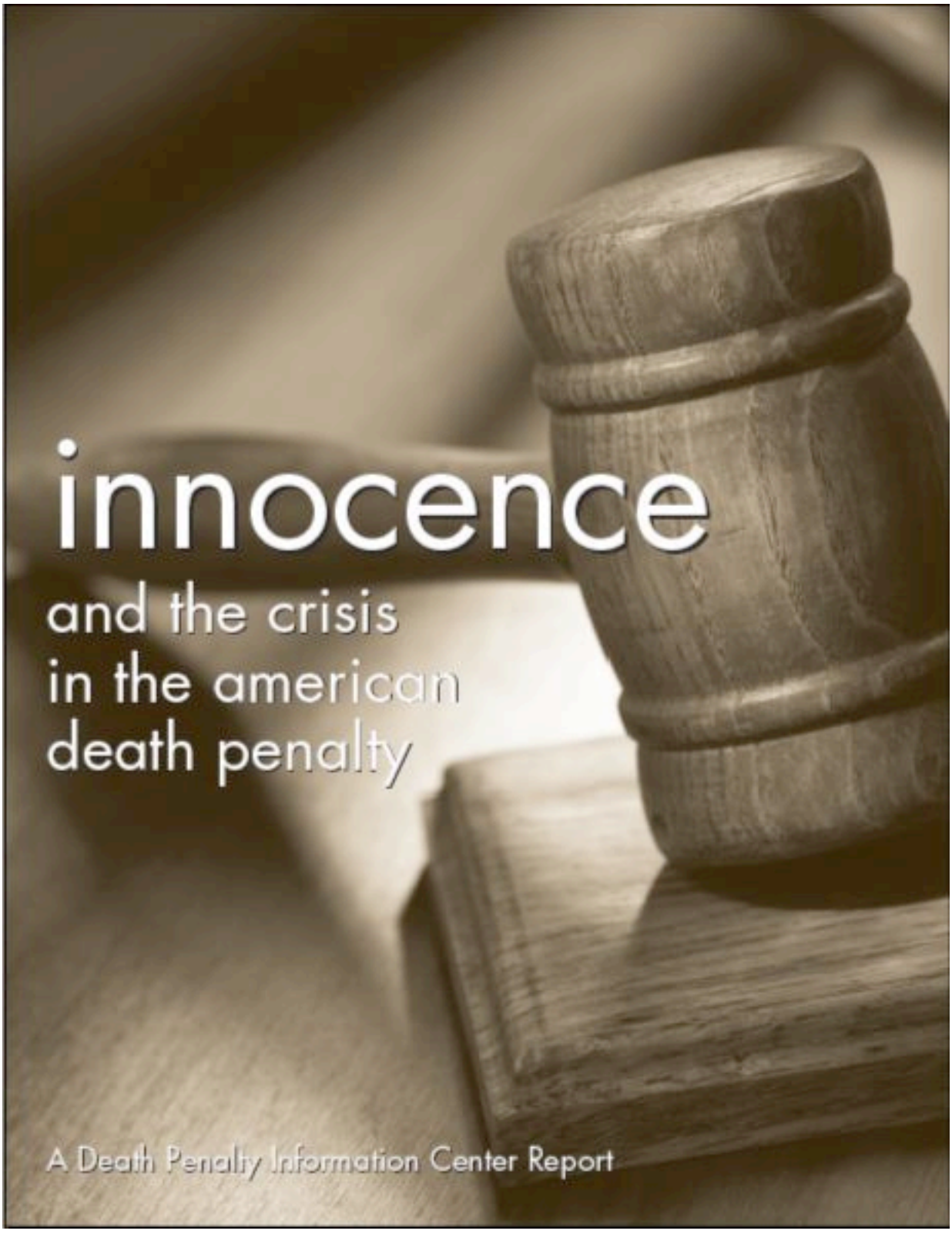
innocence
and the crisis
in the american
death penalty
A Death Penalty Information Center Report

INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY

If statistics are any indication, the system may well be allowing some innocent defendants to be executed.
-Justice Sandra Day O'Connor

The best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions.
-United States v. Quinones

A legal regime relying on the death penalty will inevitably execute innocent people - not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact.
-U.S. District Judge Michael Ponsor

A Death Penalty Information Center Report
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September 2004

INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY

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THE EXONERATED: NUMERICAL SUMMARY

TOTAL EXONERATIONS SINCE 1973 — 116

EXONERATIONS BY STATE

Florida	21	North Carolina	5	Idaho	1
Illinois	18	Pennsylvania	5	Kentucky	1
Louisiana	8	New Mexico	4	Maryland	1
Arizona	7	Ohio	4	Mississippi	1
Oklahoma	7	California	3	Nebraska	1
Texas	7	Missouri	3	Nevada	1
Alabama	5	Indiana	2	Virginia	1
Georgia	5	Massachusetts	2	Washington	1
		South Carolina	2		

EXONERATIONS BY RACE

BLACK - 58
WHITE - 45
LATINO - 12
OTHER - 1

EXONERATIONS BY GENDER

MALE - 115
FEMALE - 1

EXONERATIONS BASED UPON DNA EVIDENCE — 14

BASIS FOR EXONERATION

ACQUITTAL - 40
CHARGES DROPPED - 69
PARDONED - 7

AVERAGE NUMBER OF YEARS OF INCARCERATION BEFORE EXONERATION — 9 Years

TOTAL YEARS OF INCARCERATION BEFORE EXONERATION — 1,042 Years

INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY

Executive Summary

This report catalogs the emergence of innocence as the most important issue in the long-simmering death penalty debate. The sheer number of cases and the pervasive awareness of this trend in the public's consciousness have changed the way capital punishment is perceived around the country. The steady evolution of this issue since the death penalty was reinstated in 1976 has been accelerated in recent years by the development of DNA technology, the new gold standard of forensic investigation. This science, along with a vigorous re-investigation of many cases, has led to the discovery of a growing number of tragic mistakes and freed inmates.

The evidence in this report presents a compelling case for many Americans that the risks associated with capital punishment exceed acceptable bounds. One hundred and sixteen people have been freed from death row after being cleared of their charges, including 16 people in the past 20 months. These inmates cumulatively spent over 1,000 years awaiting their freedom. The pace of exonerations has sharply increased, raising doubts about the reliability of the whole system.

This evidence has produced a dramatic reduction in the use of the death penalty as measured by the steep decline in death sentences around the country. Death sentences have dropped by 50% over the past 5 years. Nearly every state has experienced a significant reduction in death sentencing between the 1990s and the current decade. Many states are recording their lowest death sentencing rates in 30 years, and the number of inmates on death row has declined after steady increases for decades. Even executions have declined. And public support for the death penalty in opinion polls is significantly down from its high point in the 1990s.

But the official government response to the crisis of errors has been tepid at best. Most legislators lag behind the public in changing their perspective on this punishment. Only one state has an official moratorium on executions. Token reforms have been passed in some jurisdictions, but a thorough reinvestigation of the whole death penalty rationale and process has been avoided almost everywhere.

Ultimately, the issue of innocence, grounded in reports such as this, represents a crisis for the death penalty in America. The public's tolerance for sacrificing innocent lives for the sake of maintaining a demonstrably unfair government program with questionable benefit to society is noticeably ebbing. New voices are emerging to challenge the death penalty: judges, law enforcement officials, conservative commentators, and some legislators are discarding the former polarization of the issue as one between criminals and victims. Instead, people are noting that the injustices are often perpetrated by those mantled with the public trust, and that the victims are sometimes those condemned to death.

This is not only a crisis of public confidence but one with constitutional dimensions as well. Some justices, in both legal opinions and public statements, are calling for a new legal analysis to address the challenges posed by so many mistakes in capital cases.

The death penalty may continue to decline in the U.S. Or it may, finally, be subjected to a more searching scrutiny. As examples in this report demonstrate, there is no shortage of proposals regarding the changes needed to secure a more reliable and just system. Yet, it is always easy for the next high-profile crime to overshadow the memory of so many past mistakes. Official inertia remains the biggest obstacle to change. But beyond reform, many are saying that it may be time to acknowledge that this experiment has run its course.

INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY

I. What's New in This Report

The public perception of the death penalty in the United States has radically changed in recent years. When thinking about crime and punishment, people no longer see only the threatening image of a dangerous criminal convicted of a terrible crime; they also recall the face of the innocent defendant walking into the sunshine of freedom from the confines of death row.

The issue of innocence, and the powerful examples that have thrust this issue into the public's eye, has done more to change the death penalty debate in this country than any other issue. It has slowed the death penalty down at a time when the political climate and the fears of terrorism might have led to a substantial increase in the use of capital punishment. Yet more profound changes, responsive to the enormity of the problems revealed in recent years, have so far eluded the system.

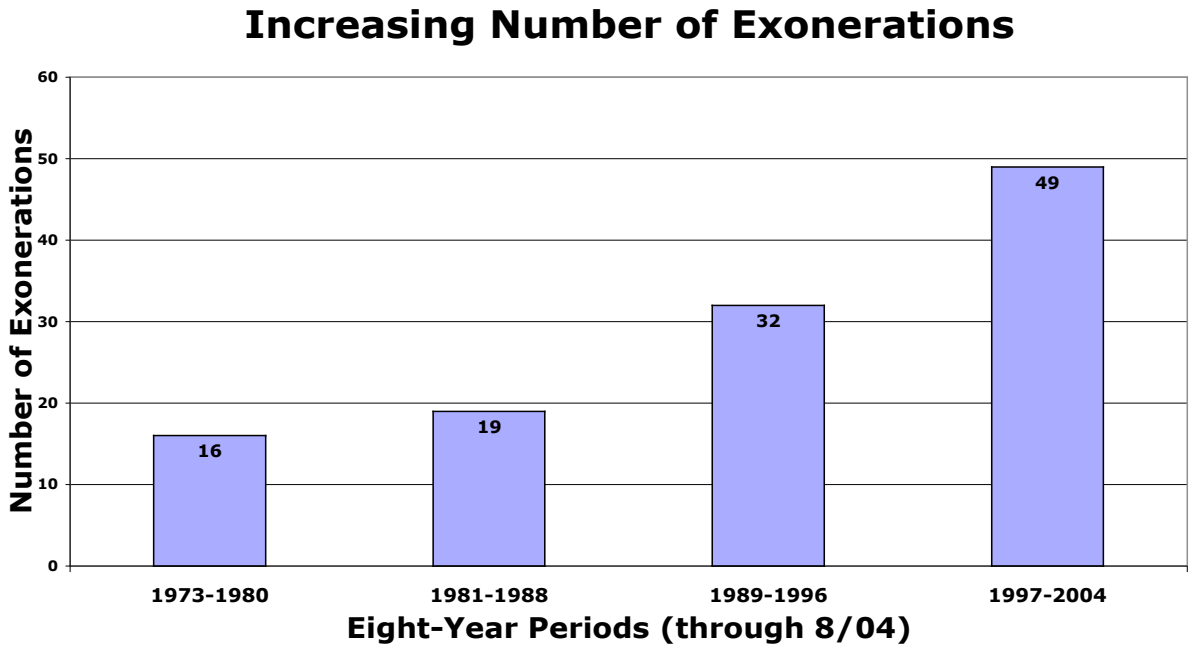
This report catalogs the many new cases of innocence, the reaction of the public to these disturbing developments, and the new challenges that this issue presents to those responsible for the death penalty in the U.S. The report includes:

- **New Cases**: 51 cases have been added to the list of exonerated individuals since DPIC's previous report in 1997. The entire list of 116 cases is displayed in charts and graphs according to states, race, basis for exoneration, and other variables.
- **New Voices**: the issue of innocence has prompted many previous supporters of the death penalty to change their opinions and to become critics of the present system.
- **New Public Response**: data from public opinion polls and from the 50% decline in death sentencing indicate the public's growing unease with the death penalty and stronger support for life without parole as an alternative sentence.
- **New Proposals for Legal Reform**: numerous public and private commissions have made recommendations to improve the reliability and fairness of the justice system in handling capital cases. Some have called for a halt to all executions while this crisis is being addressed. For the most part, only the most modest reforms have been adopted.
- **New Constitutional Challenge**: beyond public policy, the innocence issue raises a fundamental constitutional challenge to the death penalty. Supreme Court Justices, other judges, and legal experts are grappling with the legal viability of this punishment, given the revelations of the past decade.

The drama of the exonerations from death row, the sheer number of reversals, and the nagging doubts about the justice system that produced these mistakes have altered the rhetoric of the death penalty debate and provoked doubts in the minds of jurors and the general public. The advent of DNA testing, and the definitive exonerations from death row that have followed from this advancement, have established the system's fatal flaws and perhaps mark the beginning of the end to the death penalty in America.

Virtually everyone is aware of the mistakes that have been made in capital cases. In polls, the public believes that the most tragic of errors has already happened--that innocent people have been executed in recent years. The evidence of near misses, exonerations based on fortuitous circumstances, and the obvious fallibility of the justice system inexorably leads to that conclusion.

But despite the enormity of the problems, legislators have shied away from pausing the death penalty to allow for a thorough reassessment. Capital punishment has very deep roots. It has been used in America for 400 years, and its history goes back still further. Such traditions are not easily displaced. In some jurisdictions, minor attempts are being made to reform the death penalty, perhaps in order to forestall its demise. It is not yet clear how effective these reforms will be or whether the reforms will even be monitored to see if they make a difference. There will be costs associated with these changes and it remains to be seen how much the public is willing to pay for them. However, with the cracks in the system now exposed, and with a heightened demand for the utmost care and precision whenever human life is at stake, many are asking the more basic question of whether the death penalty can realistically be cobbled into conformity with our fundamental principles of justice.



