Capital punishment is on the decline, largely because of DNA testing and its ramifications for the legal system.

Death and Innocence

By Gregg Sangillo

At first glance, the decline of the death penalty in the United States is somewhat surprising. In the 1990s, death sentences and executions reached peak levels in the wake of the Supreme Court’s 1976 reinstatement of capital punishment, after a four-year gap. Public support for the death penalty has declined since 1994, according to the Gallup Poll, but still stood at 67 percent last year.

Most Republican candidates and officeholders are strong supporters of the death penalty, and even Democratic candidates have generally embraced capital punishment ever since Michael Dukakis lost his presidential bid in 1988 partly because his opposition to the death penalty opened him to the “soft on crime” label.

Notwithstanding the politics of capital punishment, however, the number of executions in the United States dropped to 53 in 2006 from a peak of 98 in 1999. An even more telling figure, many experts say, is the decline in death sentences, just 128 nationwide in 2005 after hitting 317 in 1996. And when Sen. John Kerry, D-Mass., ran for president in 2004, his opposition to capital punishment was not a big issue.

What changed? The biggest factor, according to many experts, is that the introduction of DNA testing in criminal cases in the early 1990s has cast a shadow over the legal system. DNA
testing can provide exact matches between suspects and crime-scene evidence such as blood, semen, and hair, even years after a murder, and it can also prove that a suspect—or a convict—did not commit the crime in question. The New York City-based Innocence Project, co-founded by Barry Scheck and Peter Neufeld, lists 200 post-conviction exonerations in the U.S. stemming from DNA testing. Fourteen of those cases involved death sentences. In light of such findings, and after a rash of wrongful convictions, Illinois Gov. George Ryan, a conservative Republican, commuted the sentences of 171 condemned men in 2003.

"In the early days, it was assumed that we just didn’t make mistakes with any regularity in serious felony convictions, and the emergence of all these DNA exonerations has, I think, slowed down enthusiasm for the death penalty," says Daniel Givelber, a law professor at Northeastern University in Boston. "It has sort of made people question their certainty."

The advent of DNA tests has had widespread ramifications, experts say. The prospect of wrongfully convicting a defendant size of the U.S. criminal-justice system can work without any mistakes," says Frank Baumgartner, a political science professor at Pennsylvania State University. "And when you pose the question that way, there’s obviously only one answer."

Such obsession with perfection and "innocence" is overblown, supporters of capital punishment argue. Dudley Sharp, who heads an organization called Justice Matters based in Houston, says that almost all post-conviction exonerations turn on legal points, not actual evidence such as DNA tests. The justice system—including the long appeals process—is designed to weed out mistakes, and it does, he contends. "I don’t think anybody could imagine anything that accurate," he says.

Samuel Millsap, a former district attorney in Bexar County, Texas, lost his certainty about the infallibility of the justice system in dramatic fashion. He was elected as a strong supporter of capital punishment, and his San Antonio office tried and executed half a dozen people in the 1980s. But after the Houston Chronicle published a story in 2005 questioning Ruben Cantu’s 1993 conviction and execution, Millsap gave in to his mounting doubts and became an active opponent of the death penalty. "I think the system is absolutely broken," he says. "I believe that it’s probable that we have executed innocent people in Texas."

Worrying About Innocence

Publicity over DNA tests that have exonerated condemned men has been reflected in popular culture in the past decade,
producing a rash of books, TV shows, and movies. Best-selling crime novelist John Grisham’s latest book, The Innocent Man, is based on a true story about a wrongful conviction.

Concern that innocent people could be executed has breathed new life into an anti-capital-punishment movement that had its first U.S. victory in 1847, when Michigan abolished the death penalty for all crimes except treason. Opponents mostly still wage a limited crusade, however, focused on the legal system. “There’s no broad social movement—it’s not like the civil rights movement or something,” Baumgartner explains. “It’s very oriented toward university-based projects.” In a forthcoming book, Baumgartner and a co-author trace the drive to re-examine capital cases to projects at several law and journalism schools in the early 1980s, including Northwestern University in Illinois. In addition to academics, some journalists and lawyers have also pursued the cause. California, Connecticut, Illinois, North Carolina, and Wisconsin have formed government-sponsored innocence commissions.

