP is a harsh punishment, and guarantees that the inmate will not be a threat in the community in the future. On the other hand, it does not carry the same risks as a death sentence. If new evidence emerges exonerating an inmate sentenced under LWOP, he can still be released. If he had been executed, no remedy would suffice.

Public opinion polls indicate that people prefer this alternative. As the chart above illustrates, the public was skeptical of LWOP twenty years ago, and gave much greater support to the death penalty as the proper punishment for first degree murder. Today, the public is about evenly split, with slightly more preferring the LWOP alternative over the death penalty.

Citizens serving as jurors in capital cases are being given these same alternatives. Death sentences have dropped dramatically since LWOP became a realistic alternative sentence, although other factors discussed below may also be contributing to the drop in death sentences.

The public retains some hesitation about this sentence because of the high costs of keeping someone in prison for life. Many people mistakenly believe that executions provide an inexpensive alternative to incarceration because the inmate no longer has to be housed, fed, and given medical care. But public education on the legal costs of the death penalty have helped many people to realize that it is the death penalty that costs more than even a lifetime of incarceration.[14] Death penalty trials are much more expensive than typical trials at every step of the process: securing competent representation, jury selection, expert testing and testimony, separate proceedings for guilt and sentencing, and a lengthy appeals process. In part because of the advent of DNA testing, the public better understands that appeals are necessary to avoid the fatal mistake of executing an innocent person.

Prosecutors also know that juries may be more hesitant to impose the death penalty because of the mistakes that have been made in the past and because of the availability of life-without-parole sentences. Hence, they may be more willing to accept

plea bargains to life sentences, or decline to seek the death penalty in the first place. This decision might be more difficult for them if life without parole sentences were not an option. Prosecutors can promise the family of the murder victim that the defendant will be severely punished, will not be released back into the community, and that the case will be essentially over. A death sentence presents the victim's family with years of uncertainty.

In some states like New Jersey and New Mexico, there are legislative efforts to replace the death penalty entirely with a sentence of life-without-parole. In such places, the public is frustrated that the death penalty is rarely carried out and frequently overturned on appeal. Although an LWOP sentence can also be appealed, the sentence is served immediately, instead of the 10-year delay that is typical in capital cases. And the U.S. Supreme Court, which regularly hears many death cases each year, has no such body of law around LWOP, whose constitutionality is widely accepted.

Other Death Penalty Developments

ELECTIONS

In the past, it was difficult for a candidate in many death penalty states to be elected if he or she opposed the death penalty. A position against capital punishment put a candidate immediately on the defensive, and the candidate would be labeled as siding with criminals and ignoring victims and law enforcement. Gradually, that stereotyping has changed, and now the death penalty itself is often on the defensive. This past election saw a number of candidates elected who publicly challenged the death penalty. Governors in Maryland, Massachusetts, and Wisconsin were elected in 2006 despite opposing the death penalty. In Illinois, voters re-elected a governor who has continued the moratorium established by Gov. George Ryan. They joined other governors such as those in Virginia and New Jersey, who oppose capital punishment.

U.S. SUPREME COURT

One of the most revealing statements from the Supreme Court in 2006 came in a relatively minor case. Four Justices dissenting in *Kansas v. Marsh*[15] stated that a new era

had been ushered in by DNA testing, and they called for greater scrutiny in capital cases because of the "repeated exonerations . . . in numbers never imagined before."

These words, though echoed in dissent, followed significant other opinions in the past six years overturning years of precedence upholding a broad death penalty. In 2002 in *Atkins v. Virginia*,[16] the Court struck down the practice of allowing those with mental retardation to be executed. In 2005 in *Roper v. Simmons*,[17] they took the same step with respect to juvenile offenders. In both instances, the Court made reference to input from the international community. And in both instances, they overturned decisions allowing such executions in 1989.

The Court has also reversed a number of cases because the legal representation afforded to the defendant was constitutionally inadequate.[18] Prior to 1999, the Court had never reversed a death penalty sentence because of the quality of representation. In recent years, the Court has taken six cases from Texas, the state with the greatest number of executions, and sent them back repeatedly for re-sentencing and re-trials.[19]

REASONS FOR THE CHANGE

Why has the direction of the death penalty in the U.S. changed so dramatically in the past six years? One important reason is that the issue of innocence has had a profound impact on the death penalty debate. Since 1973, one hundred and twenty-four people have been exonerated and freed from death row.[20] About half of these exonerations took place in the past ten years. Many other people not on death row have been freed from prison through newly discovered DNA evidence, also in the past decade.[21]

The innocence issue has captured the attention of Supreme Court Justices, religious and political leaders, and even former supporters of the death penalty. Moreover, the innocence issue has firmly established itself in the popular culture through books by such authors as John Grisham and Scott Turow,[22] and in movies and television programs. Since no one supports the taking of innocent life, and since the risk of wrongful executions cannot be entirely eliminated, the punishment itself is on the defensive, not just its use against innocent defendants.

The issue of innocence is important because its effect is not only felt when the innocent go free, but also in every case to which reforms are applied. The impact of this issue is not that it only leads people to the obvious conclusion that we should not execute the innocent, but also that it draws them into questioning the death penalty itself.

In 1999, an inmate named Anthony Porter was freed from death row in Illinois primarily through the investigative work of a group of journalism students. He would have been executed except that he received a stay to examine his mental competency. During that time, his case was assigned to a group of college students as an academic exercise to see if they could find any problems with the way the case was reported by the courts and the media. The students were able to completely undermine the prosecution's case, finding that a key witness had lied, and even finding the real killer who confessed to the crime on videotape.

That is a wonderful story of redemption, but the public is also concerned about how a mistake of this proportion happened? How could Porter's case go through our careful legal process without someone discovering that he was innocent? Why were journalism students able to solve this case in a few months when the legal system had failed to arrive at the most basic truth over many years?[23]

Each of the 124 exonerations, like Anthony Porter's, has a different story behind it. But consistent themes run through these miscarriages of justice: faulty eyewitness identifications, ineffective lawyers, withheld evidence, and false confessions. As a result, innocence cases have sparked a series of reforms that have affected every death penalty prosecution and many non-death penalty cases, as well.[24] Although the quality of capital representation is still grossly inadequate in many areas,[25] some states have now adopted standards for capital representation, lifted unreasonable caps on compensation, and allowed the admission of new evidence arising after conviction.[26] Moreover, many jurors are demanding a higher degree of proof of guilt before they are willing to impose a death sentence.