II. Dramatic Developments Since DPIC's 1997 Innocence Report

A Thousand Years of Mistakes

By 1997, when the Death Penalty Information Center (DPIC) released its second report on innocence,[1] the number of exonerations from death row was already accelerating. The annual number of people who had been freed from death row almost doubled from the first report in 1993. During the 20 years from 1973 to 1993, an average of 2.5 inmates were freed from death row each year. From 1993 to 1997, the average jumped to almost 5 per year. The average has increased even further since then.

The inmates who have been freed spent a total *of over 1000 years* between sentencing and exoneration. The average exoneration took 9 years.

Public Response

In any other area involving the government's failure to adequately protect against the loss of innocent lives, one might have expected an immediate halt to the process and Congressional hearings to get to the bottom of the problem. While one state has halted executions and emptied its death row, most state legislatures have taken a far more timid approach to this crisis. In many ways, the public response has been stronger than the official reaction. New voices have emerged to challenge the death penalty and public opinion has begun to shift away from capital punishment, both in opinion polls and in the jury box.

New Voices

Not only have stories regarding freed death row inmates occupied the front pages of newspapers across the country and been shown on the national news, but they have also made their way into the popular culture. Movies such as *The Green Mile* with Tom Hanks and *True Crime* with Clint Eastwood, and the non-fiction play *The Exonerated* have explored this topic with powerful stories. Fictional books such as Scott Turow's *Reversible Errors*, and non-fiction accounts of freed death row inmates in *Parade Magazine* and many other sources have reached tens of millions of people. Popular television shows such as *The Practice, West Wing* and *Law and Order* have also dealt with the subject.

The prominence of this issue has led some people to change their minds about the death penalty and others to speak out more publicly. Supreme Court Justices have weighed in with their personal concerns about the danger of executing an innocent person and have called upon the states to address this crisis. In a speech in 2001, Justice Sandra Day O'Connor said there were "serious questions" about whether the death penalty is fairly administered in the U.S. Noting the number of death row inmates who have been exonerated in recent years, O'Connor stated, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed."[2]

Justice Ruth Bader Ginsburg pointed to inadequate representation as part of the problem, and even endorsed the idea of a moratorium on executions. "People who are well represented at trial do not get the death penalty," said Ginsburg. "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."[3]

And most recently, Justice John Paul Stevens concluded that "this country would be much better off if we did not have

capital punishment," partly because of the danger of error in capital convictions.[4]

Former Illinois Governor George Ryan
(Photo by Mary Hanlon)

Former Missouri Supreme Court Justice Charles B. Blackmar recently called the death penalty "severely flawed" because of the risks it takes with innocent lives. He saw abolition as the only solution:

> The thought of executing an innocent person is repulsive. This is so even though the accused person may be a habitual criminal guilty of numerous crimes against persons and property. Yet few have the benefit of diligent services. . . . The process is so fatally flawed that the only solution lies in abolishing capital punishment. Most nations with which we share a common heritage have already taken this step. The relatives of the victim have the right to demand swift and sure punishment, but they do not have the right to demand death when the process is so severely flawed.[5]

Conservative spokesmen, such as columnist George Will and radio personality Oliver North, have had second thoughts about the death penalty because of what has been revealed about innocent persons. Will wrote about his reaction to the book *Actual Innocence* by Barry Scheck:

> You will not soon read a more frightening book. It is a catalog of appalling miscarriages of justice, some of them nearly lethal. Their cumulative weight compels the conclusion that many innocent people are in prison, and some innocent people have been executed.[6]

Even some government officials who endorsed the death penalty repeatedly in the past are now ready to stop capital punishment. Former Governor George Ryan of Illinois is perhaps the most prominent example of such a conversion. He began his term as a death penalty supporter and presided over an execution in his first year. As a legislator, he had voted for the death penalty, but he left the Governor's office echoing the words of Justice Harry Blackmun: "I no longer shall tinker with the machinery of death".[7]

Vincent F. Callahan Jr., a Republican in Virginia's House of Delegates, consistently voted for the death penalty, but he now supports a moratorium:

> In the past, I have been a strong advocate of the death penalty. I voted in favor of the resumption of capital punishment in 1977, and I have supported additional provisions expanding the categories of criminal actions for which the death penalty may be imposed.
>
> However, I have now become one of those who believe that we must take another look at the death penalty. . . .In fact, I'm now proposing a 2-year moratorium on executions.. . . I believe it is time for a new dialogue on the death penalty. New scientific evidence, such as DNA testing, has revolutionized all areas of crime detection, criminal prosecution and criminal defense.
> . . .
> A moratorium on the death penalty will give elected officials and the general public the chance to take

a hard look at the evidence to see whether the death penalty is serving its purpose.[8]

State Senator Stephen F. Lynch of Massachusetts, who regularly supported the death penalty for many years, also changed his position and now supports a moratorium on executions because of the spate of wrongful convictions: "Let me put it this way," Lynch said. "I would be reckless to see that evidence before me and not take a step back."[9]

In the past, I have been a strong advocate of the death penalty. I voted in favor of the resumption of capital punishment in 1977, and I have supported additional provisions expanding the categories of criminal actions for which the death penalty may be imposed.

However, I have now become one of those who believe that we must take another look at the death penalty.

–Vincent Callahan (R., Va. House of Delegates)

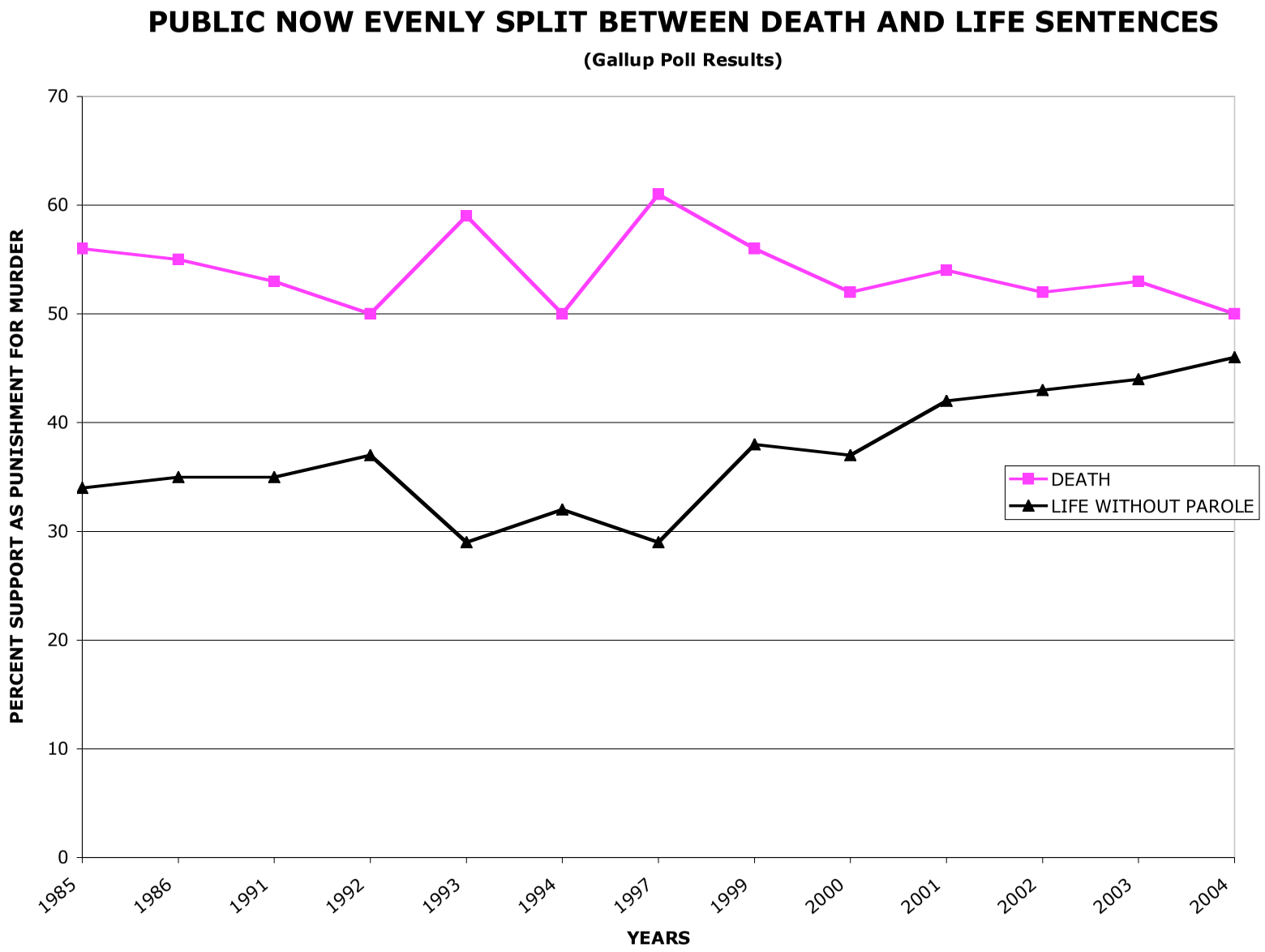
Public Opinion and Death Sentencing

In addition to the emergence of new voices, there has also been a shift in public opinion. Opinion polls have shown a very high awareness of the mistakes that have been made in capital cases and a strong support for reform. Over 90% of the public believes that innocent people have been sentenced to death in recent years, and over 70% in a recent Gallup Poll thought that innocent people have *already been executed*—most likely in Texas.[10] Over 90% support allowing those in prison to have access to DNA testing in order to demonstrate their innocence.

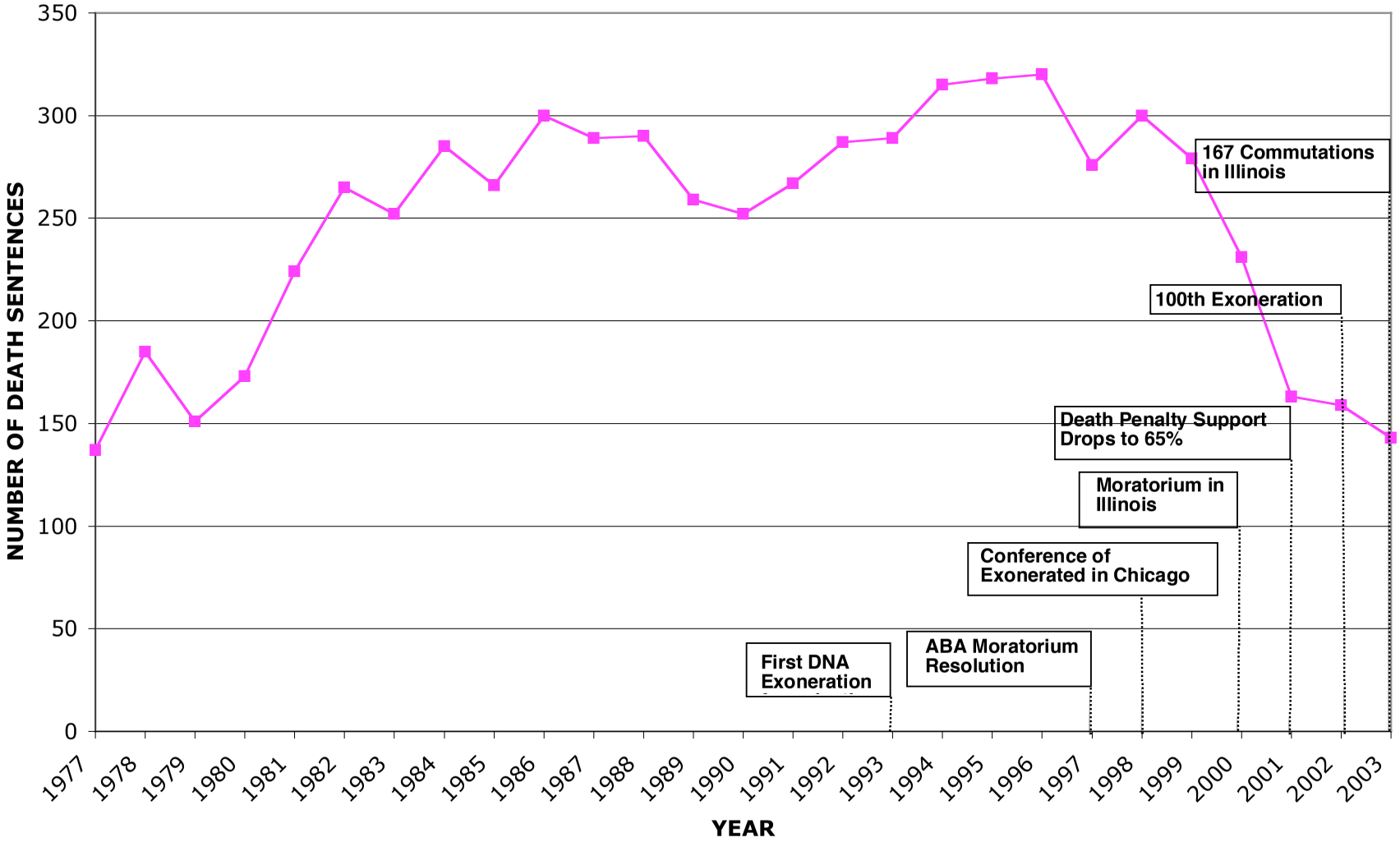
Support for the death penalty peaked at 80% in 1994. By early 2001, that support had dropped to 65%.[11] Since the terrorist attacks of September 11, 2001, some polls have shown a small rise in general support for the death penalty, while other polls indicate that the lower level of support measured in recent years has remained steady. For example, an ABC/Washington Post poll in 2003, recorded support for the death penalty at 64%.[12]

But even the Gallup Poll, which found a rise in death penalty support after 2001, also showed a rise in support for the alternative sentence of life-without-parole (46% supported LWOP in 2004 compared to only 37% in 2000, while support for the death penalty in this comparison dropped to 50%). There now exists a close split within the American public between the death penalty and life-without-parole sentences that has grown even narrower since the attacks of September 11. Six years ago in 1997, the gap was significantly wider (only 27% supported LWOP, while 61% preferred the death penalty) (see graph on p.6). Moreover, the majority of the public now supports a temporary halt to all executions. [13]

Concerns about the death penalty may also be contributing to the dramatic drop in death sentences over the past few years. Capital sentencing has declined by 50% compared to its rate in the 1990s.[14] Almost every state and every region of the country have shown a marked decline in sentencing. Even though the public continues to support capital punishment in theory, they are pulling back on imposing this extreme sanction. (See graphs on p. 7 and 8).

