

The Status of the Death Penalty in the United States

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Introduction

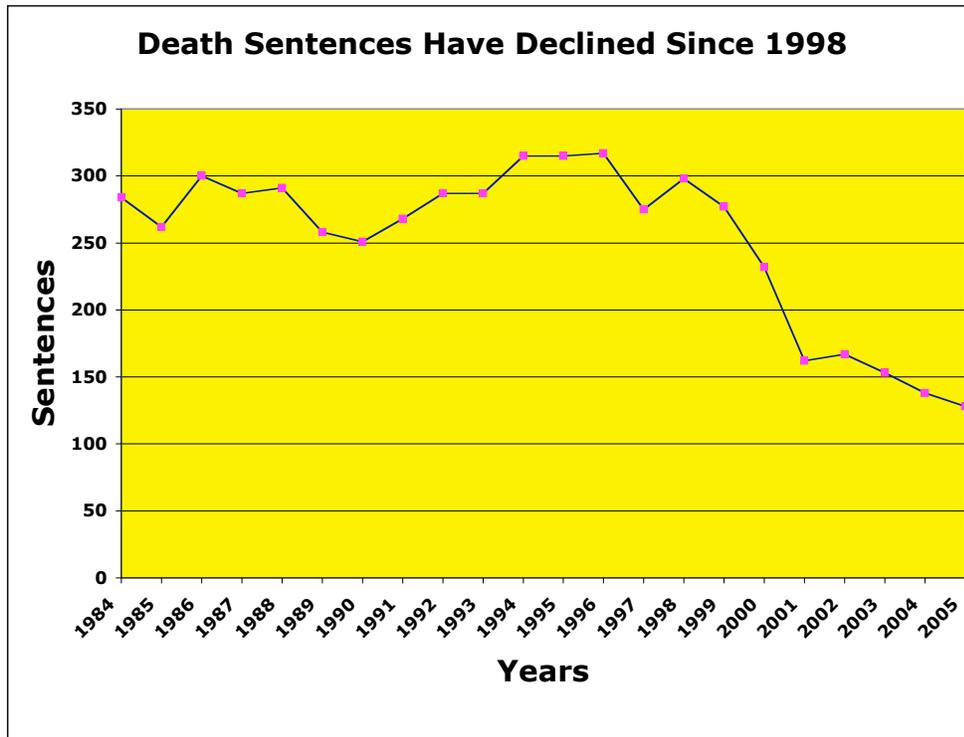
Contrary to many expectations, the use of the death penalty in the U.S. has significantly declined over the past six years. It was believed that the election of a strongly pro-death penalty president and the heightened fear of terrorism would lead to an expansion of the death penalty. However, that has not happened. 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 enact a moratorium on executions through legislation. It appointed a study commission to review its capital punishment system, and that commission overwhelmingly recommended the abolition of the death penalty. In Illinois, a moratorium on all executions 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, recently 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. Projections based on partial returns for 2006 indicate that the number of death sentences will be

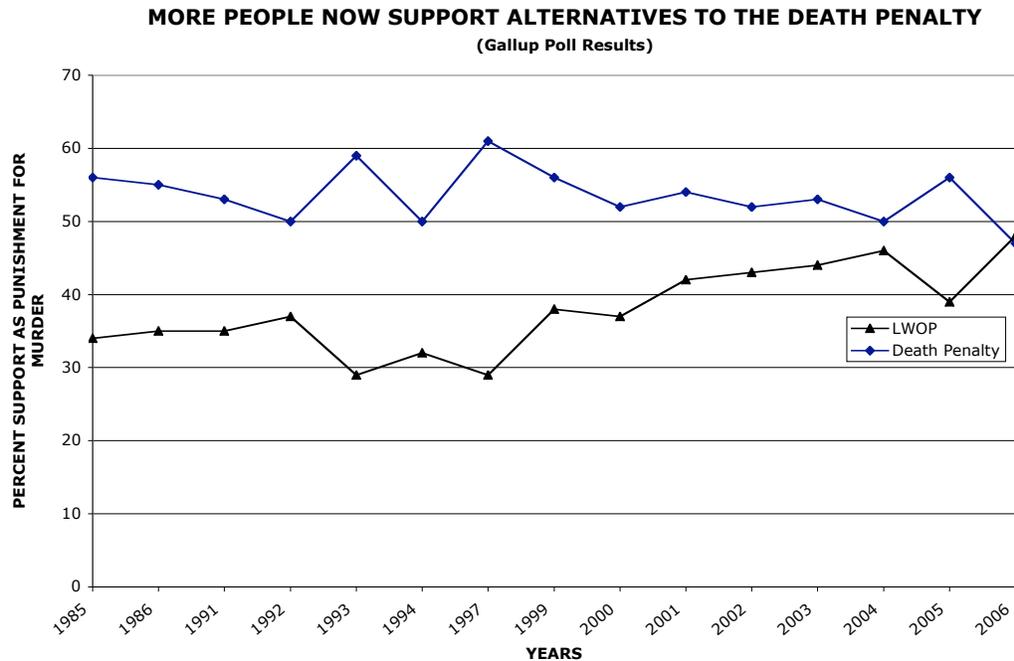
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even lower for that year. Even in Texas, death sentences have dropped 65% in the past 10 years.