PUBLIC OPINION POLL

According to a national public opinion poll conducted in 2007,[27] the U.S. public is losing confidence in the death penalty. People are deeply concerned about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purposes. Most Americans believe that innocent people have already been executed, that the death penalty is not a deterrent to crime, and that a moratorium should be placed on all executions.

Many in America also believe they would be disqualified from serving on a jury in a capital case because of their moral objections. Among women and Catholics, nearly half believe they would be excluded. Two-thirds of African Americans believe they would be disqualified. Even among those who support the death penalty and believe they would be qualified to serve on a capital jury, the risk of convicting or executing the innocent would make them less likely to vote for a death sentence.

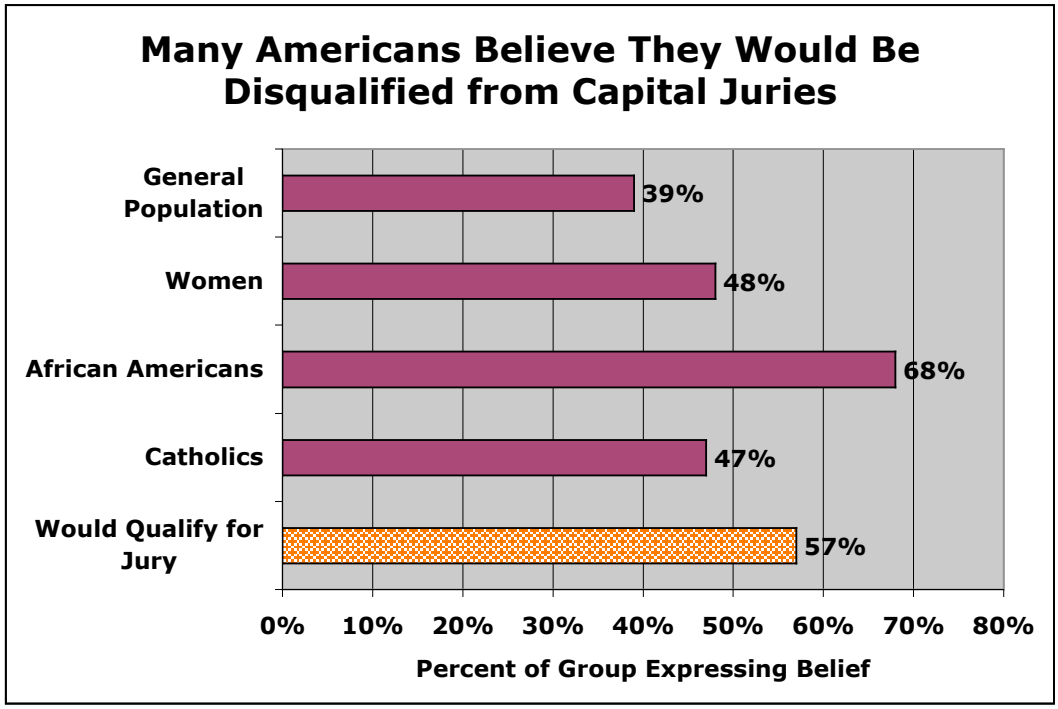
While a majority still supports the death penalty in theory, it is becoming irrelevant to many Americans because it is rarely applied, and not always to the worst offenders. Life-without-parole sentences are becoming more attractive to many Americans, and it is the preferable choice over the death penalty for major subgroups of the population. Two-thirds of Americans do not believe that reforms of the death penalty system will eliminate its problems.

The public's lack of confidence in the death penalty is being echoed by representatives of victims' groups, by former supporters of the death penalty, and in the editorial pages of the nation's newspapers. Although the dissatisfaction with capital punishment has many roots, the common and principal concern heard throughout the country is the risk that innocent people may be caught up with the guilty.

POLL ANALYSIS

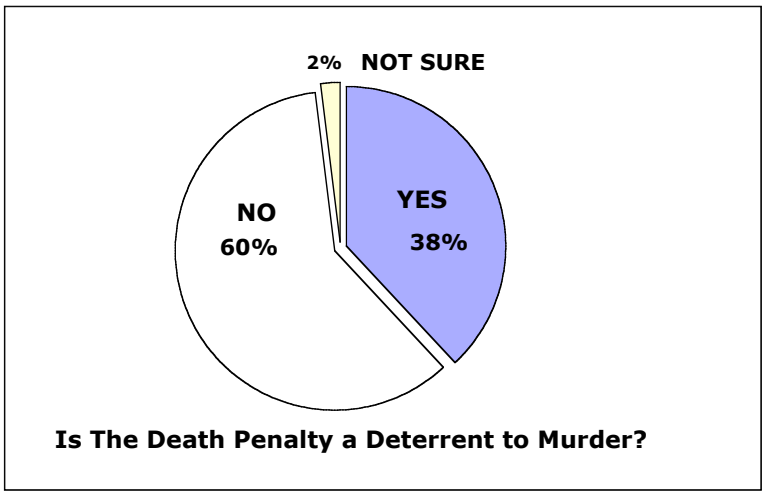
The U.S. Supreme Court has said that the death penalty should reflect the "conscience of the community,"[28] and that its application should be measured against

society's "evolving standards of decency."[29] In all states, a defendant is entitled to have a jury determine whether he or she is eligible for a death sentence.[30] In almost all states, the jury also makes the crucial decision on the actual sentence. But a recent National Omnibus Poll conducted by RT Strategies for the Death Penalty Information Center in early 2007 indicates that there is a deep divide in the community that is called upon to make such decisions.[31]



