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The death penalty is declining in the United States. The number of people executed each year has fallen by about half since the late 1990s. Opinion polls show support for capital punishment is waning. It now stands at about two-thirds, down from a high point of 86% in 1995, according to Gallup polls (p. 173).

Frank Baumgartner, Suzanna De Boef, and Amber Boydstun provide a compelling and convincing account of how the rise of the innocence movement with its dramatic focus on people wrongly condemned to death has eroded public support for the death penalty. Employing a sophisticated and pathbreaking content analysis of the *New York Times* and public opinion data, they show how this movement has profoundly reframed the debate over capital punishment. The innocence frame, with its related arguments about fairness, has supplanted constitutionality and morality as the dominant frame (while at the same time incorporating key elements from these earlier frames).

This book is not just about shifts in public opinion but also about how changes in public sentiment can transform public policy, sometimes quite quickly and dramatically. The ascendance of the innocence frame, beginning in the mid-1990s—at a time when the number of homicides was falling—had a direct and measurable effect on public policy, the authors contend. When given the chance, the public is now less likely to sentence someone to death. The authors' central evidence is the sharp drop in the number of death sentences meted out by juries, from about 250 to 300 a year in the mid-1990s to a 100 or so annually a decade later (p. 202).

An apparent change of heart by jurors in capital punishment cases sparked by the innocence movement may explain this shift in public policy, the authors suggest. But they concede that additional questions still need to be answered. For example, are we seeing fewer death sentences today because prosecutors are losing more capital cases? Or is it because prosecutors are seeking the death penalty less often these days? Their discussion of the role of jurors, prosecutors, defense attorneys, and politicians in the changing debate over capital punishment is suggestive but underdeveloped.

For example, the authors mention so-called death-qualified juries but do not deeply consider the implications of these exceptional juries for their overall argument about the relationship between public opinion and public policy. Landmark decisions by the Supreme Court give prosecutors enormous latitude to strike potential jurors who express reservations about capital punishment.[1] U.S. jurors in capital punishment cases continue to be one of the least representative swaths of the general public because of the phenomenon of death qualification. We do know from other research that death-qualified juries tend to have fewer women and minorities on them and to be more conservative. Not surprisingly, they appear more likely to favor conviction and a death sentence than juries that are not death qualified.[2] Once prosecutors decide to pursue the death penalty in a particular case, they generally seek every possible advantage in the courtroom, including a death-qualified jury. Although public opinion in favor of capital punishment has certainly fallen, finding death-qualified jurors is not a difficult task.

The authors suggest that death-qualified jurors may be less likely to hand down a death sentence today because doubts that defense attorneys raise about wrongfully executing the innocent are more persuasive now with the emergence of the innocence movement. But in many death penalty cases, compelling evidence of innocence surfaces only after the initial trial, often in the appeals process when more experienced attorneys or enterprising and earnest law or journalism students associated with one of the dozens of innocence projects take up the case. The more common scenario is that defense attorneys face a mountain of evidence against their clients during the initial trial. In that situation, raising abstract claims about the wrongfully convicted, estimated to comprise anywhere from 1% to a third of the death row population, would be counterproductive.[3] In jurisdictions where jurors are permitted to choose between first-degree murder and a lesser charge, defense attorneys often concentrate in the first phase of the two-part trial on persuading jurors to choose the lesser, noncapital charge. Failing in that, when the trial moves on to the penalty phase, the main preoccupation for skilled defense attorneys is presenting convincing evidence of mitigating circumstances, like low IQ or an abusive childhood, in the hope of persuading the jury to spare their client's life.[4] Focusing on the innocent on death row in the penalty phase of the trial would be counterproductive in many instances. Indeed, admitting one's guilt and accepting responsibility for the crime is considered a mitigating circumstance. Stubbornly holding on to claims of innocence after a guilty verdict has been rendered can be considered an aggravating circumstance tipping the scales toward a death sentence.

With their tight focus on the emergence of the innocence movement, the authors generally overlook the impact of another critical simultaneous development: the growing use of life sentences, or what many refer to today as "the other death penalty." As the innocence movement was taking shape, many opponents of the death penalty began pushing life in prison without the possibility of parole (LWOP) as an equally tough—or even tougher—retributive moral sanction.[5] Public opinion polls and other research indicate that support for the death penalty tends to drop markedly when respondents are given a choice of LWOP as an alternative to a death sentence (pp. 173–174). In the early 1990s,

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Governor Mario Cuomo of New York called for wider use of LWOP and offered to sign away his clemency powers so as to neutralize public opposition to his strident anti–death penalty stance.[6] The national Campaign to End Capital Punishment and prominent abolitionists like Sister Helen Prejean of *Dead Man Walking* fame also promoted LWOP to undermine the death penalty.