The focus on innocence remains controversial in criminal justice circles, however. Death-penalty advocates accuse abolitionists of obscuring the fact that most of the people exonerated are not actually “innocent” at all but have merely found legal loopholes through which to squirm. Sharp has examined claims made by groups like the Death Penalty Information Center, whose Web site lists 123 people who have been “released from death row with evidence of their innocence.” In reading through case files, in combination with other studies, Sharp found only 17 cases in which freed capital convicts were likely to have been truly innocent.

Sharp attributes the decline in death sentences to a commensurate drop in crime levels over the past two decades. But Baumgartner contends that factoring in the reduction in crime doesn’t explain the decrease in executions and death sentences: Murder rates fell throughout the 1990s, but executions increased until 1999.

Although DNA evidence is rarely a factor in capital cases, Richard Dieter, executive director of the Death Penalty Information Center, says that its mere existence raises questions about the entire criminal-justice system. “Everybody is aware that mistakes have been made,” he says. “If we had DNA, we’d expose even more, but not every case has it.” And Baumgartner argues that DNA testing has had a huge psychological effect on the public. “When it’s presented as the accused criminal or the convicted criminal himself saying that he’s innocent, it’s not that credible. The DNA makes it way more credible, because there’s some guy in a white lab coat who’s done the study.”

Some supporters of capital punishment say that, eventually, DNA testing will make the application of death sentences much more accurate. Arguing for a defendant’s right to post-conviction DNA testing, former FBI Director William Sessions wrote in a 2003 Washington Post op-ed, “As DNA technology continues to improve, so does its ability to identify the true perpetrators of crimes and exclude those who are wrongly suspected or charged.” In 2004, President Bush, a strong backer of capital punishment, signed the Justice for All Act, which offered federal grants to states to conduct DNA testing and to increase compensation for those wrongfully convicted.

Dieter partially agrees with Sessions’s analysis. “Our organization, the Death Penalty Information Center, probably would go out of existence if all of those [structural] problems were eliminated,” he says. “We don’t try to raise [capital punishment’s] rightness or wrongness as a theory. And I think, in a democracy, if people absolutely want the death penalty, it’s better that we have one that’s fair, that’s accurate, that doesn’t capture innocent people.” But he hastens to add, “It’s somewhat hypothetical to think that we can eliminate all of these problems in a human institution.”

**Political Developments**

The watershed event in the innocence movement came in Illinois, where Gov. Ryan ordered a moratorium on executions in 2000 after research by a professor and his journalism students at Northwestern exonerated Anthony Porter, who had been convicted of a double murder in 1982, shortly before his execution date. Evidence subsequently emerged that police had tortured other death-row inmates into confessing to crimes they didn’t commit. Shortly before Ryan left office in 2003, he commuted the sentences of all 171 people on the state’s death row. “Anthony Porter was 48 hours away from being wheeled into the execution chamber where the state would kill him,” Ryan said in his announcement. “It would be all so antiseptic that most of us wouldn’t have even paused for a second, except that Anthony Porter was innocent.”

In 2004, state Supreme Courts in Kansas and New York declared their states’ death-penalty statutes unconstitutional, although the U.S. Supreme Court later overruled the Kansas ruling. Last year, acting on the advice of a state-sponsored commission, the New Jersey Legislature imposed a moratorium on capital punishment. After gruesome accounts of botched executions, several state courts have reopened the question of whether lethal injections might run afool of the Constitution’s ban on “cruel and unusual punishment.”