An Erosion of Confidence

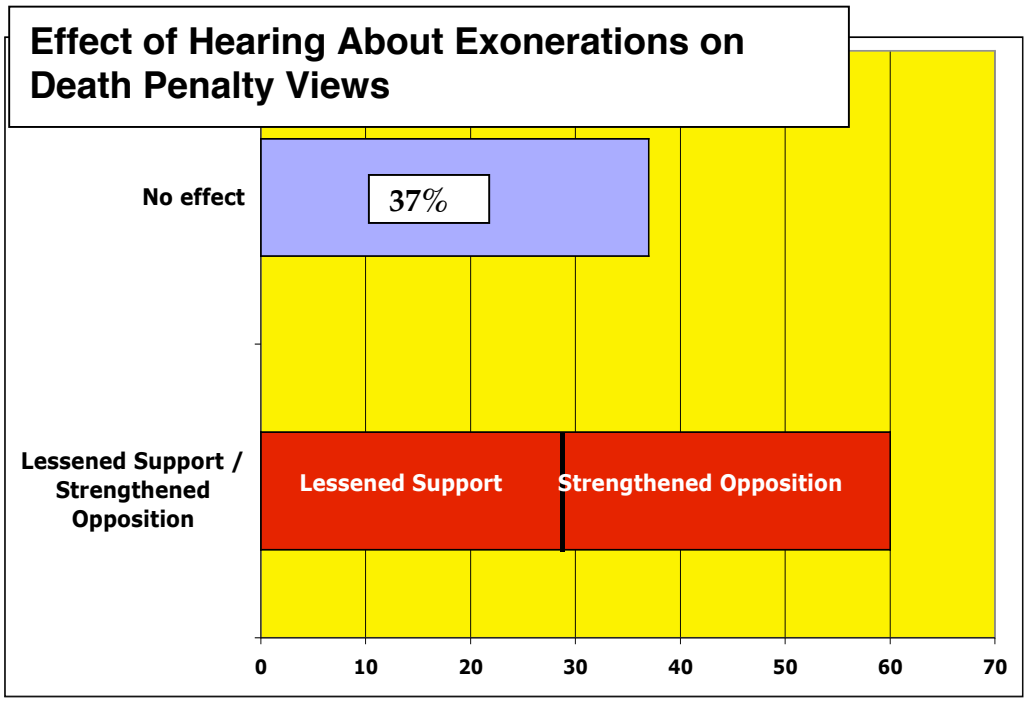
Americans have endorsed the death penalty for generations because they believed it might contribute to saving lives. For a long time, deterrence was the principal reason that Americans gave for their support of capital punishment.[32] But today, few citizens believe that the death penalty serves as a deterrent. Only 38% of respondents in this recent poll believe that the death penalty is a deterrent; 60% said it was not.



By a wide margin, the American public believes that the most significant development in the death penalty in recent years has been the advent of DNA testing and the proof that many who were sentenced to death were innocent. The repeated mistakes in determining the underlying guilt of those facing execution has sharply eroded the public's confidence in the death penalty. Particularly in this area, the public wants much more assurance that the system works reliably. For many Americans, their patience with the death penalty is wearing thin. Only 39% of the public expressed either complete or "quite a bit" of confidence that the justice system sentences only the guilty to death.

Most Americans have been affected by the news of so many exonerations in death penalty cases. Only 37% said that such news had no effect on their position on the death penalty. Sixty percent (60%) of Americans said that these wrongful convictions had either lessened their support for the death penalty or strengthened their already existing opposition.

A strong majority of 75% of those polled believes that we need a higher standard of proof for guilt in death penalty cases. The standard of "proof beyond a reasonable doubt" may be sufficient when an inmate will still be alive if new evidence overturns his conviction. But before the state should be allowed to execute an individual, a higher degree of confidence that it has charged the right person is required.



The search for truth in death penalty cases is obscured by the fact that jurors must support capital punishment in order to be chosen. Research indicates that those who support the death penalty are also more likely to support the government's case, more likely to believe police testimony and witnesses for the prosecution.[33] While such evidence is often accurate, the errors that have occurred in capital cases where innocent people have been wrongly convicted often stem from erroneous identifications and other testimony offered by the state.[34] In capital cases it is especially important that people with a wide range of viewpoints critically examine the evidence, but the exclusion of the citizens most likely to be skeptical of the state's evidence makes this goal harder to achieve.

The Ultimate Error: Executing the Innocent

The public is not only concerned because innocent people have been freed from death row. The overwhelming majority of Americans (87%) already believes that the ultimate mistake has occurred: that innocent people have been executed in recent years. The potential execution of innocent defendants lessens support for the death penalty, even though there is no clear-cut case of that happening in recent years.

Because courts do not typically provide a forum for determining the innocence of someone who has already been executed, and because states do not pay attorneys to pursue such claims, it is difficult to know how many innocent people have been put to death. Four cases in the past few years that were thoroughly re-investigated after execution indicated a strong likelihood that such mistakes have been made.[35] Larry Griffin was executed in Missouri, Ruben Cantu, Cameron Willingham, and Carlos de Luna (pictured) were executed in Texas. In all four cases, new evidence has emerged that has thrown considerable doubt on their original convictions.



In Griffin's case, the first police officer on the scene has now given a new account of the evidence. Willingham's case was exposed through an investigation by the *Chicago Tribune*. He had been convicted of murder by arson, but now new scientific analysis has questioned whether any arson (and hence any crime) ever occurred.

In de Luna's case, also investigated by the *Chicago Tribune,* another repeat offender now appears to be the likely killer. Ruben Cantu's case, the third of the cases from Texas, was investigated by the *Houston Chronicle*.[36] The former District Attorney who oversaw the prosecution now believes that Cantu was probably innocent and he has apologized for what happened.[37] An investigation was opened by the new District Attorney in San Antonio. However, this D.A. had served as a judge on Cantu's appeal and signed his death warrant.[38] This conflict of interest has clouded the investigation.

Of those who believe that an innocent person has already been executed, 55% say that has affected their opinion of the death penalty, either making them more skeptical

of capital punishment or more opposed to it entirely. Less than a third (31%) of the respondents said that knowing an innocent person may have been executed has had no effect on their death penalty views.

Other Reasons for Declining Use of the Death Penalty

The murder rate has also declined sharply in the U.S., though the decline in the use of the death penalty did not occur at the same time as the decrease in murders. From 1991 to 2000, the murder rate dropped by about 44%. Since then it has remained virtually the same. Death sentences did not appreciably decline during this period of fewer murders. However, as indicated above, they have been dropping considerably over the past six years.