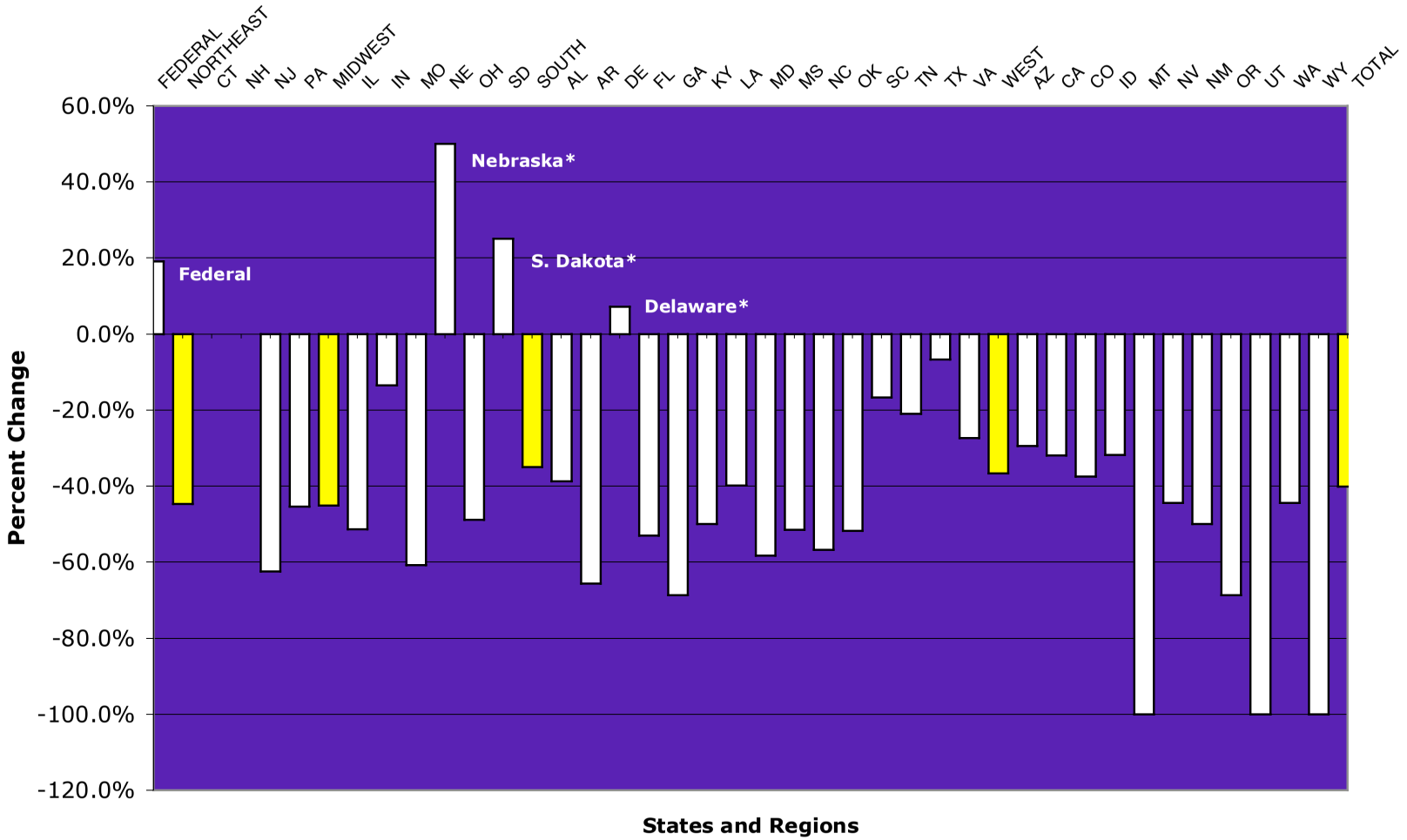

PUBLIC NOW EVENLY SPLIT BETWEEN DEATH AND LIFE SENTENCES
(Gallup Poll Results)
PERCENT SUPPORT AS PUNISHMENT FOR MURDER
70
60
50
40
30
20
10
0
1985
1986
1991
1992
1993
1994
1997
1999
2000
2001
2002
2003
2004
YEARS
DEATH
LIFE WITHOUT PAROLE

DECLINE OF DEATH SENTENCES IN U.S.



Sources: Sentences 1977-2002, Bureau of Justice Statistics; 2003, NAACP Legal Defense Fund.

Percent Change in Average Annual Death Sentences Between 1990s and 2000s



Sources: Sentences 1990-2002, Bureau of Justice Statistics; 2003, NAACP Legal Defense Fund.
* Neb. and S. Dakota averaged less than 1 death sentence/yr; Del. averaged about 2 sentences/yr.

Key Events

Many significant events marked the transition from the expanding death penalty of the early 1990s to its attrition in the present decade. The **American Bar Association**, meeting in Texas in 1997, responded to the growing concern about the reliability of the death penalty by announcing a historic resolution calling for a national moratorium on all executions, in part to "minimize the risk that innocent persons may be executed."[15] Over 2,000 organizations and governmental bodies, including numerous bar associations and county councils, have responded by similarly calling for a moratorium.[16]

Yet still more revelations about mistakes in capital cases continued to emerge. In particular, numerous capital convictions in Illinois that had been fiercely defended by the state for years began to crumble. The case of **Ronald Jones** was typical of the reversals that have eroded public confidence in the death penalty system.

Jones was a homeless man when he was convicted of the rape and murder of a Chicago woman. He maintained that he signed a confession only after a lengthy interrogation during which he was beaten by police. Prosecutors described him as a "cold brutal rapist" who "should never see the light of day."[17] But DNA testing revealed that Jones was not the rapist, and there was no evidence that more than one person had committed the crime. The Cook County state's attorney filed a motion asking the Illinois Supreme Court to vacate Jones's conviction in 1997. In May 1999, the state dropped all charges against Jones.[18]

In 1998, a historic **National Conference on Wrongful Convictions** was held at Northwestern University Law School in Chicago. Many of the 74 inmates who had been exonerated over the previous 25 years appeared for the first time together on stage. Extensive national media coverage gave the country a first-hand look at innocent people who had almost been executed. Pictures of the exonerated appeared on the evening news, on ABC-TV's *Nightline*, and in the country's major newspapers.[19] Each former death row inmate rose and repeated (filling in their appropriate state): "Had the state of Illinois gotten its way, I'd be dead today."

Ronald Jones
(Photo by Loren Santow)

The Conference and the exonerations spurred investigations by the media and legislative committees to explore why so many mistakes were being made and what could be done to prevent future errors. Investigative pieces by the *Chicago Tribune* and other papers exposed the critical causes of these pervasive errors: woefully inadequate representation, misconduct by prosecutors and police, and a system that allowed jail-house snitches and paid informants to manufacture evidence that evaporated under closer scrutiny.

"Had the state of Illinois gotten its way, I'd be dead today."

The Exonerated speak at Northwestern University
(Photo by Mary Hanlon)

Executions Halted

The situation in Illinois reached a critical juncture when Steven Manning became the 13th person exonerated from death row. Manning's conviction was based on the testimony of a jailhouse informant and known liar. With that exoneration, Illinois had freed more people from death row than it had executed since the death penalty was reinstated. Governor George Ryan, a Republican and a supporter of the death penalty, declared a moratorium on all executions in January 2000. He promptly appointed a blue-ribbon commission of the state's leading criminal justice experts, including former judges, prosecutors, and defense attorneys.

Among those appointed to the **Illinois Commission on Capital Punishment** were former U.S. Senator Paul Simon, former federal Judge Frank Johnson (who chaired the committee), and noted author and defense attorney Scott Turow. The Commission was given the mandate to explore all areas of the state's capital punishment system and to make recommendations that might begin to repair the broken system.

100th Exoneration

The year 2002 produced more important developments on the innocence issue. In the same month that the Illinois Commission on Capital Punishment released its long-awaited report on revamping the death penalty (see recommendations in section VI), Ray Krone became the 100th person exonerated after being sentenced to death. He walked out of prison in Arizona after DNA evidence clearly pointed to another suspect for the murder that had put him on death row in 1992. Bogus bite-mark evidence had convinced a jury that Krone had murdered a young woman, but other experts later agreed that no match was possible. Fortunately, new DNA testing was available to dispel all doubts, and Krone was freed.

> **"[Krone] deserves an apology from us, that's for sure. A mistake was made here. . . . What do you say to him? An injustice was done and we will try to do better. And we're sorry."**
>
> **–Maricopa County (AZ) D.A. Rick Romley**[22]

In 2003, more people were exonerated and freed from death row than in any year since the death penalty was reinstated. Gov. Ryan in Illinois became convinced that the system that had produced so many errors could not be trusted to determine life and death verdicts, even for the guilty. He emptied death row, granting 4 pardons and 167 commutations for those with death sentences.

Other Developments

State Studies

In response to the increasing number of exonerations, some states, the media and private organizations conducted many reviews of the death penalty system. The *Chicago Tribune's* investigation in Illinois found that "at least 33 death row inmates had been represented at trial by an attorney who has since been disbarred or suspended; at least 35 black death row inmates had been convicted or condemned by an all-white jury; and about half of the state's capital cases had been reversed for a new trial or sentencing hearing."[20] In addition, at least 46 death row inmates were convicted or condemned after prosecutors used testimony from jailhouse informants.[21]

Illinois was certainly not alone among the states with serious problems in their capital punishment systems:

- A 5-part investigative series in *The Tennessean* revealed that:

  • Of the 151 **Tennessee** death sentences reviewed on appeal since 1977, half were overturned, primarily because of trial errors or inadequate representation.

  • Since the death penalty was reinstated, at least 39 of the Tennessee lawyers who had represented defendants in capital cases had been disciplined by the state (165 death sentences were imposed during this period). The list of defense attorneys eligible for capital cases included a lawyer convicted of bank fraud, a lawyer convicted of perjury, and a lawyer whose failure to order a blood test let an innocent man linger in jail for four years on a rape charge.

  • Since 1977, 25% of the black men sentenced to death in Tennessee have had all white juries and, in more than half of those cases, the victim was also white.[23]

- In **Washington**, an investigative series by the *Seattle Post-Intelligencer* found that one-fifth of the 84 people who have faced execution in the past 20 years were represented by lawyers who had been, or were later, disbarred, suspended or arrested. The article also noted that judges contributed to the problem by appointing inexperienced and poorly paid local lawyers to defend capital defendants, instead of those recommended by the state Supreme Court.[24]

- A study by **Virginia's** Joint Legislative Audit Review Commission found that the death penalty was applied inconsistently in the state, with more death sentences sought in rural and suburban jurisdictions than in urban ones, even when the underlying crimes were similar. In addition, the study noted that Virginia's Supreme Court, in its role of monitoring trial courts for disproportionate sentencing, had never found a case of excessive sentencing in the 119 capital cases that had come before it since 1977.[25]

- Similar reports in **New Jersey,**[26] **North Carolina,**[27] **Maryland**,[28] **Pennsylvania**,[29] **Texas**,[30] and other states pointed to the problems of racial disparities, inadequate representation, and related flaws in the justice system.

