

Capital Punishment Research Initiative
The Next Generation of Death Penalty Research: Priorities, Strategies, and an Agenda
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Panel 2: Public Policy Perspectives
The Future of Innocence
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Introduction

The premise of my presentation is that the issue of innocence has had a more profound impact on the death penalty in the United States than any other development in the past 30 years. If that is true, then it would be wise to devote part of our future research into measuring the effect that this issue has had on the application of the death penalty. We should identify the changes in the criminal justice system that are necessary to prevent the mistakes that led to cases of innocence, and evaluate where the death penalty may be headed in light of the changes brought about by the issue of innocence.

Background

One of the most surprising developments since 2000 has been the dramatic decline in the use of the death penalty. Given the steady rise in executions in the 1990s, the constant flow of new cases into the system, and the political climate that elected a strong pro-death penalty candidate as President in 2000, it would have been natural to expect a broad increase in every measure of capital punishment. Moreover, the tragic events of September 11, 2001, should have completely solidified this country's use of a broad and expanding death penalty.

But that did not happen. Instead, we have seen death sentences decline by 60 percent in the past six years. Executions are down 40 percent. The size of death row has declined each year after 25 years of constant increases. Even public opinion, which still favors the death penalty, has declined noticeably from its high point of 80% support in 1994 to 65% this year.

No doubt, other factors have also contributed to the decline in death sentences, such as the wider use of life-without-parole sentencing. But it is the innocence issue that has captured the attention of conservative death penalty supporters, Supreme Court Justices, religious leaders, and even politicians. No one supports the taking of innocent life, and even death penalty adherents acknowledge that this risk cannot be entirely eliminated. Hence, the punishment itself is on the defensive; not just its use against innocent defendants.

As a preliminary area of research, it would be helpful to measure the extent that the issue of innocence has contributed to this dramatic change. Some creative research is being currently conducted by Prof. Frank Baumgartner of the University of Pennsylvania. He is correlating the number of media stories about the death penalty with the number of death sentences imposed on a national basis. Frequently, the news stories focused on the issue of innocence.

At the Death Penalty Information Center, we plan to conduct opinion poll research into how the public perceives the issue of innocence and what effect it is having on their views on the death penalty. I can also foresee research similar to that already conducted by Bill Bowers and the Capital Jury Project into whether jurors in capital cases are becoming more hesitant to impose death sentences because of the lingering doubts they may have about the defendant, or about the justice system generally.

I look forward to the remarks of Bill and Scott Sundby regarding the decline in death sentences. From a research point of view, it would be helpful to know to what extent the decline has been due to fewer jury verdicts, and to what extent it is due to fewer capital prosecutions. I believe these causes are related: that is, since I doubt that prosecutors are becoming abolitionists, I believe they are electing to settle cases because they know it is harder to get a death sentence from a jury. Thus, they avoid the expense and possible embarrassment from a penalty phase that ends with a life sentence anyhow.

The issue of innocence is an important ground for empirical research 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. Every time someone like Anthony Porter walks off of death row and into the arms of young journalism students who helped free him, the question arises: "How did that happen?" The answers vary with each case, but consistent themes run through these miscarriages of justice: faulty eyewitness identifications, ineffective counsel, withheld evidence, and false confessions. As a result, innocence cases have sparked a series of reforms that affect every death penalty prosecution and many non-death penalty cases, as well. For example, some states have adopted standards for capital representation, lifted unreasonable caps on compensation, and allowed the admission of new evidence arising after conviction. Moreover, many jurors are demonstrating a healthy skepticism about assuming credibility of the state's case.

II. Counting the Cases of Innocence

The issue of innocence, of course, has been the subject of much research in the past. Surprisingly, one of the controversial areas is determining *who is innocent*. The resolution of this question is clearly important for future research.

In 1993, DPIC became directly involved in tracking the issue of innocence. The origin of DPIC's Innocence List was a request that we received from Rep. Don Edwards of California in 1993. Rep. Edwards was then the Chairman of the House Subcommittee on Civil and Constitutional Rights, and he asked DPIC to assess the risk that innocent people might be sentenced to death or executed under our current laws. We prepared a draft report on this issue that resulted in the publication of a Staff Report of the Subcommittee later that year. As part of that report, we included a list of individuals who had been on death row and who subsequently had their convictions overturned. In almost all of 48 cases listed, the end result was a retrial in which the defendant was acquitted, or the dropping of all charges by the prosecution.

In preparing this list, we relied on the research of others, but we sought to apply a conservative and objective definition of innocence. We chose not to include cases in which researchers had subjectively decided that the defendant was probably innocent. Rather, we elected to accept the judgments rendered by the justice system itself, applying its traditional, legally prescribed procedures and criteria for determining *guilt or innocence*, and to restrict DPIC's role simply to recording the history of those judgments.

In the years since that initial report, DPIC has continued to maintain this list, which now consists of 123 cases. The criteria for inclusion on the list are clearly stated in our reports on this issue (1997 and 2004) and on our Web site. DPIC's List consists only of:

Cases involving former death row inmates who have since 1973:

- Been acquitted of all charges related to the crime that placed them on death row, or
- Had all charges related to the crime that placed them on death row dismissed by the prosecution, or
- Been granted a complete pardon based on evidence of innocence.