Finally, the decline in the use of the death penalty in the U.S. is part of a clear international trend away from capital punishment. More countries are abandoning the death penalty and Americans are aware of this development. The debate over the significance of international law at the Supreme Court level has been intense, but the majority of the Court appears willing to consider parallel developments in other countries when deciding cases. Judges and the public travel abroad frequently and often hear the opinions of others about the U.S. death penalty. While not decisive, these influences carry weight in a country that has always considered itself to be a protector of human rights.

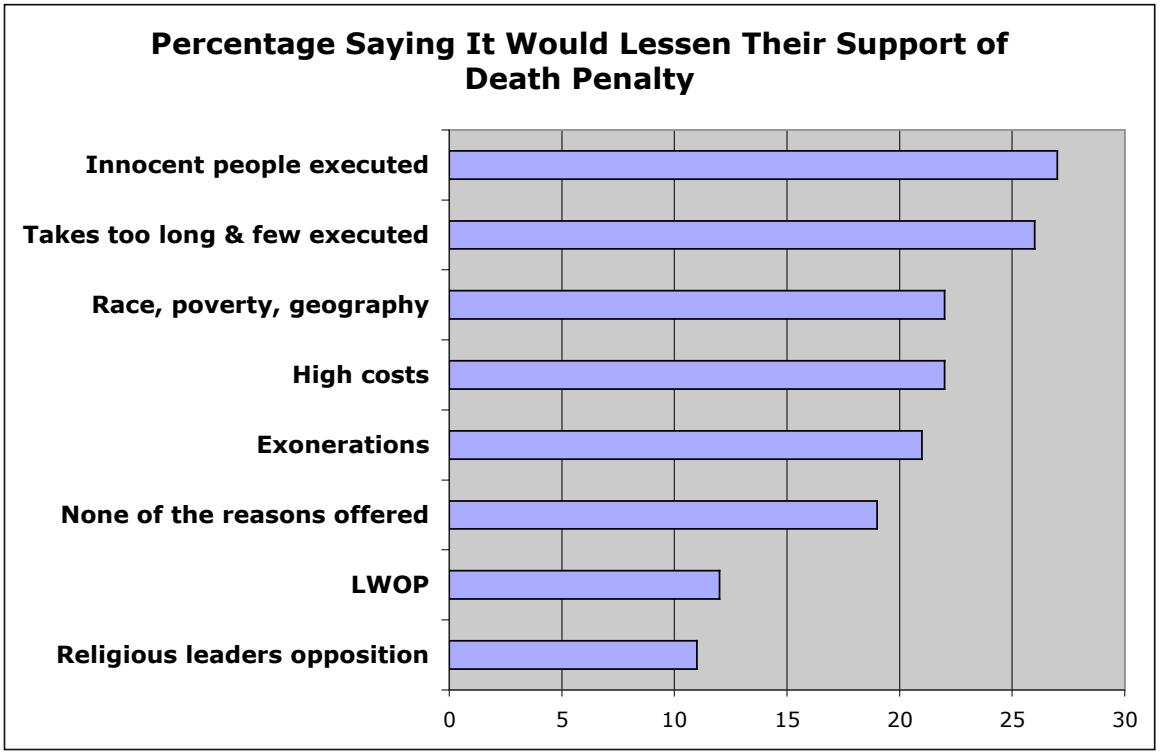
COUNTER TRENDS

Not all the evidence in the U.S. points to a gradual abandonment of the death penalty. Broad public support for the death penalty in the abstract still exists. In some states, such as Arizona, prosecutors are promising to make aggressive use of the death penalty, and death sentences could rise in those areas in the near future. Executions, too, are not necessarily on a path of continuous decline. Over 3,300 people remain on death row, and many of them are nearing the end of their appeals. The controversy over lethal injection has caused some executions to be stayed, but that problem may be resolved in the coming months.

Another development that runs counter to the overall trend away from the death penalty is the use of the federal death penalty.[39] In contrast to the states, the size of the federal death row has continued to grow, especially in cases from states that themselves do not have the death penalty. Federal death sentences have increased over the past six years, contrary to the pattern in the states. Six people, out of a total of 53, are now on the federal death row from states that have rejected the death penalty in their legislatures. Four federal executions were recently scheduled, but all were granted stays because of the lethal injection controversy.

Pragmatic Problems Cited by Those Who Support the Death Penalty

Besides the possibility of executing innocent people, other problems have raised doubts in the minds of those who favor the death penalty. There are several factors that weaken their support. Policy issues, such as the rarity of executions and high costs, rank not far behind the possibility of executing the innocent. Twenty-six percent of the public in the poll mentioned above said they the fact that "it takes too long to go



through the whole appeals process in death penalty cases and only a few of those

sentenced to death are actually executed" lessens their support for the death penalty. The high costs of the death penalty were cited by 22% and an equal percentage cited the fact that receiving the death penalty often depended on race, economics and geography. Only 11% indicated that statements from leaders in their religious denomination would have a similar effect on their views.

The Costs of Innocence

The problem of innocence has had a cascading effect on all aspects of the death penalty. After studying the risks of sentencing innocent people to death, many states have introduced reforms. Some states are requiring defense counsel to meet higher standards for capital representation and other states have raised the fees available for such representation. Many states now allow DNA evidence to be tested and introduced on appeal, despite barriers to late-filed challenges in death penalty cases. A few states are requiring that pre-trial interrogations of suspects be recorded to avoid abuses.