Thirteen official commissions studied problems in the administration of the death penalty in Arizona, Connecticut, Delaware, Illinois, Maryland, North Carolina, Indiana, Kansas, Nebraska, Nevada, Pennsylvania, Tennessee, and Virginia. The federal government also undertook a review of its capital prosecutions and found racial and geographical disparities. Top officials declared the federal findings to be "troubling" and "disturbing."[31]

In addition to the disparities in prosecutions, the federal death penalty was not immune from the taint of wrongful convictions, despite its claims of quality representation and due process. Ronald Chandler, the first person to receive the federal death penalty after it was reinstated in 1988, temporarily had his death sentence overturned because of ineffective representation by his lawyer. The death sentence was restored by a higher court, but by that time the government's chief witness had recanted his testimony against Chandler and took full responsibility for the murder. Faced with these doubts of Chandler's guilt, on his last day in office President Bill Clinton commuted Chandler's sentence to life in prison.[32]

A Broken System

Professor James Liebman

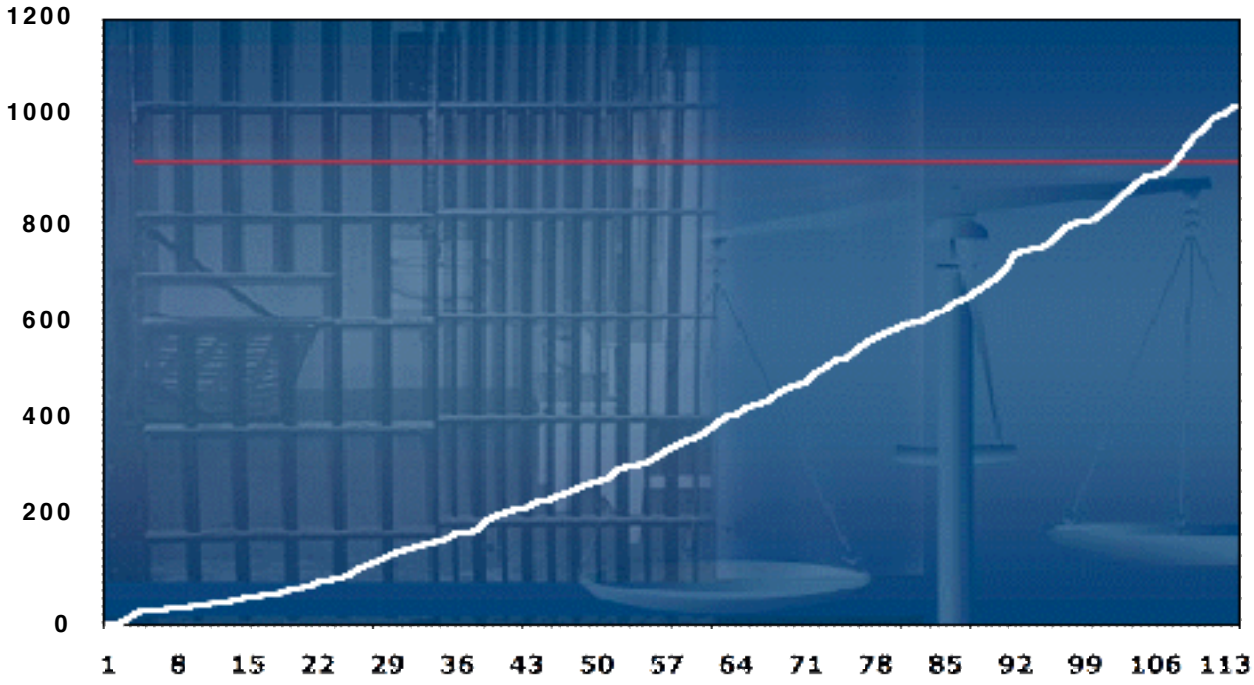
In 2000, Columbia University Law School released an extraordinarily comprehensive study of the death penalty in the United States.[33] Professor James Liebman studied every death penalty appeal from 1973 through 1995 and discovered disturbing patterns. Of all the thousands of cases that had completed the appeals process, an astonishing 68% were found to contain errors so serious the guilt or sentencing trials had to be done over again. Although in the early 1990s some prosecutors and legislators had tried to convince the public that the death penalty was plagued by needless and endless appeals thwarting justice, the Liebman study found that the appeals process was critical because it revealed that most trials contained serious errors.

When a significant sample of the cases that were overturned was tracked through re-trial, it was learned that very few received the death penalty. Eighty-two percent of the cases in the sample ultimately resulted in a sentence of less than death when they were done over, correcting for the error of the first trial. And 7% of those defendants turned out to be innocent. This was clearly a system that deserved the term "broken."

About half of the 50 states have enacted legislation to allow evidence from DNA testing to be considered after the normal appeals in capital cases have concluded. Some states have begun the process of improving their systems of representation in capital cases. In the U.S. Congress, the Innocence Protection Act (now included in S. 1700, the "Advancing Justice Through DNA Technology Act") was introduced in

2000 to encourage all states to enact comprehensive DNA legislation and to provide effective representation in death penalty cases. However, despite receiving bi-partisan support, it was still languishing in the Senate as of August 2004.

Cumulative Years from Sentencing to Exoneration



III. New Cases Illustrate the On-Going Crisis

Anthony Porter
(Photo by Loren Santow)

Nothing brought home the crisis that had grown up around the death penalty more than the many individual stories of innocence revealed over the past few years. Most notable were cases like **Anthony Porter's**. Porter was scheduled to die in two days in Illinois when he received a stay from the court to look into his mental competence. That stay allowed his case to be pursued by a journalism class at Northwestern University. Fortunately, the students and an investigator were diligent enough to discover that one of the witnesses admittedly lied at the trial and they found another man, who confessed on videotape to the murder.

Porter was freed into a confusing world he had not known during his agonizing 16 years on death row. This was truly a "dead man walking."[35] Governor Ryan cited Porter's case repeatedly in justifying his halt to executions.

* * *

One of the nation's most poignant cases was that of **Frank Lee Smith** in Florida, the state that has had more exonerations of those on death row than any other but has resisted all calls for a moratorium or even a study into why these mistakes keep happening.

Smith had always maintained his innocence of the murder that put him on death row. Since his alleged crime also involved a rape, it was a prime candidate for DNA testing. But the state of Florida resisted his requests for testing. Smith died from cancer while awaiting the legal skirmishes over his fate. When DNA testing was performed posthumously, it excluded Smith as the perpetrator. The prosecution offered a belated apology, but Smith was never granted the freedom that he deserved, and he died under society's worst condemnation for a crime he did not commit.[36]

* * *

At the end of the day, perhaps the best argument against capital punishment may be that it is an issue beyond the limited capacity of government to get things right.

-Scott Turow, Author and Former Federal Prosecutor[34]

To adequately tell all the stories of those who have been belatedly exonerated and freed from death row would take an entire book. In total, they spent 1,042 years between their death sentences and their exonerations. Below are summaries regarding the inmates who have been freed in 2004 and 2003. A complete listing of the 116 cases and summaries of the cases from 1997 (the year of DPIC's previous report) to 2002 appear in the Appendix.

Inmates Exonerated and Freed from Death Row Since DPIC's 1997 Report

Cases are listed in reverse chronological order. The numbering of the cases may be different from previous postings because of changes in the listing of earlier cases.

This list includes former death row inmates who have:

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

2004

116. Ryan Matthews — Louisiana — Convicted 1999 — Charges Dismissed 2004

(photo: Reprieve)

Shortly after his 17th birthday, Ryan Matthews was arrested for the murder of a local convenience store owner. Three individuals interviewed by police were unable to definitively identify Matthews, and witnesses described the murderer as short - no taller than 5'8". Matthews is at least 6 feet tall. Matthews' court appointed attorney was unprepared, and unable to handle the DNA evidence. On the third day of the trial, the judge ordered closing arguments, and sent the jury to deliberate. When they could not agree on a verdict after several hours, the judge ordered the jury to resume deliberations until a verdict was reached. Less than an hour later, the jury returned a guilty verdict and Matthews was sentenced to death two days later.

In March 2003, Matthews' attorneys had the physical evidence (including a ski mask) re-tested. The DNA results excluded Matthews, and this time they pointed directly to another individual - one serving time for a murder that happened a few months after the convenience store murder and only blocks away.

In April of 2004, based on the new DNA testing and findings that the prosecution suppressed evidence, a new trial was ordered for Matthews. (Order of Judge Henry Sullivan overturning conviction, Division M of the 24th Judicial District Court, April 15, 2004). Released into his mother's care after she posted bond, Matthews was officially exonerated on August 9, 2004 when prosecutors dropped all of the charges against him. (New Orleans Times-Picayune, August 9 & 11, 2004; Associated Press, August 11, 2004). Matthews was the 14th death row inmate freed with the help of DNA testing.

115. Dan L. Bright — Louisiana — Convicted 1996 — Charges Dismissed 2004

In 1996, Dan L. Bright was convicted of first-degree murder in Louisiana and was sentenced to death. On appeal, the Supreme Court of Louisiana found the evidence insufficient to support his conviction of first-degree murder and rendered a judgment of guilty of second-degree murder. (State v.

Bright, 776 So.2d 1134 (La. 2000)). The trial court imposed a sentence of life without parole at hard labor.

On May 25, 2004, the Supreme Court of Louisiana reversed Bright's conviction, vacated the sentence, and remanded for a new trial holding that the state suppressed material evidence regarding the criminal history of the prosecution's key witness, Freddie Thompson. The court noted that there was no physical evidence against Bright, and that Thompson's testimony was the only evidence that served to convict him. Thompson was very drunk on the day of the crime. Moreover, the prosecution failed to disclose that he was a convicted felon and in violation of his parole. The court held that the specific facts of Thompson's criminal record and the fact that he was still on parole when he testified against Bright raised questions about the veracity of his trial testimony: "This conviction, based on the facts of this case which include a failure to disclose what the State now admits is significant impeachment evidence, is not worthy of confidence and thus must be reversed." Because material evidence had been withheld by the state, Bright's conviction was overthrown. (See State of Louisiana v. Bright, No. 02-KP-2793, May 25, 2004). The prosecution subsequently dismissed all charges and Bright was freed. (See Associated Press, Aug. 9, 2004, listing Bright's exoneration; also conversation with Ben Cohen, attorney for Dan Bright, July 21, 2004).

114. Gordon "Randy" Steidl Illinois Convicted 1987 Charges Dismissed 2004

Gordon "Randy" Steidl was freed from an Illinois prison on May 28, 2004, 17 years after he was wrongly convicted and sentenced to die for the 1986 murders of Dyke and Karen Rhoads. An Illinois State Police investigation in 2000 found that local police had severely botched their investigation, resulting in the wrongful conviction of Steidl and his co-defendant Herbert Whitlock. Due to the poor representation Steidl received at trial, a new sentencing hearing was granted in 1999, resulting in a sentence of life without parole. In 2003, federal judge Michael McCuskey overturned Steidl's conviction and ordered a new trial (267 F.Supp.2d 919 (C.D. Ill. 2003)), stating that if all the evidence that should have been investigated had been presented at trial, it was "reasonably probable" that Steidl would have been acquitted by the jury. The state reinvestigated the case, tested DNA evidence, and found no link to Steidl. State Attorney General Lisa Madigan decided not to appeal the ruling and Edgar County prosecutors announced that they would not retry the case. (Chicago Tribune, May 27, 2004).

113. Alan Gell North Carolina Convicted 1998 Acquitted 2004

Alan Gell after his release
(Photo by Scott Lewis, News & Observer)

Alan Gell was arrested for a 1995 robbery and murder of a retired truck driver named Allen Ray Jenkins. The two key witnesses presented by prosecutors were Gell's ex-girlfriend and her best friend, both teenagers. The girls, who were at Jenkins' house and pled guilty to involvement in the murder, testified that they saw Gell shoot Jenkins on April 3, 1995. However, prosecutors withheld valuable evidence that might have cleared Gell in the initial trial, including an audiotape of one of the girls saying she had to "make up a story" about the murder. (News and Observer, December 10, 2002). In 2002, a State Superior Court judge found that the prosecutors withheld evidence "favorable" to Gell, and vacated Gell's conviction. (North Carolina v. Gell, No. 95 CRS 1884, Order (Superior Court of Bertie County, December 16, 2002) (vacating conviction and granting new trial).

Convicted in 1998, Gell spent the next four years on death row until a new trial was ordered. He was re-tried in February 2004. The defense team was able to present evidence that Gell was out of state or in jail at the time of Jenkins' murder, which was placed closer to April 14th. This refuted the April 3 claim by the original prosecutors. Also challenging the state's timetable was a series of statements by as many as 17 witnesses who told investigators that they had seen Jenkins alive between April 7 and April 10. The most important new evidence was the taped conversation mentioned above, in which the state's key witness referred to making up a story about the murder. On February 18, 2004, a jury found Gell not guilty on all counts, and he left the courtroom with his family. (News and Observer, February 18, 2004.)

If we can't answer the first and simplest question correctly, "Is this person guilty?," how can we expect to answer the infinitely more difficult question correctly: "Is the death penalty the only appropriate punishment for this individual?"

Representative Harold V. Dutton Jr. of Houston[37]

2003

112. Nicholas Yarris Pennsylvania Convicted 1982 Charges Dismissed 2003

In 1981, Nicholas Yarris was in jail on a minor charge when he learned of the murder of 32-year-old Linda Mae Craig in Delaware County, Pennsylvania. Yarris believed that he would be freed if he could tell investigators he knew the killer's identity. Yarris gave investigators a wrong name, believing he could blame the murder on a dead associate. Police leaked to other inmates that Yarris was a snitch, and Yarris endured days of regular beatings and torture. In an effort to save himself, Yarris asked what would happen if he had participated in the crime but was not the murderer. The beatings stopped, and Yarris was charged with capital murder. A fellow inmate made a deal with the D.A. and began exchanging false information about Yarris in exchange for conjugal visits and a reduced sentence. This inmate became one of the few witnesses to testify against Yarris at trial. The sole physical evidence prosecutors offered was semen that had been tested only for blood type. During the trial in June 1982, the prosecution did not hand over some 20 pages of documents that would later be revealed to include other physical evidence and conflicting witness accounts. Yarris was found guilty and sent to death row.

