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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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Fueling this new sentiment about capital punishment is a growing awareness of the fallibility of the death penalty system. Exonerations from death row have become quite common. Since 1973, more than 130 people in 26 states have been released from death row with evidence of their innocence. These exonerations have had a great impact on the debate about the death penalty, leading to the imposition of moratoria on executions in some states. In addition they have spurred the passage of congressional legislation like the Innocence Protection Act, a comprehensive package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. Finally, approximately 80% of the American public now believes that an innocent person has been executed in the past five years.²

The specter of convicting the innocent has spurred the growth of a new abolitionist politics. Opposition to the death penalty traditionally has been expressed in several guises. For instance, some abolitionists have opposed the death penalty in the name of the sanctity of life. Even the most heinous criminals, they urge, are entitled to be treated with dignity. Other traditional abolitionists have emphasized the moral horror, the “evil,” of the state’s taking a life. Still others believe that death as a punishment is always cruel and thus incompatible with the Eighth Amendment’s prohibition of cruel and unusual punishment.

New abolitionists, though, focus less on morality and more on legal values. They use the familiar language of due process, equal treatment, fairness, and the incontrovertible proposition that the innocent should not be executed. They speak in the language of the “American mainstream”—of scrupulous, fair-minded people committed to the view that even in death cases, and perhaps especially in death cases, justice must be done justly. As Wisconsin Senator Russ Feingold put it, “The continued use of the death penalty demeans us. [It] is at odds with our best traditions.”³

While the signs of change are all around us, the explanation for *how* this has happened is less readily apparent. Here, *The Decline of the Death Penalty and the Discovery of Innocence* makes a truly important contribution. Frank Baumgartner, Suzanna De Boef, and Amber Boydston provide a careful and persuasive examination of the development of what they label a “social cascade,” which, in their view, has reached a “tipping point . . . where changes in public understanding have begun to induce further changes in policy, which in turn reinforce these same changes in public understanding” (p. 10). In their view, the death penalty provides a quite unusual example of an instance of a “near-complete overhaul of an issue debate” in a relatively short period of time (p. 4).

The authors set out to explain how this reframing took place. In their view, the key to this reframing was the growth of the innocence movement. They provide a com-

prehensive overview and chronology of the emergence of that movement, usefully stressing the important role played by actors outside as well as inside the legal process: “As legal scholars, judges, journalists, and others have focused new attention on the old problem of innocence, the debate has been transformed. Once the process started, it was reinforced by further findings of innocence. Particular facts, which once might have been treated as one-of-a-kind historical flukes . . . were transformed into evidence of the entire system being flawed. . . . More attention led to more efforts to find more cases” (p. 5).

Baumgartner, De Boef, and Boydston suggest that changes in news coverage of the death penalty has been both a key indicator of, and a key force in, the process of issue redefinition. To make this case, they present the results of a content analysis of coverage of the death penalty in the *New York Times* from 1960 to 2005. That analysis demonstrates substantial changes in the “framing” of the debate about capital punishment.

Over a period of more than 40 years, the emphasis of the death penalty coverage has shifted from moral and/or constitutional issues to the administration of capital punishment, and since 1993, “attention has increasingly focused on questions relating to the defendants in criminal trials rather than to victims” (p. 127). News coverage has recently been dominated by stories about the fairness of the death penalty, and as the authors document, there has been an increase in “anti-death penalty tone over the last decade” (p. 121).

Yet in spite of this change in tone and the reframing of the death penalty debate, public support for capital punishment, as measured at the most general level, has remained remarkably stable over time. The authors demonstrate that “opinions on the death penalty tend to be grounded in moral values and related to social conditions and to demographics, both of which are mostly fixed” (p. 167). What has changed, however, is the relative willingness of Americans to translate their abstract support for capital punishment into death sentences and executions. Although Baumgartner, De Boef, and Boydston do not speak in these terms, the “discovery of innocence” has created a new set of background conditions for considering whether to impose a death sentence or carry out an execution in particular cases today. Declining numbers of death sentences and executions suggests that the *de facto* burden of proof has shifted in capital cases, making it harder for the pro-capital punishment side to carry the day.

In what is, I think, their least successful chapter, the authors discuss the dynamics of decision making at the level of death sentences. They claim that the sentencing rate can be explained by reference to “the tenor of media framing” of the death penalty debate (p. 214). Yet the explanatory power of this factor, while great in comparison with things like homicide rates, is nonetheless not

very strong. We are left to speculate how prosecutors, judges, and jurors in capital cases operate in the interstices of abstract support and concrete doubts as they make decisions in capital cases.

The Decline of the Death Penalty and the Discovery of Innocence provides an important complement to research on that kind of decision making. Its analysis is sophisticated and careful. Its findings are generally quite compelling. In the end, it helps us understand how America has come to a period of national reconsideration of capital punishment through a cumulating, and often undramatic, set of actions and events whose effects could not have been predicted but which at the start of the twenty-first century have put the United States on the road to abolition.

Notes

- 1 Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>; see also “Executions in the United States,” <http://www.deathpenaltyinfo.org/executions-united-states-2008>.
- 2 See CNN/USA Today/Gallup Poll Release, June 30, 2000. Results summarized at New Jerseyans for Alternatives to the Death Penalty, “Recent Poll Results from Around the Country,” <http://www.njadp.org/forms/guessagain.html>.
- 3 See “Feingold Calls for Abolition of Federal Death Penalty to Mark the New Millenium.” November 11, 1999. Truth in Justice Organization. <http://www.truthinjustice.org/feingold.html>.