Many of these changes are long overdue, but one result could be that the costs of the death penalty will increase compared to what they were when standards were more lax. As executions decline and the costs for each prosecution go up, the cost per execution (including all the legal and custodial costs of all the cases in the death penalty system) has become a concern in many states. In Florida, a 1988 study by the *Miami Herald* concluded that the extra costs associated with the death penalty amounted to $3.2 million per execution.[40] Since then, costs have increased and executions have slowed down. A similar study by the *Palm Beach Post* in 2000 found that the cost per execution was now costing taxpayers $24 million.[41]

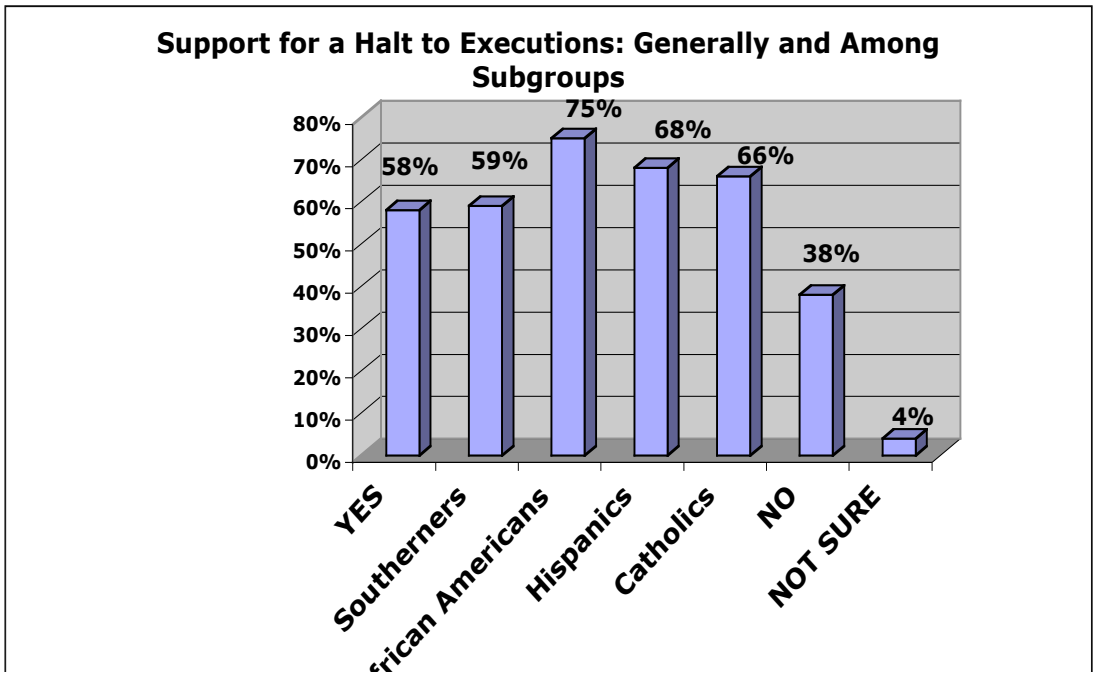
Likewise in California, the *Sacramento Bee* had estimated that the state was spending an extra $90 million per year on the death penalty, with no executions to show for it.[42] A more recent study by the *Los Angeles Times* indicated that the costs were now more like $124 million per year. With an average of less than one execution every two years, that meant the state was paying *$250 million* per execution.[43]

States like New York and New Jersey, where the death penalty is in suspension, spent enormous sums of money with no executions resulting. Hearings in New York cited costs of over $160 million over 7 years with no death sentences carried out and no cases affirmed on appeal.[44] In New Jersey, the costs were about $250 million over 22 years with no executions.[45] In both states, such economic concerns were cited in votes that have brought the death penalty to a halt.[46]

Prospects for the Future

With the use of the death penalty declining and becoming more isolated in a few states, and with the costs of cases increasing and the time between sentencing and execution not getting any shorter, the majority of the public is convinced that this government program needs to be at least temporarily halted and studied to see if it is worth continuing. A significant majority of 58% responding in the poll cited earlier believed it was time for a moratorium on the death penalty while the process undergoes a careful review.

Support for a moratorium was widespread among subgroups: 59% of southerners, 75% of African Americans, 68% of Hispanics, and 66% of Catholics supported such a halt to executions. This support reflects the reality that in practice such a moratorium already exists in much of the country. Most states with the death



penalty carried out no executions in 2006 or the first 8 months of 2007. This year only 10 of the 38 death penalty states have carried out an execution, and Texas, alone, has been responsible for 60% of all executions. Even in the most active years of the death penalty, about 80% of the executions in the country have been in just one geographical area, the South. A national suspension of executions would hardly change the reality in most of the country.

Executions this year have been slowed by the challenges to the lethal injection process. In eleven states, stays of executions were in place for many months, and the controversy over lethal injection is far from being resolved. Although this debate was not the result of a public outcry, a number of states appear resigned to letting it run its course. North Carolina, which temporarily arrived at a compromise that allowed some executions to go forward, has returned to a stand down position and the governor has said the courts should decide the issue.[47]

In other states like California and Maryland, it also appears that executions will remain on hold for a considerable period while solutions are explored. Florida, which previously had resisted any challenges to both its faulty electric chair and its lethal injection process, voluntarily halted all executions late last year. Angel Diaz's execution in December 2006 took over 30 minutes, with the drugs being at first injected into his muscles rather than his veins. A complete second series of lethal drugs was administered after he writhed and spoke while on the gurney. Governor Jeb Bush immediately declared a halt to all executions and appointed a study commission.[48] No executions have occurred in Florida through August 2007.

MENTAL ILLNESS

An emerging death penalty issue was recently identified by the American Bar Association in 2006 when it unanimously passed a resolution calling for an exemption from the death penalty for people whose severe mental illness may have led to their crime.[49] An almost identical resolution had been endorsed earlier by such groups as the American Psychiatric Association, the American Psychological Association, and the National Alliance on Mental Illness. The report in support of the ABA resolution said

that those whom the resolution would exempt from the death penalty are no more morally culpable than the mentally retarded and juvenile offenders.

The U.S. Supreme Court has stirred interest in this issue when it accepted the case of a severely mentally ill man from Texas, Scott Panetti, in 2007. Panetti had been scheduled for execution but the date was stayed to allow time for exploration of his mental competency. (Panetti had been hospitalized for mental illness on 14 occasions prior to the crime that sent him to death row. At trial, he was allowed to defend himself, wearing a cowboy suit to court and asking to subpoena Jesus Christ and other notable persons.) The Supreme Court ruled that the lower courts had been too restrictive in their understanding of mental incompetency and that more than just superficial awareness of one's impending punishment for a crime should be considered. This is a different issue than the question of whether those who were severely mentally ill at the time of their crime should be exempt from the death penalty, but it is one that many of those concerned with this issue will be watching.