On appeal, a federal judge approved a motion by prosecutors to have evidence from the case tested in a lab in Alabama that was later revealed to have had no experience in DNA testing. This lab found no conclusive results to exclude Yarris or include anyone else. A 1994 motion for a new trial was denied. The DNA evidence was finally tested independently in 2000 by arrangement with the Pennsylvania Federal Defender Office that now represents Yarris, and the results of 3 tests based on evidence from the crime scene excluded Yarris.

A Philadelphia Common Pleas judge vacated Yarris's conviction and ordered a new trial (Pennsylvania v. Yarris, No 690-OF1982, Court of Common Pleas, Delaware County, September 3, 2003 (order vacating conviction).) According to Delaware County Assistant D.A. Joseph Brielmann, the D.A.'s office reviewed all of the available evidence, and "they have not uncovered enough information to proceed against Mr. Yarris. ... In fairness to Mr. Yarris, we requested that the prosecution be

dismissed." (Pittsburgh Post-Gazette, December 10, 2003; Pennsylvania v. Yarris, No 690-OF1982, Court of Common Pleas, Delaware County, December 9, 2003 (order of nolle prosequi).) District Attorney Michael Green said that he might be willing to offer an apology "in a private way." (Los Angeles Times, December 10, 2003; Pittsburgh Post-Gazette and Philadelphia Inquirer, December 10, 2003.)

111. Joseph Amrine Missouri Convicted 1986 Charges Dismissed 2003

Joseph Amrine
(Photo: Amnesty Int.)

Joseph Amrine was sentenced to death in 1986 for the murder of a fellow prisoner while housed in one of Missouri's "SuperMax" prisons. Amrine maintained his innocence, and investigators never uncovered any physical evidence linking him to the crime. Amrine was convicted on the testimony of fellow inmates, three of whom later recanted their testimony, admitting that they lied in exchange for protection. The Missouri Supreme Court found "clear and convincing evidence of actual innocence that undermines confidence" in Amrine's conviction and ordered Amrine released 30 days from their mandate (Amrine v. Roper, Mo. Sup. Ct. No. SC84656, April 29, 2003). During arguments before the court, the state argued that new evidence of innocence should have no bearing on the case. (Herald Sun, April 29, 2003.) On July 28, 2003, prosecutor Bill Tackett announced that he would not seek a new trial of Amrine and that Amrine would be released. (Associated Press, July 28, 2003.)

110. Gary Lamar James Ohio Convicted 1977 Charges Dismissed 2003
109. Timothy Howard Ohio Convicted 1977 Charges Dismissed 2003

Timothy Howard and Gary James were arrested in December 1976 for a Columbus, Ohio bank robbery in which one of the bank guards was murdered. Both men maintained their innocence throughout the trial. In 1978, Ohio's death penalty was held to be unconstitutional and all death row inmates were re-sentenced. Howard and James were given life sentences. With funding from Centurion Ministries in New Jersey, Howard and James were subsequently able to uncover new evidence not made available to their defense attorneys at the time of their trial, including conflicting witness statements and fingerprints. James agreed to and passed a state-administered polygraph test, prompting Franklin County prosecutor Ron O'Brien to dismiss all charges "in the interest of justice." Howard was freed earlier when Franklin County Common Pleas Judge Michael Watson overturned his conviction, citing evidence not disclosed or available at trial. The state dropped its appeal of the judge's ruling, thereby also clearing Howard of the same charges. O'Brien said that releasing the two men was an admission of a 26-year-old unsolved murder and robbery, but that "[w]e don't want anybody in prison serving time for something they didn't do." (Columbus Dispatch, July 16, 18, and 21, 2003.)

108. John Thompson Louisiana Convicted 1985 Acquitted 2003

John Thompson was sentenced to death in 1985 following his conviction for a New Orleans murder. Thompson, who has maintained his innocence since his arrest, was released from prison on May 9, 2003, less than 24 hours after a jury acquitted him at his retrial. (Times-Picayune, May 9, 2003).

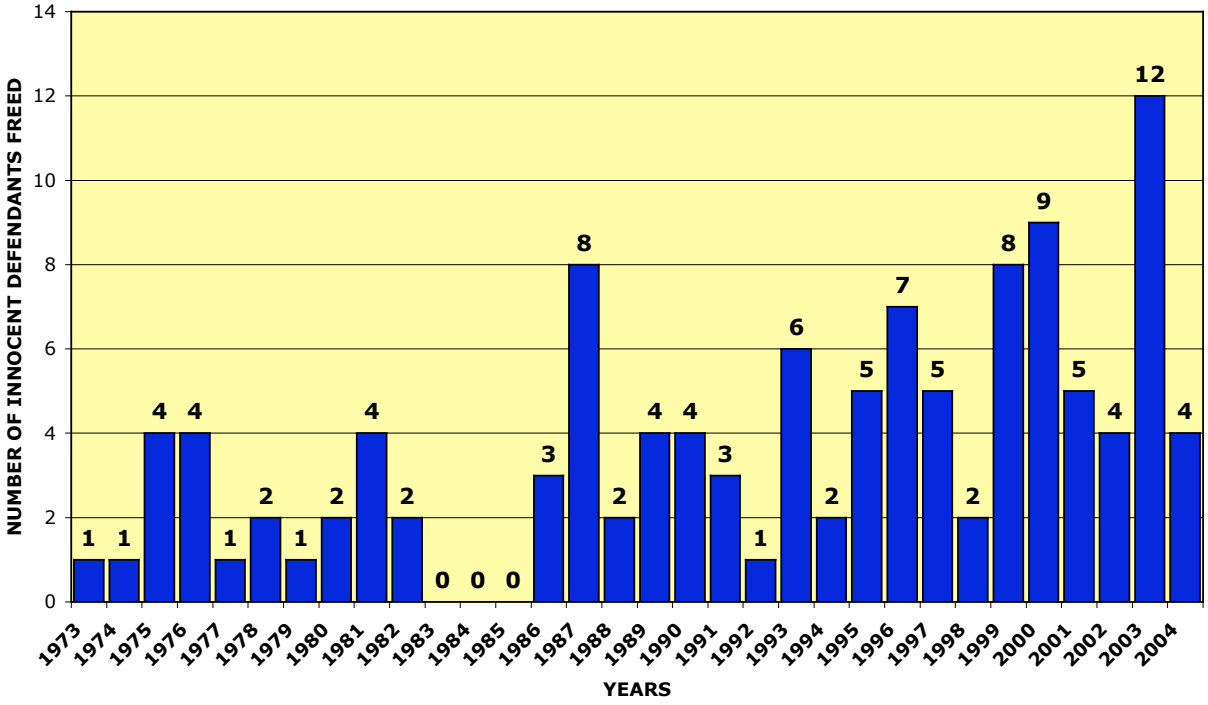
In 1999, just five weeks before his scheduled execution, Thompson's attorney discovered crucial blood analysis evidence that undermined information used to influence the jury's decision to send Thompson to death row. The blood evidence, which had been improperly withheld by the state, cleared Thompson of a robbery conviction. It was that conviction that kept Thompson from testifying on

his own behalf at his murder trial. In 2001, the trial judge vacated Thompson's death sentence, stating that the erroneous robbery conviction had likely influenced the jury's decision to send Thompson to death row. Thompson remained in jail under a sentence of life without parole.

In a later appeal to the 4th Circuit Court of Appeal of Louisiana, the court ruled that Thompson was "denied his right to testify in his own behalf based upon the improper actions of the State in the other case." (See State v. Thompson, 825 So. 2d 552, 557 (La. 2002)). The court held that it was "the State's intentional hiding of exculpatory evidence in the armed robbery case that led to [Thompson's] improper conviction in that case and his subsequent decision not to testify in the instant case because of the improper conviction." The court reversed Thompson's conviction and sentence, ordering a new trial.

The retrial featured Thompson's testimony professing his innocence which had never been heard before. In addition, jurors heard testimony from an eyewitness who insisted that it was not John Thompson whom she saw kill the victim. They also heard testimony that another man, Kevin Freeman, was the actual killer. Freeman was originally charged with the murder, but arranged a plea agreement with prosecutors and implicated Thompson. Although Freeman died prior to Thompson's recent trial, jurors were allowed to hear his earlier statements about the case, which were followed by questions that the defense would have asked on cross-examination. The trial concluded after jurors took less than an hour to acquit Thompson. (Times-Picayune, May 9, 2003).

EXONERATIONS FROM DEATH ROW BY YEAR
(Through 8/04)



[T]he argument against the death penalty has become more profound and salient. Simply put, we now know beyond dispute that the criminal-justice system wrongly sentences people to death. We even know their names, because since 1970, 101 of them have subsequently been found innocent. Moreover, the pace of exonerations has been accelerating, due in part to the wider use of DNA evidence.

. . .

[S]ociety can no longer ignore the practical consequences and risks of the death penalty.

-Editorial Arizona Republic, July 28, 2002

107. Wesley Quick Alabama Convicted 1997 Acquitted 2003

An Alabama jury acquitted death row inmate Wesley Quick of the 1995 double murder for which he was sentenced to death in 1997. The jury acquitted Quick at the conclusion of his third trial for this crime. Quick's first trial ended in a mistrial because of juror misconduct, but a second jury convicted him in 1997. (Quick v. State, 825 So. 2d 246 (2001)). During that trial, defense counsel tried to impeach the state's witness with prior inconsistent statements from the first trial, but the judge would not allow the attorney to use his notes, and would not provide counsel with a copy of the transcript from the previous trial. Quick was found guilty and sentenced to death, but the Alabama Court of Criminal Appeals overturned that verdict in 2001, stating that the judge in Quick's second trial was wrong to deny Quick a free copy of the transcript from the previous mistrial in light of his indigent status.

During Quick's third trial for the double murder, at which he received experienced representation, he testified that he did not commit the murders but said he was at the scene and saw the state's star witness against him, Jason Beninati, kill the men. (Birmingham News, April 22, 2003).

106. Lemuel Prion Arizona Convicted 1999 Charges Dismissed 2003

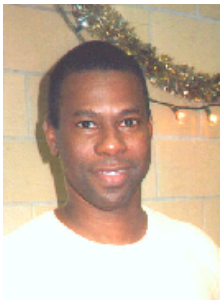
On March 14, 2003, the Pima County (Arizona) Attorney's Office dismissed all charges against death row inmate Lemuel Prion, who had been convicted of murdering Diana Vicari in 1999. In August 2002, the Arizona Supreme Court unanimously overturned his conviction, stating that the trial court committed reversible error by excluding evidence of another suspect. According to the Supreme Court, "There was no physical evidence identifying Prion as her killer," and the trial court abused its discretion in not allowing the defense to submit evidence that a third party, John Mazure, was the actual killer. Mazure, who was also a suspect in the murder, was known to have a violent temper, saw Vicari the night of her disappearance, concealed information from the police when they questioned him, and "appeared at work the next morning after Vicari's disappearance so disheveled and disoriented that he was fired." The Arizona Supreme Court held that the third-party evidence "supports the notion that Mazure had the opportunity and motive to commit this crime. . . ." (Arizona v. Prion, No. CR-99-0378-AP (2002)).

Prion's conviction was based largely on the testimony of Troy Olson, who identified Prion as the man who was with Vicari on the night of her murder. However, when police first showed Olson photographs of Prion, Olson could not identify Prion. According to the Court, "[Olson] stated that the person in the photograph did not look familiar." Seventeen months later, after seeing a newspaper picture of Prion labeling him as the prime suspect in the Vicari murder, Olson believed he could identify Prion. The Arizona Supreme Court also held that the trial court committed prejudicial error in

failing to sever the Vicari murder trial from Prion's trial for another crime, stating that "any connection between the two crimes is attenuated at best."

Prosecutors admitted that Prion would most likely have been acquitted if prosecuted under the standards set by the August 2002 ruling. Prion remained incarcerated in Utah for an unrelated crime. (Tucson Citizen, March 15, 2003).

105. Rudolph Holton Florida Convicted 1987 Charges Dismissed 2003



(photo: Florida Support)

Florida death row inmate Rudolph Holton was released on January 24, 2003, after prosecutors dropped all charges against him. (Miami Herald, January 25, 2003). Holton's convictions for a 1986 rape and murder were overturned in 2001 when a Florida Circuit Court held that the state withheld exculpatory evidence from the defense that pointed to another perpetrator. The court also found that new DNA tests contradicted the trial testimony of a state's witness. At trial, a prosecution witness testified that DNA hairs found in the victim's mouth linked Holton to the crime. However, more recent DNA tests conclusively excluded Holton as the contributor of the hair, and found that the hairs most likely belonged to the victim. (Florida v. Holton, No. 86-08931 (Fla. Cir. Ct. Sept. 2001) (order granting, in part, motion to vacate judgment)).

In December 2002, the Florida Supreme Court upheld the lower court's decision to reverse Holton's conviction and sentence. (Florida v. Holton, No. SC01-2671, 2002 Fla. LEXIS 2687 slip op. at 1 (Fla. December 18, 2002)). Prosecutors announced in January 2003 that the state was dropping all charges against Holton, who had spent 16 years on death row. (Miami Herald, January 25, 2003).