The 53 executions in 2006 was the lowest number since 1996, when there were 45. Lethal injection litigation temporarily halted some executions. If that controversy is resolved, executions could increase in 2007. Nevertheless, 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 the South; none were from the Northeast.

Overall, public support for the death penalty remained about the same in 2006 compared to 2005, but has dropped from 80% support in 1994. Gallup Polls in 2006 indicated that two-thirds of the American public supports the death penalty for murder. However, for the first time in the 20 years that Gallup has tested support for the death penalty against a sentence of life without parole, more people chose life without parole as the proper punishment for murder (48% to 47%). Virtually every state in the country now employs a sentence of life without parole, a significant change from 20 years ago.



Other Significant 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.

Fifty-six percent of voters in Wisconsin did approve a non-binding referendum recommending reinstatement of the death penalty as a possible punishment for defendants whose convictions were confirmed with DNA evidence. However, this degree of support for the death penalty is significantly lower than the national average and may not represent a sufficient mandate for the legislature to overturn 150 years of

not having capital punishment, especially where the new legislature and governor appear to be against such a measure.

U.S. SUPREME COURT

One of the most revealing statements from the Supreme Court in 2006 came in a minor case. Four Justices dissenting in *Kansas v. Marsh* 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." And in *House v. Bell*, the Court ruled that a Tennessee inmate could pursue his appeal in federal court because of doubts raised about his guilt through DNA testing.

These decisions followed momentous other opinions in the past six years overturning years of precedence upholding a broad death penalty. In 2002 in *Atkins v. Virginia*, the Court struck down the practice of allowing those with mental retardation to be executed. In 2005 in *Roper v. Simmons*, they took the same step with respect to juvenile offenders. (In both instances, the Court made reference to input from the international community.)

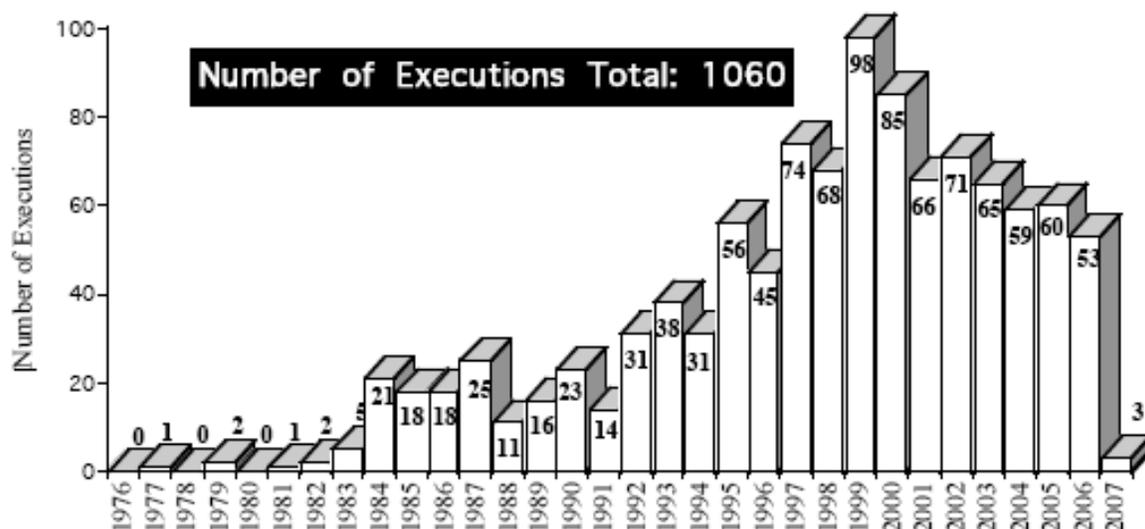
The Court has also reversed a number of cases because ineffective counsel, as seen in cases like *Wiggins v. Smith*. Prior to 1999, the Court had never reversed a death penalty sentence because of the quality of representation. In recent years, the Court has taken a number of cases from Texas, the state with the greatest number of executions, and sent them back repeatedly for re-sentencing and re-trials.