IMPATIENCE WITH THE DEATH PENALTY

The lethal injection issue and the exemption of the mentally ill are not likely to be decisive in ending the death penalty. But these issues have not arisen in a vacuum. In the past six years, the American public has seen the U.S. Supreme Court place further restrictions on the use of the death penalty.[50] Many family members of homicide victims are realizing that accepting a life sentence for a defendant gives them a far greater chance of achieving a resolution to the legal case than holding out for a tenuous death sentence.

An impatience with the death penalty has emerged among some former supporters of the death penalty. If it is not going to be carried out in a short period of time, if many cases are overturned and then receive a life sentence anyhow, and if the costs of the whole process are continuing to rise, then some have concluded that it may not be worth the effort. Such sentiments ranked as high as innocence in lessening support of the death penalty among its proponents in the recent poll.

In 2006, New Jersey appointed a blue-ribbon commission to study the state's death penalty. The commission concluded by a vote of 12-1 that the death penalty should be abolished. But it was not simply that the members were morally opposed to capital punishment. Rather, their report examined statements from victims' advocates, such as Richard Pompelio, founder of the New Jersey Crime Victims' Law Center and father of a murder victim. According to the commission's report:

> He (Mr. Pompelio) testified that the death penalty is the greatest failing of the justice system in the State and that it re-victimizes victims. He stated that the death penalty should be abolished in favor of life in prison without parole, and that the funds spent on the death penalty be used for services for homicide victims and funding for law enforcement. "I have absolutely no doubt that there will never be an execution in the State of New Jersey. . . . We are just sitting here playing with words and playing with taxpayers' dollars."[51]

Some prosecutors have echoed these sentiments. Samuel Milsap, former District Attorney of Bexar County, Texas, said: "I've come to the conclusion . . . that the system as it relates to capital murder is simply broken. It's my view in fact that because it's driven by human beings and decisions that are made by human beings, it can't be fixed, and that as a result what has to happen is that the option to put people to death has to end."[52]

His words were similar to those of Justice Blackmun before retiring from the Supreme Court in 1994. Blackmun had voted to uphold the death penalty when it was struck down in 1972, and he voted in favor of its constitutionality when it was reinstated in 1976. But years of exposure to the way the death penalty worked in practice led him to withdraw even his legal judgment that it should be allowed to continue:

> In recent years, I have grown increasingly skeptical that 'the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment,' given the now limited ability of the federal courts to remedy constitutional errors. . . . I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it--and the death penalty--must be abandoned altogether."[53]

For Some, A Conclusion That It Cannot Be Fixed

One reason that Americans believe a moratorium may be needed is that they lack confidence that the problems of the death penalty have been fixed. An overwhelming 69% of the public believes that the reforms will not eliminate all wrongful convictions and executions. This sentiment is also reflected by major national newspapers that formerly supported the death penalty for decades, but have now changed their positions.

The *Chicago Tribune* recently pronounced that the revelations about innocence and other problems had shaken "the foundation of support for capital punishment:"

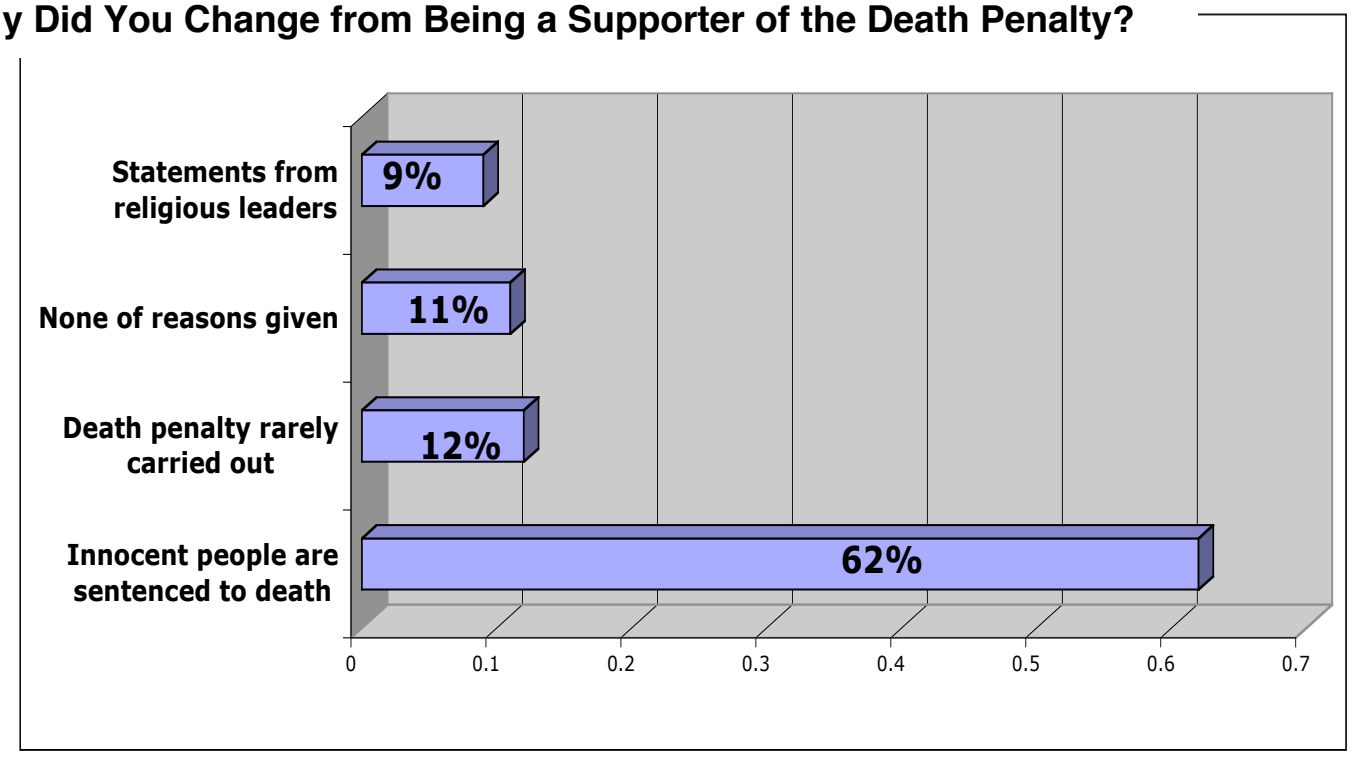
> *One of the core tenets of this newspaper since its founding has been that the extraordinary power of government must be wielded carefully and sparingly--particularly when that power weighs on the life and liberty of citizens.*
>
> *It has, as well, long been the position of this editorial page that the government should have the legal right to impose capital punishment--the death penalty.*
> . . .
> *We have learned much, particularly with advances in DNA technology, about the criminal justice system's capacity to make terrible mistakes. These revelations--many stemming from investigations by this newspaper--shake the foundation of support for capital punishment.*
> . . .
> *The evidence of mistakes, the evidence of arbitrary decisions, the sobering knowledge that government can't provide certainty that the innocent will not be put to death--all that prompts this call for an end to capital punishment. It is time to stop killing in the people's name.*[54]