Illinois Pardons

On January 10, 2003, Illinois Governor George Ryan granted four pardons based on innocence. The men pardoned, Aaron Patterson, Madison Hobley, Leroy Orange and Stanley Howard, were all members of the "Death Row 10," a group of Illinois death row prisoners who claimed that they were the victims of police torture. The four pardoned men maintained that their confessions were given only after they were beaten, had guns pointed at them, were subjected to electric shock, or were nearly suffocated with typewriter covers placed over their heads. In 2002, a special prosecutor was named to conduct a broad inquiry into the allegations from more than 60 suspects who, like the Death Row 10, claimed that they were tortured by former Chicago Police Commander Jon Burge or his detectives at the Burnside Area Violent Crimes headquarters in Chicago during the 1980s. Jon Burge was fired by the Chicago Police Board in 1993 for his role in the torture of another prisoner. Governor Ryan examined the cases of all the Illinois death row inmates and selected these four for pardons based on their coerced confessions and other information.[38]

104. Stanley Howard Illinois Convicted 1987 Pardoned 2003

Stanley Howard was convicted in 1987 of the murder of Oliver Ridgell. At trial, one of the main pieces of evidence against Howard was his statement to the police. Howard, however, always maintained that his confession was obtained through the use of police torture. Testimony at his trial contradicted information in Howard's "confession." The other evidence used against Howard was the testimony of Tecora Mullen, the passenger who was in the car when Ridgell was shot. Mullen admitted that it was dark and raining at the time of the shooting. In addition, Mullen's husband was originally a suspect in the murder. (State v. Howard, 588 N.E.2d 1044 (Ill. 1991)). Howard was granted a complete

pardon by Gov. Ryan on January 10, 2003. (Chicago Tribune, January 10, 2003). He remained incarcerated for an unrelated offense.

Leroy Orange with his attorneys
(Photo by Jennifer Linzer)

103. Leroy Orange Illinois Convicted 1984 Pardoned 2003

Leroy Orange spent 19 years on death row before he was pardoned by Governor Ryan. Orange was arrested and questioned about the murders of four persons, and he subsequently confessed. Orange later stated that his confession was obtained by police torture and that he was innocent. At Orange's trial, his half-brother, Leonard Kidd, testified that although Orange was at the victims' apartment earlier in the evening he left before the murders and took no part in the crime. Kidd testified that he was solely responsible for the murders. Shirely Evans, a friend of Orange, testified that Orange was with her the night of the murders. (State v. Orange, 521 N.E.2d 69, 72 (Ill. 1988)).

At trial, Orange was represented by attorney Earl Washington, who was paid only $400 to represent him and who had three Attorney Registration and Disciplinary Commission charges pending at the time of the trial. (State v. Orange, 659 N.E.2d 935, 947 (Ill. 1995)). The Chicago Tribune singled out Washington for his ineptitude, noting that the state had filed new disciplinary charges against him. Those charges alleged that Washington's representation of Orange and others "amounted to professional misconduct." (Chicago Tribune, November 15, 1999). Orange was granted a complete pardon by Gov. Ryan on January 10, 2003. (Chicago Tribune, January 10, 2003).

102. Madison Hobley Illinois Convicted 1987 Pardoned 2003

Madison Hobley was convicted of setting fire to an apartment building in 1987 that claimed the lives of seven tenants, including his wife and child. Hobley maintained his innocence, claiming that his confession was the product of police torture. At trial, the evidence against Hobley consisted of the testimony by Andre Council, a suspected arsonist who claimed to have seen Hobley buying gasoline before the fire, and by a gas station attendant who could not identify Hobley in a lineup and could only state that Hobley "favored" the man who purchased the gasoline.

Hobley's trial was marred by prosecutorial and juror misconduct. The Illinois Supreme Court concluded that "despite [Hobley's] pretrial requests for production, the State failed to disclose to him the evidence of two pieces of exculpatory evidence: (1) a report that defendant's fingerprints were *not* on the gasoline can introduced against him at trial, and (2) a second gasoline can found at the fire scene." (State v. Hobley, 696 N.E.2d 313, 331 (Ill. 1998) (emphasis in original)). Records also showed that police destroyed the second gasoline can after the defense issued a subpoena for it, a move the Illinois Supreme Court said supported a finding that the destruction was "motivated by bad faith." (Id.).

In addition, post-conviction affidavits of jurors stated that some jurors were intimidated by non-jurors while they were sequestered at a hotel, and that they were prejudiced by the acts of the jury foreperson, a police officer who believed Hobley was guilty. The affidavits also stated that jurors brought newspapers with articles about the case into the jury room and that they repeatedly violated the trial court's sequestration order. The Court remanded the case for an evidentiary hearing on the

issue of whether prosecutors violated Hobley's constitutional rights by withholding evidence, and on the issue of whether the jurors were intimidated during deliberations. (Id. at 345). In remanding the case, the court stated: "We stress that we are deeply troubled by the nature of the allegations in this case." (Id. at 338). Hobley was granted a complete pardon by Gov. Ryan on January 10, 2003. (Chicago Tribune, January 10, 2003).

101. Aaron Patterson Illinois Convicted 1986 Pardoned 2003

(Photo by Jennifer Linzer)

Aaron Patterson spent 17 years on death row and always maintained his innocence of the stabbing deaths of an elderly couple in 1986. (Chicago Tribune, January 10, 2003). During his pre-trial interrogation, Patterson etched the following words on an interrogation room bench: "I lie about murders police threatened me with violence slapped and suffocated me with plastic - no phone - no did signed false statement to murders (Tonto) Aaron." (State v. Patterson, 735 N.E.2d 616, 627-28 (Ill. 2000)).

In addition, photographs of the interrogation room revealed the phrase "Aaron lied" etched in the door of the room. There was no physical evidence tying Patterson to the crime, and fingerprints recovered from the scene did not belong to him. In addition, Patterson's former girlfriend testified that she was with Patterson on the night of the murders. In 2000, the Illinois Supreme Court granted Patterson an evidentiary hearing to determine whether his attorney was ineffective for failing to present evidence that the confession was coerced. The court stated:

> Evidence identifying defendant as perpetrator consisted of (1) the oft-changing testimony of a teenager [Marva Hall] whose cousin had been a suspect in the crime; and (2) the testimony from the police officers and assistant State's Attorney concerning defendant's confession.

(735 N.E.2d at 633).

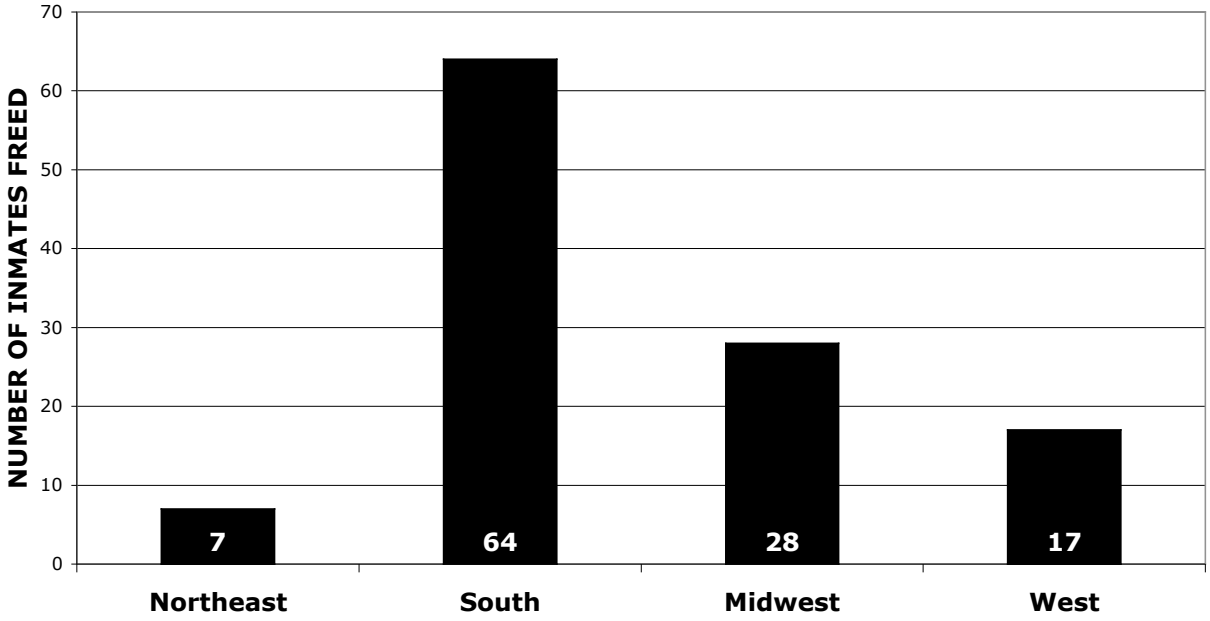
After Patterson's conviction, Marva Hall swore in an affidavit that prosecutors pressured her into implicating Patterson. "It was like I was reading a script," she said of her testimony. Hall told Northwestern University journalism students who were investigating the case: "I helped send [an] innocent man to jail." (Newsweek, May 31, 1999). Patterson was granted a complete pardon by Gov. Ryan on January 10, 2003. (Chicago Tribune, January 10, 2003).

Additional Cases Added Since DPIC's 1997 Report on Innocence
Full Case Descriptions Included in the Appendix*

Nr.	Name	State	Race	Yr. Of Conviction	Yr. Of Release	Years Between	Reason
100	Larry Osborne	KY	W	1999	2002	3	Charges Dismissed
99	Thomas Kimbell, Jr.	PA	W	1998	2002	4	Acquitted
98	Ray Krone	AZ	W	1992	2002	10	Charges Dismissed
97	Juan Roberto Melendez	FL	L	1984	2002	18	Charges Dismissed
96	Charles Fain	ID	W	1983	2001	18	Charges Dismissed
95	Jeremy Sheets	NE	W	1997	2001	4	Charges Dismissed
94	Joaquin Jose Martinez	FL	L	1997	2001	4	Acquitted
93	Gary Drinkard	AL	W	1995	2001	6	Charges Dismissed
92	Peter Limone	MA	W	1968	2001	33	Charges Dismissed
91	Oscar Lee Morris	CA	B	1983	2000	17	Charges Dismissed
90	Albert Burrell	LA	W	1987	2000	13	Charges Dismissed
89	Michael Graham	LA	W	1987	2000	13	Charges Dismissed
88	Frank Lee Smith * -died prior to exoneration	FL	B	1986	2000*	14	Charges Dismissed
87	William Nieves	PA	L	1994	2000	6	Acquitted
86	Earl Washington	VA	B	1984	2000	16	Pardoned
85	Joseph Nahume Green	FL	B	1993	2000	7	Charges Dismissed
84	Eric Clemmons	MO	B	1987	2000	13	Acquitted
83	Steve Manning	IL	W	1993	2000	7	Charges Dismissed
82	Alfred Rivera	NC	L	1997	1999	2	Charges Dismissed
81	Warren Douglas Manning	SC	B	1989	1999	10	Acquitted
80	Clarence Dexter, Jr.	MO	W	1991	1999	8	Charges Dismissed
79	Ronald Jones	IL	B	1989	1999	10	Charges Dismissed
78	Ronald Williamson	OK	W	1988	1999	11	Charges Dismissed
77	Steven Smith	IL	B	1985	1999	14	Acquitted
76	Anthony Porter	IL	B	1983	1999	16	Charges Dismissed
75	Shareef Cousin	LA	B	1996	1999	3	Charges Dismissed
74	Curtis Kyles	LA	B	1984	1998	14	Charges Dismissed
73	Robert Lee Miller, Jr.	OK	B	1988	1998	10	Charges Dismissed
72	James Bo Cochran	AL	B	1976	1997	21	Acquitted
71	Randall Padgett	AL	W	1992	1997	5	Acquitted
70	Robert Hayes	FL	B	1991	1997	6	Acquitted
69	Benjamin Harris	WA	B	1985	1997	12	Charges Dismissed

* Three cases from before 1997 were also added. See Appendix, p.A-10.

EXONERATIONS BY REGION: 1973-2004



IV. Innocence Exposes Broader Problems

The power of the innocence issue is that it throws open a window onto all capital cases as it sheds light on the fallibility of the justice system. People have always known that the system can make mistakes. But the numbers of people being released, the scientific credibility lent by DNA testing, the high media profile of many of these cases, along with the fact that an execution looms in the background, have all contributed to the greater impact of the innocence issue.

No one supports the execution of an innocent person. But these cases also raise the specter of doubt about a much larger class of capital cases: those where the defendant may be guilty, but about whom it is impossible to be certain. For the people freed from death row, the jury's vote to convict had been unanimous and beyond a reasonable doubt, the appeals' courts often found no reversible errors, and typically the governors had shown no inclination to mercy. Yet DNA testing, or the persistent work of journalism students or volunteer lawyers, uncovered something that was entirely missed before and which turned the case completely around.

These same concerns about possible innocence prompted Governor Ryan to commute all the death sentences in Illinois. Although he did not believe all those on death row were innocent, his confidence in the system that had pronounced their guilt and sentences had been shattered. Commutation to life sentences was the only choice acceptable to him in light of the many deficiencies that had been demonstrated.