MENTAL ILLNESS

An emerging death penalty issue was 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. 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 by recently accepting the case of a severely mentally ill man from Texas, Scott Panetti. 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 Court has now agreed to decide whether more than just superficial awareness of one's impending punishment for a crime is required to meet the standard of mental competency that would allow the execution. 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. The case is *Panetti v. Quaterman*.

The dramatic decline in the use of the death penalty since 2000 has been a surprising development. 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, might have completely solidified this country's use of a broad and expanding death penalty. But a different trend has emerged instead.



REASONS FOR THE CHANGE

Why has this happened? One reason is that the issue of innocence has had a profound impact on the death penalty debate in the United States in recent years. Since 1973, one hundred and twenty-three people have been exonerated and freed from death row. 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.

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, 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. When an inmate like Anthony Porter, who was freed from death row in Illinois in 1999 primarily through the investigative work of a group of journalism students, is exonerated, 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 demanding a higher degree of proof of guilt before they are willing to impose a death sentence.

Many factors besides innocence may have contributed to the decline in death sentences, such as the wider use of life-without-parole sentencing. When the Supreme Court struck down the death penalty in 1972, there were about 600 people on death row. All of the inmates' death sentences were reduced to life sentences, and in almost every case that meant that the inmate would be eligible for parole at some point. Today, that is no longer true.

Thirty-seven of the 38 death penalty states now employ a sentence of life-without-parole. Texas was the most recent state to make this change, having done so in 2005. In addition, 11 of the 12 states without the death penalty also have this sentence, as does the federal government and the military courts. Because of a series of Supreme Court rulings, 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. And public opinion polls indicate that people prefer this alternative.

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. Many states are requiring higher standards for defense counsel, which may be another factor in prosecutors seeking the death penalty less, and in juries opting for life sentences. A more careful and well-defended death penalty case often means that it will be more expensive at the trial level, thus providing additional incentive to the state to look for alternatives to the death penalty.

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. The recent vote in Wisconsin indicates that broad public support for the death penalty in theory 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—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. In contrast to the states, the size of the federal death row 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 are now on federal death row from states that have rejected the death penalty in their legislatures. Three federal executions were scheduled earlier in 2006, though all three were granted stays because of the lethal injection controversy. Another execution date has been set for 2007.

PROSPECTS FOR THE FUTURE -- INNOCENCE COMMISSIONS

The frequency of mistakes in capital cases has led some jurisdictions to consider extra-judicial bodies to explore two areas of concern: First, to look into cases that have already been overturned 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 George Ryan's imposition of a moratorium on executions in that state in 2000. Although it was not delegated with question of whether the death penalty should be continued in any form, the Commission noted that its majority view was that it would be better to simply abolish the death penalty. If the death penalty was to be continued, it offered 85 changes to current law and practice to make the system fairer and more reliable.

A second kind of commission could be established to explore the possible innocence of people *presently* in prison or on death row. Although courts and the appellate process already exist to distinguish the guilty from the innocent, procedural barriers to bringing claims of innocence have often prevented the truth from coming out. Almost all states have specific time restrictions on presenting new evidence after trial. In other cases, defense attorneys have failed to investigate and present claims that their clients urged them to explore. And, of course, in death penalty cases, the execution of the defendant makes it almost impossible for the judicial system to overturn a prior conviction.

The model for a review of claims of innocence from those in prison and on death row is the Criminal Cases Review Commission established in the United Kingdom in 1997. The Commission reviews both convictions and sentences. Cases that merit further consideration 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 the former Chief Justice of the North Carolina Supreme Court. It is the first of its kind in the United States.

In Texas, the need for an independent commission to examine claims that an innocent person has been executed recently became clear in a case from San Antonio. Following an investigation by attorneys associated with the NAACP Legal Defense and Educational Fund, the *Houston Chronicle* conducted its own inquiry and concluded that Ruben Cantu, who was executed in 1993, was likely innocent of the murder for which he was condemned to death.

The investigation of the innocence claim is being handled by the present District Attorney, Susan Reed, who as a judge signed Cantu's death warrant. Witnesses who have come forward concerning the original crime have been mocked by prosecutors in the D.A.'s office, and some have been threatened with charges of perjury. This conflict

of interest and possible prejudice have prompted calls for an independent investigation, but to no avail. An independent state or national innocence commission could conduct an inquiry that would engender greater public confidence.

Conclusion

There have been more positive developments in limiting the death penalty in the U.S. during the past six years than in the entire previous thirty years. The issue of innocence continues to have a profound effect on the death penalty in the U.S. today, affecting juries, public opinion, prosecutors, judges and legislators. Public awareness of the problems of the death penalty has grown considerably, thereby allowing the election of leaders who oppose the death penalty, and the passage of laws to either limit or ban its use. While not all evidence points in the same direction, it appears that the public is now seriously considering whether continuing this punishment makes good public policy sense.

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