This year, measures to halt executions in several states have gone further than any in recent memory. In February, the Montana Senate gave preliminary approval to a bill abolishing the death penalty. In March, legislation to repeal the death penalty in Nebraska failed in the state’s judiciary committee by one vote; a measure to reform capital punishment is tied up in the Legislature. Also in March, a bill repealing the death penalty in Maryland failed on a tie vote in committee.
Capital punishment has been a powerful issue in political campaigns, although there are signs that it is weakening. In 1992, then-Gov. Bill Clinton made a point of leaving the presidential campaign trail to preside over the execution of Ricky Ray Rector, whose case raised questions of severe brain damage. In 1994, New York Gov. Mario Cuomo, a death-penalty foe, lost re-election to Republican George Pataki in a campaign that focused on the issue.

In the 2000 presidential campaign, George W. Bush, who had presided over more executions than any other Texas governor, got no argument from Vice President Gore, also a supporter of capital punishment. In fact, Gore’s only criticism of Bush’s death-penalty record was that Bush wasn’t tough enough. During the second presidential debate, Gore attacked Bush for not supporting a hate-crimes law that could have been attached to the conviction of the men who dragged James Byrd, an African-American, to his death behind a pickup truck in Jasper. In response, Bush questioned whether an extra law was needed. “Guess what’s going to happen to them?” he asked eagerly. “They’re going to be put to death.” (Two of the three men convicted of the crime were sentenced to death.)

In 2004, however, Sen. Kerry said he opposed capital punishment on moral grounds and because he believes it is unfairly applied, although he did make an exception for terrorists. Peter Loge, a former aide to Sen. Edward Kennedy, D-Mass., and to Rep. Brad Sherman, D-Calif., points out that Kerry’s stance never became a campaign issue. “The last presidential campaign was just mean and vicious, with both sides accusing the other of making stuff up. [But] the death penalty never came up,” says Loge, whose public-affairs firm represents families of violent crime victims who nevertheless oppose capital punishment. “To me, that says [GOP] pollsters look at all the data and say, ‘You know what? Just don’t talk about it. Nobody cares.’” Loge also notes that Sen. Jon Corzine’s opposition to capital punishment was not an issue in a bitter gubernatorial campaign in New Jersey.

Democratic Gov. Jim Doyle of Wisconsin, a death-penalty opponent, was re-elected in 2006. Newly elected Maryland Gov. Martin O’Malley, another Democrat, has stridently opposed capital punishment. In perhaps the most noteworthy case, Democratic Virginia Gov. Tim Kaine has steadfastly maintained his opposition, even though his state trails only Texas in the number of people it has executed since 1976.

Clogs in the Wheel

The potential impact of DNA evidence has made the process of trying a death-penalty case even more cumbersome and expensive. That, in turn, has had the effect of delaying executions and buying more time for appeals. “What we know about the appeals process is that, on average, among those offenders who get executed after a death sentence, there’s a lapse of usually between 10 to 12 years,” says James Acker, a criminal-justice professor at the State University of New York (Albany). More convicts are being exonerated (or having their death sentences commuted), in part, because errors in the process are bound to surface as the cases undergo so much scrutiny at the trial, appellate, and habeas corpus stages.

The truth is, lengthy appeals most often center on legal and administrative issues. Basic questions of guilt and innocence are not much debated after the trial. “When it gets down to appeal, they’re talking about, ‘Were the jury instructions appropriate? Was the jury seated correctly?’” Givelber says. “Although [trials are] reviewed again and again and again, they’re never reviewed on the basic question of whether the defendant did it.”

One relatively new issue under debate is the adequacy of legal representation. In 2003 the Supreme Court ruled in Wiggins v. Smith that defendants in capital cases must receive adequate counsel.
Amid rising questions about innocence, defense attorneys are spending more money on capital cases across the country, and courts are setting higher standards for public defenders and other lawyers who handle these cases. With more money flowing to defense attorneys, prosecutors are likewise spending more, in an arms race that makes counties think twice about bringing such cases in the first place. A death-penalty case “costs $1 million, and [a county’s] whole budget could be $2 million,” Dieter says. “And some of these are retrials—they already did this case once.”