The Death Penalty in a Scientific Age

In the past, a certain degree of error was assumed and accepted. Without scientific confirmation, it was hard to conclusively prove that a mistake had been made. In death cases before the modern era, the issue of innocence did not arise often because people were executed quickly. There was little time for new evidence to emerge while the case was still open, and little science to check the evidence that did come to light. Once the defendant was executed, the case was closed, evidence was destroyed, lawyers moved on, and courts had little reason to reconsider the guilt of an executed prisoner.

But today the standards are different. We expect a higher degree of precision, especially when lives are at stake. When the space shuttle Columbia blew up no one suggested that we should just chalk this tragic loss of life up to the inevitable dangers of exploration. Rather, a thorough investigation was undertaken to find the root cause of the disaster, and to require whatever changes necessary be made so that this mistake would not happen again.

Similarly, each American life that is lost in a terrorist attack or recent war is carefully inscribed on a monument. If one life can be saved by rescue, no cost is spared. A death penalty that has the tragic consequence of sacrificing some innocent lives is not tolerated as it once was.

This may explain why jurors are apparently becoming more reluctant to impose the death penalty. In the absence of reliable remedies from legislatures or the courts, the public is taking matters into its own hands. As noted above, death sentences across the country have dropped by 50% in the past couple years, and many states such as Florida, North Carolina, and California are reporting their lowest number of new entrants to death row in 20 years.

From 1995 to 1999, the country averaged about 300 death sentences per year. By 2001, that number had plunged to 163, and it dropped even more in the next two years.

From 1995 to 1999, the country averaged about 300 death sentences per year. By 2001, that number had plunged to 163, and it dropped even more in the next two years.[39] (See chart on p. 7.) In the federal system, during one recent period, 20 of the 21 death penalty prosecutions resulted in sentences less than death.[40] Jurors appear to be choosing the less risky alternative of life-without-parole sentences instead of the death penalty. It is true that the number of murders has also decreased. But that decline has been over the last decade, while the drop in death sentences is more recent. Moreover, during the same period, crime in general has also declined and yet the overall prison population has *increased*, including the number of persons imprisoned for murder.[41] Death sentences might have followed the same increases prompted by a "tough on crime" mentality, but instead they declined.

V. The DPIC List and Responses

As the issue of innocence became prominent for the American public, those who feared that the death penalty was being weakened reacted with attacks on the very notion of persons on death row being innocent. Critics asserted that people on the list of exonerated death row inmates were not *really* innocent, despite the removal of all charges against them. In light of these criticisms, it is important to clarify the meaning of innocence in our society and to restate the criteria for DPIC's innocence list.

Since DPIC assumed a primary role in keeping this list, the only cases that have been added are those involving former death row inmates who have:

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

Cases are included in DPIC's list based on objective criteria. These criteria differ markedly from subjective judgments about who is "actually innocent." For example, some commentators have suggested that if the original prosecutor still thinks the defendant is "guilty," even though the defendant has been unanimously acquitted, then such a person should be excluded from the list. But DPIC's list avoids such personal suspicions and relies instead on the traditional source given the authority to separate guilt from innocence—our justice system. Our principal role has been to assemble these cases. We avoid subjective judgments or a hierarchy of innocence.

The people on DPIC's list (now numbering 116) are entitled to the status of innocence conferred on them by our legal system. In this system, as in our society generally, a person who has been cleared of all charges is just as innocent as a person who has never been charged.

(Photo by R. Dieter)

To argue that people who have been acquitted at trial are not "actually innocent" because a prosecutor holds some lingering belief in the person's guilt is to turn suspicion into a permanent stigma. That goes against the most fundamental principle of our constitutional system. No one should have to prove his or her innocence. The status of innocence is a person's full right unless the state has proven them guilty beyond a reasonable doubt. If we throw out that protection, we have abandoned one of this country's most important founding principles.

Besides the danger of establishing a class of individuals who are placed under permanent suspicion, the failure to acknowledge the innocence of those who have been exonerated retards the search for the real perpetrator. A special prosecutor in Illinois examining the wrongful convictions of the "Ford Heights Four" described the police and prosecutors as having "tunnel vision" – that is, blindly holding on to their pursuit of the wrong defendants when evidence clearly was pointing to the guilt of others.[42]

Similarly, prosecutors persistently held on to their mistake in the case of Kirk Bloodsworth from Maryland. Bloodsworth was freed in 1993 after DNA evidence excluded him from the crime, the first such capital case in history. He constantly urged investigators to use the same evidence to find the real killer. But it took the state 10 years to discover that a DNA match existed all the time within their own prison system. For much of that time, the prosecution disseminated the notion that the DNA evidence did not prove Bloodsworth's innocence. Finally, in 2004, the state charged another man with the crime that

Kirk Bloodsworth
(Photo by Loren Santow)

sent Bloodsworth to death row. In so doing, they apologized not only for Bloodsworth's wrongful conviction, but also for not challenging the references to his possible guilt, despite the removal of all charges. (The new defendant was quietly sentenced to life in prison.)[43]

In Florida, Innocence Doesn't Exist

Florida has had more exonerations than any other state. As a token response to this development, a state commission examined some of these cases and came to the correct conclusion that the justice system does not *prove* innocence: "Of these 23 cases, none were found 'innocent,' even when acquitted, because no such verdict exists. A defendant is found guilty or not guilty, never innocent."[44]

However, the commission then went on to the shocking conclusion that *none* of the Florida former inmates *were* innocent and that for almost all of them their guilt should not be doubted: "The guilt of only four defendants, however, was ever truly doubted," their report concluded.[45] This was said despite the fact that 8 of the 23 had all charges dropped by the prosecution, 10 were acquitted at re-trial, and 2 were pardoned. This represents a clear departure from our country's long-standing commitment to the principle of being innocent until proven guilty.

One of the commissioners ironically claimed (while he himself was campaigning for Florida Attorney General) that the innocence list was politically motivated. Moreover, he came to an even more sweeping conclusion, unsubstantiated by the report, regarding all of those on Florida's *current* death row: "Number one, the system is not broken," he said. "Number two, *there are no innocent people on death row.* And Number three, the people who use these 23 cases as a reason to call for a moratorium are making a political statement."[46] There had been no commission review of the cases of people currently on death row. This kind of unfounded extrapolation blinds the state to the true extent of the problems in its midst.

Other Critics

A criticism of the innocence list in the *National Review* revealed the subjective standards held by those seeking to downplay the significance of innocence: "Most of the people who refer to the list clearly have no idea that many of the 'innocents' on it are probably guilty," one critic stated.[47]

Probably guilty is a personal assessment with no reference to an objective system. Such a judgment may exist in the mind of the original prosecutor or a magazine editor,

but its vagueness and arbitrary quality make it particularly subject to political motivations and biases. It is an example of the "tunnel vision" that prevents the discovery of the real offender in many of these cases. It certainly should not be used to brand those who have been cleared and freed by the only objective system we have.

Refinements to the List

As with any area of research, new information helps refine previous findings. DPIC's original construction of the innocence list was made in conjunction with the U.S. House of Representatives Subcommittee on Civil and Constitutional Rights, which issued the first report as a Staff Report in 1993. That list included a small number of cases that did not completely fulfill the criteria that DPIC alone has used in adding to the innocence list. In these cases, although there was powerful evidence of the defendant's innocence, and although they were freed into society after being on death row, there remained a conviction for some lesser offense. We will no longer include this handful of cases, despite their original inclusion in the Staff Report mentioned above.

Accordingly, the following cases have been excluded from DPIC's list, despite having appeared in the 1993 staff report: Henry Drake (GA 1987); John Henry Knapp (AZ 1987); William Jent and Ernest Miller (FL 1988); Jerry Bigelow (CA 1988); Jesse Keith Brown (SC 1989); and Patrick Croy (CA 1990).

Prominent Cases, But Not Included on DPIC's Innocence List

It should be noted that others have compiled different lists of exonerated individuals who were freed from death row, and those lists may include cases that DPIC has not. The strength of the innocence claims in many of these other cases is powerful and underscores the fact that the list in this report is probably an understatement of the true extent of the problem. Nevertheless, in keeping with our objective criteria, the following cases have never been included on DPIC's list:

Sonia Jacobs	**Florida**	**Convicted 1976**	**Released 1992**
Mitchell Blazak	**Arizona**	**Convicted 1974**	**Released 1994**
Joseph Spaziano	**Florida**	**Convicted 1976**	**Not Released**
Paris Carriger	**Arizona**	**Convicted 1978**	**Released 1999**
Kerry Max Cook	**Texas**	**Convicted 1978**	**Released 1997**
Lloyd Schlup	**Missouri**	**Convicted 1985**	**Not Released**
Donald Paradis	**Idaho**	**Convicted 1981**	**Released 2001**
Charles Munsey	**North Carolina**	**Convicted 1996**	**Died in prison**

Descriptions of these cases may be found in the Appendix.

In many of the above examples, defendants were pressured into pleading guilty to a lesser charge to escape the threat of the death penalty at a retrial and to finally gain their freedom. Under that type of pressure, many people have falsely confessed to things they did not do. These cases demonstrate the grey area that often surrounds decisions in capital cases. In many instances, it is impossible to be certain of either guilt or innocence, rendering the death sentence to be an extreme and risky punishment.

Is DNA The Solution?

The era of DNA testing has not ushered in a fool-proof criminal justice system. It is not true that the problems of wrongful convictions are in the past and will not happen anymore because technology can now precisely determine guilt. Nor is it true that the death penalty can proceed unchecked under the assumption that all the inmates on death row have had ample opportunity for DNA testing.

To begin with, exonerations from death row have not declined in recent years. In fact, the number of people that were freed in 2003 was more than in any year since death sentencing resumed in 1973. Twelve people were cleared of their original offense in 2003. Moreover, the average number of exonerations has steadily increased in each quarter of the total years covered in this report: 1973-2004 (see chart on p. 2).

Only 14 of these exonerations have been due to DNA testing. It is true that more states now allow this kind of new evidence to be tested and admitted on appeal, despite time limitations on appeals. However, the DNA exonerations represent only 12% of the total list of 116 cases. In 88% of the cases, attorneys and courts had to rely on other forms of evidence, such as a confession by the actual killer, witnesses who now admit that they were pressured into lying at trial, or the refinement of other kinds of forensic testing such as fingerprint or bite mark analysis.

There is no reason to believe that all of the innocent people among the 3,500 people on death row have been discovered. Some states like Alabama do not supply attorneys for the complete appeals process. In other states, the attorneys do not have the resources for adequate re-investigation. In California, death row inmates wait four years to be assigned an attorney to begin the appeals process, and often several more years until counsel to pursue habeas corpus proceedings is appointed. In that intervening time, witnesses move, evidence is lost, and memories fade.

Attorney Barry Scheck (l.) has helped exonerate many inmates through DNA.
(Photo: American Film Foundation)

Many states have not passed legislation guaranteeing the right to DNA testing. Even where this right is protected by statute, such as in Texas, there are stringent limits on its use and inmates have been refused testing where the results might have affected the death sentence, even if not the determination of their guilt.

Pre-Trial Reliability

But what of the new cases coming into the system? Shouldn't DNA testing ensure that only the guilty are being convicted and sentenced to death? This is not the case because most murders do not involve the exchange of bodily materials containing DNA evidence. A single shooting where no blood of the victim appears on the perpetrator and the defendant drives away in his own car is not likely to be a DNA case. And yet, the same kind of errors that have arisen in DNA cases -- faulty

eyewitnesses, unreliable jailhouse snitch testimony, coerced confessions, withheld evidence of other suspects -- can just as easily arise in non-DNA cases. Wrongful convictions will continue to occur as long as our criminal justice system utilizes human actors. Exonerations due to DNA testing only serve to underscore the risk of mistake in every case.

When newly tested DNA evidence is presented after an inmate has been convicted and sentenced to death, it is usually checked and rechecked before that inmate is ever set free. However, it appears that the same reliability cannot be attributed to the *pre-trial* DNA testing that can often result in a conviction and a death sentence. Recent scandals from crime labs in many parts of the country have exposed the risk of wrongful convictions that shoddy forensic work can bring.

The performance of pre-trial DNA testing is not always a reliable source of forensic information. If evidence is contaminated at the scene of the crime, if the police are not skilled in the collection of such evidence, if the police lab that performs the testing is unqualified to render reliable results, or if the state's expert is incompetent or dishonest, then evidence presented under the veil of scientific certainty becomes the very source of misinformation leading to mistake.

Recent developments in Harris County (Houston), Texas are perhaps the most shocking example of such dereliction.[48] More executions occur in cases from Harris County than from most other *states* in the country. The DNA testing in the crime lab there has proven so unreliable that all of its results are being stricken from the national database of DNA profiles. The roof at the lab has been leaking for years, contaminating critical evidence. The mayor of Houston has called for a moratorium on all executions in cases from that city, and he has decided not to seek re-election in the wake of the scandal. Two grand juries have been convened to look into the scandal. And it appears that other forms of forensic evidence, such as ballistics tests, have likewise been mishandled by the lab.

From Elephant Cages to DNA Labs

An investigation by the *Houston Chronicle* into personnel assigned to the lab revealed:

- The founder and former head of the DNA lab, James Bolding, did not meet the standards for the job. Among other things, he originally failed both algebra and geometry in college, and he never took statistics. Bolding held a bachelor's and a master's degree from Texas Southern University, but was academically dismissed from the University of Texas Ph.D. program. Bolding resigned from the lab after Houston's police chief recommended he be fired.