Around the same time, the *Dallas Morning News* shifted from its long-term support for the death penalty because it had "lost confidence that the state of Texas can guarantee that every inmate it executes is truly guilty of murder." The editorial board wrote:

> *That is why we believe the state of Texas should abandon the death penalty – because we cannot reconcile the fact that it is both imperfect and irreversible.*
>
> *This board has lost confidence that the state of Texas can guarantee that every inmate it executes is truly guilty of murder. We do not believe that any legal system devised by inherently flawed human beings can determine with moral certainty the guilt of every defendant convicted of murder.*
> . . .

> *The state holds in its hands the power of life and death. It is an awesome power, one that citizens of a democracy must approach in fear and trembling, and in full knowledge that the state's justice system, like everything humanity touches, is fated to fall short of perfection. If we are doomed to err in matters of life and death, it is far better to err on the side of caution. It is far better to err on the side of life. The state cannot impose death – an irrevocable sentence – with absolute certainty in all cases. Therefore the state should not impose it at all.*[55]

Other papers, such as *The Sentinel* of Pennsylvania, were more succinct, simply calling the death penalty "useless."[56] The *Rocky Mountain News* of Colorado said that, in their state, "for all practical purposes the penalty no longer exists in any meaningful sense at all," and hence it should be taken off the books.[57] The *Los Angeles Times* called on the state study commission to make a death penalty moratorium its first order of business. The *Houston Chronicle* likewise advocated for a Texas moratorium. National papers such as the *New York Times*, the *Washington Post*, and *USA Today* have had long-term editorial positions against the death penalty.[58]



An Emerging Trend

The death penalty is deeply ingrained in American history and politics. Most Americans still support the death penalty for persons convicted of murder. Even with all that has been revealed about this practice in recent years, the majority of respondents said that their position had not changed in the past ten years. But among those who had shifted their position, more people became opponents of the death penalty than proponents, by a margin of 3 to 2. And the overwhelming reason given by those who have changed from supporters to opponents of the death penalty was the issue of innocence: 62% of those who changed to opposing the death penalty did so because of the risk that innocent people could be sentenced to death.

The problem of innocence can be lessened but never completely eliminated. The chance of human error will be present in the investigation of the crime, the testing of evidence, in expert testimony, and in the opinions of jurors and judges passing judgment. When the former governor of Massachusetts, Mitt Romney, claimed to have devised a mistake-proof death penalty, the state legislature strongly rejected his proposal as unrealistic.[59]

The implications of the realization that the "innocence problem" cannot be fixed are profound: there is less talk now of eliminating appeals or cutting back on defense services. The death penalty for the foreseeable future will be time consuming, more expensive, and still unpredictable.

The public is very aware of these developments and many are becoming resigned to the fact that, in the long run, the death penalty is unsustainable. Support for the death penalty drops to less than 50% when compared with the sentence of life-without-parole. Capital punishment is seen as an outmoded government policy that no longer meets its intended uses.

Politicians may still continue to offer a patched-up death penalty as a panacea to the public's fear of crime. But rather than there being some light at the end of the tunnel

after thirty years of experiment, the prospects for a "successful" death penalty seem to be rapidly receding.

Endnotes

[1] . See Death Penalty Information Center Web site, Historical Executions, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=269>, visited Aug. 1, 2007.

[2] . Furman v. Georgia, 408 U.S. 238 (1972).

[3] . Gregg v. Georgia, 428 U.S. 153 (1976).

[4] . U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment, 2005* (2006).

[5] . Death Penalty Information Center, "The Death Penalty in 2006: Year End Report" (2006).

[6] . New Jersey Death Penalty Study Commission Report (January 2007).

[7] . See *Capital Punishment, 2005*, note 4.

[8] . See *The Death Penalty in 2006: Year End Report* (2006), note 5.

[9] . See Gallup News Service, "Two in Three Favor Death Penalty for Convicted Murderers," June 1, 2006 (press release).

[10] . J. Marquart & J. Sorenson, *A National Study of the* Furman-*Commuted Inmates: Assessing the Threat to Society from Capital Offenders,* 23 Loyola of Los Angeles L. Rev. 5 (1989).

[11] . New Mexico is the only death penalty state that does not have a LWOP sentence. Alaska is the only non-death penalty state that does not have LWOP.

[12] . Governor's Office, Press Release, "Governor Perry Signs Life Without Parole Bill," June 17, 2005.

[13] . See Simmons v. South Carolina, 512 U.S. 154 (1994); Shafer v. South Carolina, 532 U.S. 36 (2001); and Kelly v. South Carolina, 534 U.S. 246 (2002).

[14] . See, e.g., R. Dieter, "Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty" (1994) (available from DPIC, <http://www.deathpenaltyinfo.org>.

[15] . Kansas v. Marsh, 548 U.S. ___, No. 04-1170 (2006) (Souter, J., dissenting).

[16] . Atkins v. Virginia, 536 U.S. 304 (2002).

[17] . Roper v. Simmons, 543 U.S. 551 (2005).

[18] . Wiggins v. Smith, 539 U.S. 510 (2003).