Historically, LWOP had not been a widespread practice in the United States. Prior to 1974, it was used sparingly.[7] Today, 48 of the 50 states have some form of LWOP on the books, up from 16 in the mid-1990s (p. 174).[8] Between 1992 and 2003, the total number of offenders serving a life sentence in state and federal prisons increased by 83%. As of 2003, one in 11 prisoners was serving a life sentence. Of the imprisoned lifers, one in four was serving a sentence of life without parole, compared with one in six in 1992.[9] Pennsylvania has about 450 inmates serving LWOP sentences for offenses committed when they juveniles, more than any other state or country by far.[10]

The proliferation of life sentences calls into question the authors' contention that the success of the innocence movement in decreasing the number of death sentences demonstrates that "the weak *can* sometimes do well in politics" (p. 224, original emphasis). The number of people sentenced to death and executed has fallen sharply but at the cost of an explosion in "the other death penalty." The promotion of LWOP as an alternative to capital punishment also appears to be legitimating the greater use of life sentences for noncapital cases. People serving life sentences often have fewer legal resources to challenge their sentences because they are not entitled to the automatic appeals process available to prisoners on death row. Life sentences are like a death sentence in slow motion for many prisoners, causing great mental and sometimes great physical distress. As Lewis E. Lawes, warden of New York's Sing Sing prison in the 1920s and 1930s, once said: "Death fades into insignificance when compared with life imprisonment. To spend each night in jail, day after day, year after year, gazing at the bars and longing for freedom, is indeed expiation."[11] In an important reversal at its annual convention in November 2008, the Campaign to End the Death Penalty passed a resolution stating that LWOP is not a "humane or just alternative to the death penalty."[12]

In promoting LWOP, abolitionists helped legitimize a sanction that, like the death penalty, is way out of line with human rights and sentencing norms in other Western countries. Many European countries do not permit LWOP, and those that do use it sparingly. In much of Europe, a "life" sentence typically amounts to a dozen years or so, as it once did in practice in many U.S. states.

Like many studies of the impact of public opinion on public policy in the United States, this one could have benefited from taking a more comparative approach. Over the last 25 years or so, capital punishment has become a major international human rights issue in Europe, which is now a death penalty–free zone. This great change obscures a startling and revealing fact about the successful wave of abolition that lapped across Western Europe after World War II: Leading European countries abolished the death penalty in the face of strong, sometimes overwhelming, public support for its retention. When the constitution of the Federal Republic of Germany, with its ban on capital punishment, was promulgated in 1949, about three-quarters of the German public favored retention of the death penalty. Yet the campaigns in the 1950s to reintroduce capital punishment in West Germany made little headway.[13] Canada, France, and Britain also abolished the death penalty in the face of public opinion polls showing strong support for its retention.[14] Public support for the death penalty is still considerable in many European countries and Canada.[15] Yet none of these countries is likely to reinstate capital punishment for the foreseeable future.

For varied political, institutional, and historical reasons, an elite consensus congealed in much of Europe and Canada to abolish capital punishment in defiance of public opinion.[16] Such a stable elite consensus has so far eluded the United States. This casts doubt on any claims that the death penalty may finally be in its dying days in the United States.

The innocence movement has not spawned a significant overt countermobilization by supporters of capital punishment, as Baumgartner, De Boef, and Boydstun note. But there is ample evidence of elite resistance to abandoning what Supreme Court Justice Harry A. Blackmun famously called "the machinery of death." In the 1988 presidential debate, Massachusetts Governor Michael Dukakis signed his own political death warrant when he appeared to reject capital punishment even in the hypothetical case of the rape and murder of his wife. Since then, no serious contender for the White House has disavowed capital punishment. In 2003, Governor George Ryan decided to commute the death sentences of 163 prisoners on death row in Illinois to life in prison and to completely pardon four others because of deep flaws in the state's criminal justice system. No governor appears poised to follow in his footsteps. Governors once routinely commuted death and life sentences in many states and sometimes even boasted how few death warrants they had signed. But they almost never do so today. Democratic Governor Edward G. Rendell of Pennsylvania has commuted just two life sentences in his first six and a half years in office, compared to the hundreds of sentences commuted by his predecessors in the 1970s and 1980s. In 2003, Supreme Court Justice Anthony Kennedy lamented that the pardon process has been "drained of its moral force" now that commutations have become infrequent.[17]

Many prosecutors and judges remain fiercely resistant to allowing defense attorneys to reopen old cases with new DNA or other evidence.[18] Judges and prosecutors in Georgia appear hell-bent in 2009 on executing Troy Davis, despite a public uproar at home and abroad that the state

is poised to execute a man who is probably innocent. Despite passage of the Innocence Protection Act of 2004, many men and women in prison lack the legal and material resources to pursue claims of innocence and face legal guerilla warfare by prosecutors and judges determined not to give them another day in court. In a remarkable landmark decision in June 2009, the U.S. Supreme Court sanctioned this prosecutorial intransigence. In a 5 to 4 decision, it ruled that inmates do not have a constitutional right to postconviction DNA testing that might prove their innocence. Notably, the Obama administration took a stance against a constitutional right to DNA testing. Even once someone is exonerated, police and prosecutors are often unwilling to look for the real culprit because it might cast further doubt on the infallibility and fairness of the criminal justice system.