Judicial Review

Throughout the 1990s, the Supreme Court issued rulings intended to speed the seemingly endless process of appeals in capital cases. But in this decade, the Court has chipped away at states’ ability to carry out executions. In Atkins v. Virginia, the justices ruled in 2002 that executing mentally retarded defendants violates the Eighth Amendment ban on cruel and unusual punishment. In the 2005 decision in Roper v. Simmons, the Court barred states from executing people who were under the age of 18 when they committed their crimes. Last year, in the Hill v. McDonough case dealing with lethal injections, the high court ruled that death-row inmates may challenge their convictions under expansive civil-rights laws as well as under narrow habeas corpus arguments.

“It’s hard for the Supreme Court to affect what juries decide about guilt or innocence,” Dieter says. “But they can make restrictions, or just give the death penalty a second look. And I think that’s what they’ve done in requiring better quality of counsel, checking on the prosecutors use of jury strikes, eliminating the death penalty for some offenders, and looking at the mental illness problems. All of these things are happening in a climate in which the death penalty is a little bit more on the defensive.”

Ultimately, Baumgartner says, the Supreme Court may one day declare capital punishment unconstitutional—as it did in 1972—on grounds that it has come to be applied too unevenly and unpredictably. According to the Death Penalty Information Center, 83 percent of all executions in 2006 took place in the South; this year, 12 out of 14 executions have occurred in Texas. “It’s possible that as it becomes more and more rare, the Supreme Court will say that if it’s unusual, it’s unconstitutional,” Baumgartner says. “How they define ‘unusual’ could mean that it’s only used in five states, and 45 other states virtually never use it. We’re not at that point yet, but we’re moving in that direction.”

Robert Blecker, who teaches constitutional history at New York Law School, derides that idea. “It is not at all difficult for me to stomach the fact that some states execute and others do not, in terms of federalism,” he says. “The essential trade we made in 1788 [in writing the Constitution] was one that ac-

knowledged that it is primarily a state function to define, detect, prosecute, and punish crime.”

Theory Versus Practice

Despite the drop in death sentences, public support for capital punishment remains fairly high. In an October 2006 Gallup Poll, 67 percent of those surveyed said that they favor capital punishment. But that’s well below the 80 percent support recorded in 1994. When pollsters probe beneath the surface, moreover, they find indications that support is lessening. When respondents are given the option of backing an alternative sentence of life without parole, support for the death penalty drops to 47 percent, according to a May 2006 Gallup Poll. Likewise, Baumgartner says, jurors’ theoretical support for the concept of capital punishment weakens when they have to make real-world decisions in capital cases.

Millas changed his mind on the death penalty because of personal experience. When he was the Bexar County district attorney, the main criticism he faced from his constituents was that his office did not use the death penalty enough, he says. But he started to have doubts after reading news reports on the issue. After the controversial June 2000 execution of Gary Graham, a Texas man who was convicted on the testimony of a single eyewitness, “I came out in favor of a moratorium,” he says. “I took the position that there ought not to be any more executions until we had a system that we were confident was doing what it was supposed to do—mainly, to protect the innocent.” His wife accused him of being disingenuous on the matter, he says, and encouraged him to oppose the death penalty in all cases.

When a Houston Chronicle story called one of his own cases into question, he turned into an unequivocal opponent of capital punishment. In November 2005, the Chronicle reported that Ruben Cantu, a man whom Millas’s office tried and executed, may very well have been innocent. Juan Moreno, the victim of the shooting who survived, and the lone eyewitness to the crime, told the paper that Cantu was innocent and that he had fingered Cantu only because of pressure from the police. “I acknowledged at that point, publicly, responsibility for not simply the decision to prosecute the case, but I [also] assumed responsibility for the execution,” Millas recalls. “And with the understanding that while his innocence had not been established, it was clear to me that the case should not have been prosecuted as a death-penalty case.”

Since then Millas has worked to get the death penalty abolished in Montana, New Jersey, New Mexico, and other states. He still believes that in the vast majority of cases, states execute only the guilty. But he adds, “There’s just lots of ways that the system can break down, and I think does break down. Fortunately, I believe it doesn’t happen often. But if it happens once, that’s too often.”

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