[19] . See Panetti v. Quarterman (No. 06-6407) (2007); Smith v. Texas (No. 05-11304) (2007) (twice rev'd by Supreme Court); Abdul-Kabir v. Quarterman (No. 05-11284) (2007); Brewer v. Quarterman (No. 05-11287) (2007); Miller-El v. Dretke (No. 03-9659) (2005) (twice rev'd by Supreme Court); Miller-El v. Dretke (No. 03-9659) (2004).

[20] . See Death Penalty Information Center's list of exonerations at http://www.deathpenaltyinfo.org/article.php?scid=6&did=110, visited May 3, 2007.

[21] . See D. Fears, *Exonerations Change How Justice System Builds a Prosecution: DNA Tests Have Cleared 200 Convicts,* Washington Post, May 3, 2007, at A3.

[22] . See, e.g., Grisham, John, "The Innocent Man: Murder and Injustice in a Small Town" (2006); Turow, Scott, "Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty" (2003).

[23] . An interesting response to cases of innocence that may have been missed in the ordinary legal review has been adopted in the United Kingdom. See Criminal Cases Review Commission, United Kingdom, http://www.ccrc.gov.uk/, visited January 2007.

[24] . See, e.g., Illinois Commission on Capital Punishment Report (April 2002).

[25] . See, e.g., series on representation in 4 southern states, North Carolina News & Observer, January 20, 2007.

[26] . For a review of reforms that have been passed, see Campaign for Criminal Justice Reform at http://www.thejusticeproject.org/state/legislation.html.

[27] . RT Strategies of Washington, D.C., conducted this National Omnibus Poll on March 8-11, 2007 for the Death Penalty Information Center. The sample was 1,000 adults nationwide, and the margin of error was $\pm$3.1%.

[28] . Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

[29] . Trop v. Dulles, 356 U.S. 86, 101 (1958) (evolving standards interpretation of the Eighth Amendment).

[30] . Ring v. Arizona, 536 U.S. 584 (2002).

[31] . See R. Dieter, *A Crisis of Confidence: Americans' Doubts About the Death Penalty,* a Death Penalty Information Center report (2007).

[32] . See Stuart Banner, *The Death Penalty: An American History*, 10 (Harvard Univ. Press 2002) ("the main purpose of the death penalty was conceived to be its deterrent effect").

[33] . C. Haney & D. Logan, "Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment," 50 Journal of Social Issues 75, 91 (1994).

[34] . See, e.g., Charles A. Morgan III, M.D., *Yale Medicine*, Fall/Winter 2004, at p.9 (false eyewitness testimony); Symposium, *Judicature*, Journal of the American Judicature Society, September-October, 2002 (issue devoted to causes of wrongful convictions).

[35] . See National Coalition to Abolish the Death Penalty, *Innocent and Executed: Four Chapters in the Life of America's Death Penalty* (2006).

[36] . Lise Olsen, Houston Chronicle, two-part series on Ruben Cantu, November 20, 21, 2005.

[37] . Pew Forum on Religion and Public Life, Event Transcript, July 21, 2006, at <http://pewforum.org/events/index.php?EventID=122>.

[38] . See Editorial, *Mistrust: Court's decision to leave a wrongful execution inquiry with a tainted DA clouds Texas justice*, Houston Chronicle, Sept. 5, 2006.

[39] . See Federal Death Penalty Resource Counsel, http://www.capdefnet.org/, visited January 2007.

[40] . D. Von Drehle, *Bottom Line: Life in Prison One-sixth as Expensive*, The Miami Herald, July 10, 1988, at 12A.

[41] . S. V. Date, *The High Price of Killing Killers*, Palm Beach Post, Jan. 4, 2000, at 1A.

[42] . S. Maganini, *Closing Death Row Would Save State $90 Million a Year*, Sacramento Bee, March 28, 1988, at 1.

[43] . See R. Tempest, *Death Row Often Means a Long Life,* Los Angeles Times, March 6, 2005.

[44] . *Costly Price of Capital Punishment—Case Shows Effort Expended Before the State takes a Life*, Albany Times-Union, Sept. 22, 2003 (over $160 million spent in 7 years).

[45] . See *Report: Death penalty cost $253M and executed no one in NJ*, New Jersey Policy Perspectives report, Newsday, Nov. 21, 2005 ($253 million spent since 1983).

[46] . See discussion of New Jersey Death Penalty Study Commission's report in Associated Press, Jan. 2, 2007 (citing costs); see Press Release, New York State Assembly, "Assembly Releases Death Penalty Report," April 4, 2005 (citing costs).

[47] . See A. Weigl, *Execution impasse unlikely to end soon,* News & Observer (North Carolina), April 6, 2007 ("'The legislature isn't going to be able to move in any direction, really, until it gets some final ruling from the federal and state courts,' Gov. Mike Easley said.").

[48] . See P. Davis, *Panel: Crist should review death drugs,* Associated Press, March 1, 2007 (discussing Florida Lethal Injection Commission Report).

[49] . American Bar Association Resolution, Adopted August 8, 2006, reported in Mental & Physical Disability Law Reporter, Vol. 30, No. 5 (September-October 2006), p. 668.

[50] . See, e.g., Atkins v. Virginia, 536 U.S. 304 (2002) (no death penalty for the mentally retarded); Wiggins v. Smith, 539 U.S. 510 (2003) (requiring investigation of mitigating evidence); Roper v. Simmons, 543 U.S. 551 (2005) (no death penalty for juveniles).

[51] . See New Jersey Death Penalty Study Commission Report (January 2007) at http://www.njleg.state.nj.us/committees/njdeath_penalty.asp.

[52] . See *Pew Forum on Religion and Public Life*, note 37 above.

[53] . Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of cert.).

[54] . Editorial, Chicago Tribune, March 25, 2007.

[55] . Editorial, Dallas Morning News, April 15, 2007.

[56] . Editorial, The Sentinel (Pennsylvania), April 3, 2007.

[57] . Editorial, Rocky Mountain News (Colorado), Feb. 12, 2007.

[58] . See Death Penalty Information Center, Editorials Web page, at http://www.deathpenaltyinfo.org/article.php?did=189&scid=43.

[59] . See S. Helman, *Death penalty bill fails in House: Romney initiative roundly defeated*, Boston Globe, November 16, 2005.