DPIC has never claimed sole ownership of this issue. Others have compiled innocence lists that differ from ours. The groundbreaking work of Hugo Bedau and Michael Radelet has continued in this area, though their criteria for innocence differs slightly from ours. However, a far different approach to how innocence cases should be counted has arisen as a response to the widespread attention this issue has received in recent years.

This approach, voiced in op-eds, amicus briefs and other venues, attempts to diminish the importance of the innocence issue by drastically reducing the number of cases. The thrust of this approach can be summarized fairly simply: defendants are not "innocent" just because they have been acquitted at a trial or have no charges pending against them. The bases for denying these individuals the status of innocence are the opinions of prosecutors, investigating officers, and sometimes even judges, expressing the view that a defendant is *likely* guilty, despite his legal exoneration.

Typically, such critics do not clearly define how they would conclude that someone is innocent. Their approach is premised on the notion that someone who has been charged with a crime, formally tried on the charges, and acquitted of each and every charge at trial is not thereby established to be “innocent.” Instead, a person must *additionally* pass a subjective test of “actual innocence” set by prosecutors or other opinionated “experts.” If these self-appointed judges determine that the person is *probably* guilty--despite an official determination that there is not enough legal proof to meet the time-honored standard of “beyond a reasonable doubt”--then that person is not innocent and should not be included on DPIC’s, or anyone else’s, list.

This, of course, is a very different notion of innocence than that traditionally used in our justice system. We specifically avoided such subjective second-guessing and vague judgments that would surely leave us open to claims of bias.¹ Such an extra requirement to a person’s status of innocence is also contrary to our long-standing traditions and constitutional principles. The bedrock principle that a person is innocent until proven guilty beyond a reasonable doubt is the individual’s protection in our society against the unchecked power of the state to diminish a person’s status through mere suspicion.

Before leaving this aspect of the innocence issue, I want to briefly turn to Justice Scalia’s recent remarks in *Kansas v. Marsh*. As I am sure everyone is aware, Justice Scalia took great exception to the dissent’s contention that, because of all the mistakes made in capital cases, we should be erring on the side of caution even when it comes to death sentencing. Justice Souter, writing for the four dissenters, had stated that:

[A] new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.

¹ . In a subsequent letter, Chairman Edwards thanked DPIC on behalf of his Subcommittee for this objectivity: “This document and the Center’s other reports serve as the basic reference materials for objective, relevant data on the death penalty.” Letter from Don Edwards, Subcommittee on Civil and Constitutional Rights, Oct. 22, 1993 (on file with DPIC).

For Justice Scalia, the claim of "repeated exonerations . . . in numbers never imagined before" has been grossly exaggerated. He singles out DPIC for overstating the innocence issue, but doesn't fail to mention quite a few people in this room. He then attempts to discredit DPIC's innocence list by discussing the case of Delbert Tibbs.

Reading Justice Scalia's opinion would give you the distinct impression that Tibbs escaped death unjustly on the barest of technicalities. What he fails to mention is that Tibbs' conviction was based chiefly on a single eyewitness, and that mistaken eyewitness identifications are the primary reason for wrongful convictions. He leaves out that Tibbs was black and that the witness was white, that he was tried by an all-white jury for rape and murder in Florida. But most amazingly, he never mentions that Tibbs' conviction was thrown out by the Florida Supreme Court because of *insufficiency of the evidence*. Surely, this is a relevant to a discussion of innocence. Nor does he mention that the *prosecutor* from the original trial later called the case "tainted from the beginning" and vowed to be a witness for the defense if the case was tried again.

For Justice Scalia, Tibbs was merely "a lucky man," not an innocent one. He adopts the view that cases in which the state drops all charges should not be counted as innocence cases. Although I disagree with that assessment as stripping away a fragile right on the basis of unproven suspicion, I also believe that Scalia importance the point of these cases.

However one may label the people who have been freed, their cases should indeed raise alarms across the country. In all 123 cases, the justice system unanimously convicted the individual and then expressed such certainty in its decision that it sentenced the person to death. This same justice system then reviewed the cases and concluded that each person could not even be convicted of the slightest offense, and they were set free. That reflects a terrible record and should be ample cause for the court's concern. Even if one were to refuse to grant these individuals the status of innocence, their cases represent the tremendous risks and unreliability involved in death sentencing.

III. Future Research Related to Innocence

In addition to the areas of possible research that I mentioned above-- measuring the impact of the innocence issue on juries, on prosecutors, and on public opinion; and the need for laying a proper groundwork for identifying innocence cases-- a number of other research areas related to this issue present themselves. One area is the potential use of innocence commissions.