The innocence movement has spawned a wave of legislative reforms, such as mandatory DNA preservation and testing and improved legal representation for capital offenders, to "fix" the death penalty. But these reforms could ultimately reverse the trend in eroding public support for capital punishment. They offer "the appearance of much greater procedural regularity than they actually produce, thus inducing a false or exaggerated belief in the fairness of the entire system of capital punishment."[19]

Public support for the death penalty is slowly eroding—at least for now—thanks in large part to the way that the innocence movement has fundamentally reframed the debate over capital punishment, as this book so ably demonstrates. But if history and the experience of other countries are any guide, it is durable shifts in elite opinion that may ultimately determine whether capital punishment lives or dies in the United States. Elsewhere, elites were willing to defy public opinion and take a strong stance against the death penalty. The evidence is underwhelming that U.S. politicians and public officials are ready to do the same today.

Notes

1 *Witherspoon v. Illinois*, 391 U.S. 510 (1968); and *Lockhart v. McCree*, 476 U.S. 162 (1986).
2 Cowan, Thompson, and Ellsworth 1984; Fitzgerald and Ellsworth 1984.
3 The 1% figure comes from Dow 2002, 5. For higher estimates, see Waldo and Pasternoster 2003, 312.
4 See, for example, Sarat 2001, 158–84.
5 Haines 1996, 140 and 180; Wright 1990, 566; Paternoster 1991, 287; Turow 2003, 47.
6 Haines 1996, 179.
7 Wright 1990.
8 Bohm 2003, 591.
9 Mauer, King, and Young 2004, 3, 17; Fox Butterfield, "Almost 10% of All Prisoners Are Now Serving Life Terms," *New York Times*, 12 May 2004.
10 Jason Cato and Chris Togneri, "U.S. Supreme Court May Alter Juveniles' Life Sentences," *Pittsburgh Tribune-Review*, 13 May 2009. The United States and Israel are the only two countries that have prisoners serving life sentences for crimes committed before age 18. Leighton and de la Vega 2007, 1.
11 Lawes 1976, 194.
12 Nelson 2009, 26.
13 Evans 1996, 775–804; Mohrenschlager 1987.
14 Chandler 1976, Chapter 2; Lifton and Mitchell 2000, 247; Zimring 2003, 16–17; Christoph 1962; McGowen 1994, 2003.
15 Marshall 2000.
16 For more on these historical-institutional factors, see Gottschalk 2006, especially Chapters 8 and 9.
17 Quoted in Mauer, King, and Young 2004, 29.
18 Shaila Dewan, "Prosecutors Cut Inmates' Access to DNA Testing," *New York Times*, 18 May 2009.
19 Steiker and Steiker 2002, 422.

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What seemed unimaginable a decade ago, namely, the abolition of the death penalty in the United States, today seems well within the horizon of possibility. Indeed, supporters of capital punishment now seem to be very much on the defensive. To take but one example, in April 2005, then Massachusetts Governor Mitt Romney filed a long-awaited bill to reinstate the death penalty in his state. The bill, which Romney called "a model for the nation" and the "gold standard" for capital punishment legislation, was remarkable for its hesitations and qualifications. Thus, it limited death eligibility to a narrow set of crimes, including deadly acts of terrorism, killing sprees, murders involving torture, and the killing of law enforcement authorities. It excluded entire categories of crimes that many believe also warrant the death penalty, including the murders of children and the rape-murders of women. It also laid out a set of hurdles for meting out capital punishment sentences, in an effort to neutralize the kind of problems that have led to dozens of death row exonerations across the nation in recent years. The measure called for verifiable scientific evidence, such as DNA, to be required before a defendant can be sentenced to death, and a tougher standard of "no doubt" of guilt (rather than the typical "guilty beyond a reasonable doubt" standard) for juries to sentence defendants to death. The limited nature of Romney's bill, which nonetheless ultimately was defeated in the Massachusetts legislature, provides one vivid sign that the tide has turned in the national conversation about capital punishment.

Another key indicator of the changed reality of capital punishment is that the number of people being sentenced to death and executed in the United States has steadily and dramatically declined in recent years. In 1998, 302 people were sentenced to death. In 2008, just 111 were sentenced to death. The number of executions, dropped from 98 in 1998 to 42 in 2007 and 37 in 2008.[1]

Given our decentralized federal system and the current ideological alignment of the United States Supreme Court, abolition is unlikely to happen all at once. Rather, it will come gradually, in a two steps forward, one step back type of process. Here again, there are ample signs that that process is already well under way. Thus, in May 2000, the New Hampshire legislature became the first in more than three decades to vote for repeal of its death penalty. In December 2007, New Jersey Governor Jon Corzine signed a law replacing that state's death penalty with life in prison without parole. This year New Mexico abolished its death penalty.

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