Innocence Commissions

These extra-judicial bodies have been recommend to explore two areas of concern: First, an innocence commission could be established to look into cases of wrongful convictions to discern how the system failed and what changes need to be made to prevent a reoccurrence. This was the principal task given to the Illinois Death Penalty Commission in the wake of Governor Ryan's imposition of a moratorium on executions in that state. The Illinois Commission consisted of a stellar array of the state's prominent individuals concerned about the justice system. It worked for over two years and produced a broad array of recommendations. Only a small portion of the recommendations has been adopted by the state, but the moratorium on executions remains in place. Interestingly, the Commission offered its majority view that, in a final analysis, it would be better to simply abolish the death penalty.

By way of contrast, a government-related commission in Florida also considered that state's cases of innocence. Their conclusions were far different than the one in Illinois. They reviewed the cases of 23 people who had been freed from death row (21 of whom were on DPIC's innocence list). Citing mostly comments from prosecutors and police, they concluded that none of the 23 was innocent, and that the guilt of only 4 could be doubted. One member of the commission went even further in comments to the press, concluding that no one on *death row* was innocent, even though the Commission never looked at those cases.

A very different kind of commission could be established to explore the possible innocence of people presently in prison or on death row. The model for this type of review is the Criminal Cases Review Commission established in the United Kingdom in

1997. The Commission reviews both convictions and sentences. Cases that merit further review are sent to a court of appeals. The Commission has received almost 9,000 applications since its inception.

This model was recently adopted by the state of North Carolina in the wake of a number of high profile exonerations there. The Innocence Inquiry Commission was promoted by a former Chief Justice of the N.C. Supreme Court, I. Beverly Lake. It is the first of its kind in the United States.

The commission consists of 8 members, including a prosecutor and a sheriff. The commission has subpoena power to pursue evidence. If an appeal to the commission is found to have sufficient merit, it is sent to a 3-judge panel, which then has to be unanimous in order to overturn a conviction. If an inmate pleaded guilty, he or she must wait two years before applying for relief from the commission. As presently constituted, the commission will only hear claims filed through 2010.

This commission is certainly not without its critics. Some fear that, given its makeup and the difficulty in passing through all its procedures, it is unlikely that it will have a substantial impact. The existence of the commission does not take away any rights that defendants have of pursuing their appeals in the traditional fashion. However, once someone files a petition with the commission, he or she can be required to testify. Moreover, the commission can use evidence that would not otherwise be admissible in court, such as evidence obtained without a warrant or without *Miranda* rights being given, in its deliberations.

Given the unique structure and power of this body, research into its use would be very helpful. Do such commissions lessen the importance of the courts, or the responsibility of the jury in the criminal justice system? If there are flaws in the regular courts, does the establishment of such a commission relieve the burden of remedying those flaws? What rights does a defendant have if denied relief by the commission? What power does the public have to affect the composition and decisions of the commission? Could such a commission consider the case of someone who was executed, but where there has emerged new evidence of their innocence?

In its recent report on the death penalty in Florida, a panel convened by the American Bar Association's Death Penalty Moratorium Implementation Project recommended the establishment of two innocence-related commissions, one of each type mentioned above. The first commission would establish the causes of wrongful convictions in capital cases and recommend changes to prevent future mistakes. The second commission would review claims of innocence from those sitting on death row. Similarly, legislation to establish a commission like the one in North Carolina has already passed one house of the Pennsylvania legislature.

Another area to be explored in the realm of legislative activity concerns two recent and prominent efforts to reinstate the death penalty in non-death penalty states. In Massachusetts, Governor Mitt Romney proposed a "gold-standard" death penalty law: defendants would only be eligible for a death sentence if the jury believed they were guilty beyond any doubt and the conviction was obtained through the use of scientific evidence. The bill was the result of a committee appointed by the governor to study this issue. The bill was soundly defeated by the legislature. Would such a law have been practical? If a jury can consider even *unreasonable* doubts, is there any limit to what they might imagine? Even if it were wise for Massachusetts not to rest reinstatement of the death penalty on this slim reed, would a variation on such a system be an improvement in states that currently do have the death penalty?

Similarly, voters in Wisconsin are being asked whether the death penalty should be reinstated with a law that would require that a capital conviction be supported by DNA evidence. Is that a reliable criterion for eliminating the risks of our present system? Would such a limit succeed in selecting the "worst of the worst" from among those who have committed murder, or only those who happen to leave DNA evidence?

Finally, I would like to recommend research to help answer some of the following questions:

- Many states have had study commissions to review their death penalty systems.
 - What are the consensus recommendations from all of this review?

- How many states have adopted recommendations as a result of these reviews?
 - Are errors in capital cases decreasing because of these changes?
 - What are the political and practical obstacles to further reform?
 - How much would such reforms add to the costs of the death penalty?
 - Would such expenses be justified?
- And finally, regarding the recent decline in the use of the death penalty: is it likely to continue, to level off, or to reverse direction?

Conclusion

The issue of innocence received a high-level of attention it had in the late 1990s and the early 2000s. It continues to have a profound effect on the death penalty in the U.S. today. Taking the time to empirically measure the importance of innocence, through public opinion research, systematic interviews with jurors, through a quantification of the legislative and policy changes that have occurred, and by exploring the notion of innocence commissions and other initiatives, could give us a better idea of where the death penalty is headed, and could help the public discern whether continuing this punishment makes good public policy sense.

Thank you.