- Jobs were often given to graduates without the required degrees, such as those who had majored in chemistry or zoology. Among those hired to do DNA tests or prepare samples for testing were two workers from the city zoo. One had most recently been cleaning elephant cages. The other had done DNA research, but only on insects.

- The lab hired Joseph Chu despite a former employer's comment that he "has difficulty in speaking English," (a serious handicap when testifying in court). In his application, he wrote, "I have skilled several equipments" and "I have experience in testing animal and sacrificing them." His supervisors rated him poorly in communication. Chu was suspended for 14 days after several errors were found in four cases, including a capital murder case. He also misrepresented his degree in a court document.[49]

The importance of these events is greatly heightened when their role in the death penalty arena is considered. Texas leads the country by far in executions. About 35% of the executions in the modern era have occurred in Texas, three times as many as the next leading state. And Harris County is the leading jurisdiction in Texas in executions. Juries there, as elsewhere, put enormous weight on the sworn testimony of forensic experts who confidently link evidence to a particular defendant on trial. But reliance on that evidence is sadly misplaced.

An employee's photograph of conditions at the Houston Police Department Crime Lab.

Hundreds of cases are being reviewed including that of Josiah Sutton, who was convicted of rape but has now been freed and pardoned by the governor. The problems with DNA labs are not confined to Houston. Concerns have also been raised about Texas labs in Fort Worth. In Oklahoma, which is currently close to Texas for the most executions, the chief police chemist, Joyce Gilchrist, was fired from her position after an FBI investigation of her lab.[50] Again, hundreds of cases are being reviewed, including many where the defendants are awaiting execution. And around the country, there are reports of improper testing techniques and erroneous testimony at labs in Arizona, Florida, and other states. The FBI's lab has also come under withering criticism and has been completely restructured.[51]

Demanding qualified personnel, establishing standards for forensic labs, creating an oversight mechanism to ensure quality, all will take time to implement. But in the meantime, people who were put on death row as a result of testimony by unqualified witnesses are often at the mercy of review by the same authorities that allowed such a scandal to develop in the first place. A fair review of these cases in court is not necessarily guaranteed, as the debacle in Texas shows. Houston's District Attorney, Chuck Rosenthal, refused to recuse himself from the investigation of the city's lab, despite numerous calls from editorials, the mayor, and former prosecutors. The grand juries investigating the scandal had to insist that they would operate on their own, without the usual input from the prosecutor's office.[52]

Does the Innocence Issue Render the Death Penalty Unconstitutional?

It has always been a paramount concern of the criminal justice system to avoid the conviction of an innocent person. Generally, the emergence of convincing evidence demonstrating a prisoner's innocence should result in his or her release from prison, either through the action of the courts or a pardon by the governor. Death penalty cases, however, raise the disturbing possibility that the new evidence may come too late. Once an execution has occurred, the door on a case is closed and sealed. This prospect raises legal concerns that are unique to capital cases.

• **What should a court do if new evidence arises in a capital case that falls short of being convincing but which raises reasonable doubts about the defendant's guilt?** In particular, what should be done when this evidence comes to light after the normal appeals process has run its course? Does the system's interest in finality trump the risk that an innocent person might be executed? Should more time and tests be allowed, even if they delay an execution, so that tentative evidence might be turned into convincing evidence?

• **Apart from the evidence in a particular case, can the accumulation of mistakes in capital cases reach a critical mass so that proceeding with *any* death penalty prosecution becomes an untenable danger to innocent human life?** Or, to put the question differently, is it constitutional to deprive someone of life, given that the risk of error is so great?

[T]he Court found that the best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions.

–U.S. v. Quinones (2002)

The disturbing pattern in which subsequent scientific evidence has completely discredited prior state claims in capital cases led a federal judge in New York to draw a comprehensive legal conclusion. After considering the evidence from over 100 exonerations and from the Liebman report mentioned above, Judge Jed Rakoff ruled in 2002 that the federal death penalty was unconstitutional because of the risk it posed of executing the innocent.[53]

Judge Jed Rakoff

Judge Rakoff wrote:

> [T]he Court found that the best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty, a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence.[54]

His ruling was overturned by the Court of Appeals, but his reasoning has already appeared in other cases as judges consider the prospect of such fatal mistakes. Clearly, the evidence of wrongful convictions and the risk of irrevocable error are not unique to the federal system. Such errors are probably even more likely in state courts, where the quality of representation is often inferior to the federal system, and the resources for a full investigation are more restricted.

An opinion from Judge Mark Wolf in Massachusetts did not go so far in its legal conclusion, but raised some of the same concerns:

> This court agrees that "executing the innocent is inconsistent with the Constitution." The open issues in this case are whether the [Federal Death Penalty Act] FDPA will inevitably result in the execution of innocent individuals and, if so, whether this renders the statute unconstitutional, and inapplicable to [the defendant] Sampson because it is an invalid law. For the reasons described below, the court finds that: *the FDPA will inevitably result in the execution of innocent individuals*; there is not now, however, a proper basis to declare the FDPA unconstitutional for this reason; and, therefore, it is not necessary to decide Sampson's claim that he has a right not to be tried under an unconstitutional statute.[55]

Judge Michael Ponsor presided over the federal capital trial of Kristen Gilbert in Massachusetts. Gilbert was not sentenced to death, but the prospect of such a sentence led the judge to write in the *Boston Globe*:

> The experience left me with one unavoidable conclusion: that *a legal regime relying on the death penalty will inevitably execute innocent people* - not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact. [56]

Finally, a fourth federal judge, Judge William Sessions of Vermont, ruled that the federal death penalty was unconstitutional because the sentencing process had too few safeguards to ensure against improper sentences.[57] None of these rulings or opinions has the power to overturn the entire death penalty process, or even the federal death penalty in the U.S. But they are indicative of a growing concern among prominent jurists that has been echoed by Supreme Court Justices, Senators, governors, and leading professional organizations such as the American Bar Association.[58]

[A] legal regime relying on the death penalty will inevitably execute innocent people – not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact.

–U.S. District Judge Michael Ponsor

VI. What Can Be Done?

In its 1997 report on innocence, DPIC noted that recent legislative changes in the death penalty system were likely to *increase* the risk of executing the innocent. Many states were cutting back on appeals. The federal death penalty was expanded and two new states (NY and KS) were added to the death penalty column. The passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 and the defunding in 1995 of the death penalty Resource Centers that assisted with appeals around the country meant that new evidence of innocence could easily be ignored or ruled inadmissible on procedural grounds.

Fortunately, the emergence of DNA testing has dramatically shown the danger of such cutbacks. The problem of innocence and the death penalty has now been addressed by numerous organizations and committees, and pivotal recommendations have been proposed. Most notably, the blue-ribbon commission appointed by Governor George Ryan in Illinois studied the problems in that state over a two-year period and released a series of 85 recommendations in 2003. Among their proposals for change were the following:

- **Videotaping** of all interrogations of capital suspects conducted in a police facility.
- **Reducing the number of crimes eligible for a death sentence** from 20 to five (cases in which the defendant has murdered two or more persons, where the victim was either a police officer or firefighter, where the victim was an officer or inmate of a correctional institution, when the murder was committed to obstruct the justice system, or when the victim was tortured in the course of the murder).
- **Forbidding capital punishment** in cases where the conviction is based solely on the testimony of a single eyewitness.
- **Barring capital punishment** in cases where the defendant is mentally retarded.
- **Establishing a state-wide commission** -- comprised of the Attorney General, three prosecutors, and a retired judge -- to confirm a local state's attorney's decision to seek the death penalty.
- **Intensifying the scrutiny of testimony provided by in-custody informants** during a pre-trial hearing to determine the reliability of the testimony before it is received in a capital trial.
- **Requiring a trial judge to concur with a jury's determination** that a death sentence is appropriate; or, if not, sentence the defendant to natural life.[59]

About 20 of these recommendations were passed by the legislature and have now been adopted by the state.[60] Death sentences have dropped considerably, but the critical step of reducing the broad scope of the state's capital punishment law was not adopted.

On a national level, the Constitution Project, which is based at Georgetown University's Public Policy Institute and which seeks consensus solutions to difficult legal and constitutional issues, also convened a blue-ribbon study commission of judges, former prosecutors and other national figures to address the crisis surrounding the death penalty. Their recommendations are broader, and would have a dramatic effect if adopted across the country.

The recommendations of the Project's report, **Mandatory Justice**, that most

directly relate to the issue of innocence, include the following:

- **Effective Counsel**
  Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train, and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers' performance.

- **Expanding and Explaining Life without Parole (LWOP)**
  Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment. The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as "truth in sentencing."

- **Protection Against Wrongful Conviction and Sentence**
  DNA evidence should be preserved, and it should be tested and introduced in cases where it may help to establish that an execution would be unjust. All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

- **Duty of Judge and Role of Jury**
  If a jury imposes a life sentence, the judge in the case should not be allowed to "override" the jury's recommendation and replace it with a sentence of death. The judge in a death penalty trial should instruct the jury at sentencing that if any juror has a lingering doubt about the defendant's guilt, that doubt may be considered as a "mitigating" circumstance that weighs against a death sentence.

- **Role of Prosecutors**
  Prosecutors should provide "open-file discovery" to the defense in death penalty cases. Prosecutors' offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies.[61]

Unfortunately, the widespread adoption of these reforms is still only on the distant horizon. The same can be said for the recommendations for reform of the system of representation in capital cases issued by the **American Bar Association**. A year after the guidelines were overwhelmingly approved and issued, no state had adopted the ABA's standards.[62]

In the U.S. Congress, the proposed Innocence Protection Act (now part of the "Advancing Justice Through DNA Technology Act") appears to be the best current vehicle for bringing about national change to both uncover existing mistakes and prevent future ones. However, even this basic reform has met stiff political opposition and its future is uncertain.

Conclusion

Although some states have adopted legislation allowing DNA testing, and some have imposed special standards for lawyers to be eligible to represent defendants in capital cases,[63] so far no state has truly responded to the seriousness and urgency that these cases of innocence demand. Far from a few scattered mistakes, there have been frequent and continuing discoveries that many of the people slated for execution should not have been convicted of any crime at all. The death penalty is not meeting the burden that the issue of innocence presents. Fixing this system will not be quick and easy; it will not be cheap; and it is not clear that a satisfactory degree of certainty will ever be achieved.

Perhaps a far more limited punishment applied only to the most extreme cases, would have a better accuracy rate than one exoneration for every 8 people executed. Death penalty supporters such as Judge Alex Kozinski of the U.S. Court of Appeals have endorsed such a narrowing of the death penalty system, [64] but no state has cut back on their broad list of eligible cases.

A rarely applied and highly selective death penalty might still be subject to the arbitrariness, bias, and human fallibility that have always plagued this punishment. But the current system serves no one well. It is a system in which nearly every murder is eligible for the death penalty, and, as a result, an overwhelmed system does most cases poorly rather than a few cases reliably.

The accumulated revelations in recent years are more than sufficient in the majority of peoples' minds to require a moratorium on all executions. The innocence cases in this report contradict the notion that the death penalty is a cost-free panacea for crime. The high number of critical mistakes in this life-and-death matter represents a crisis in our system of justice. The first step in addressing this crisis is to at least acknowledge that it exists. A thorough, system-wide review followed by fundamental changes in the death penalty system would seem to be a minimal intermediate response. A complete resolution, though, may be beyond human capability.

ENDNOTES

References for the cases that have been added in this report are included within the case descriptions. Permission for the use of the photographs was obtained from the sources accompanying the photos.

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[6] George F. Will, "Innocent on Death Row," Washington Post, April 4, 2000 (op-ed).

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[12] ABCNews.com, January 24, 2003.

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[30] Texas Defender Service, "Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals," (December 2002).

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[43] See J. Dao, "In Same Case, DNA Clears Convict and Finds Supsect," N.Y. Times, Sept. 6, 2003; Baltimore Sun, May 22, 2004 (noting apology).

[44] Florida Commission on Capital Cases, Report June 20, 2002, at p.3 (the Commission improperly attributed two cases to the DPIC list that were never included in our list: Spaziano and Jacobs).

[45] *Id*.

[46] Associated Press, "State Senator Says Review of Cases Finds No Innocence," June 20, 2002 (emphasis added).

[47] R. Ponnuru, *National Review,* Oct. 1, 2002; see also W. Campbell, "Critique of DPIC List," presentation by the author (2002), at p.10 (also using subjective criteria—questioning cases "whose guilt is debatable to say the least and whom it is hard to believe that a majority of neutral observers would conclude were innocent").

[48] See, e.g., N. Madigan, "Houston's Troubled DNA Crime Lab Faces Growing Scrutiny," N.Y. Times, Feb. 9, 2003.

[49] See L. Olsen, "DNA Lab Analysts Unqualified," Houston Chronicle, September 8, 2003.

[50] See S. Cohen, D. Hastings, "For 110 inmates freed by DNA tests, true freedom remains elusive," Associated Press, May 28, 2002 (Gilchrist's testimony refuted by the FBI).

[51] See, e.g., T. Maier, "Inside the DNA Labs," Insight Magazine (Washington Times), June 10-23, 2003, at 18.

[52] See A. Liptak, "Prosecutions Are a Focus in Houston DNA Scandal," N.Y. Times, June 9, 2003.

[53] See United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), rev'd by 313 F.3d 49 (2d Cir. 2002).

[54] *Id*.

[55] U.S. District Judge Wolf's opinion in United States v. Sampson is quoted in New York Times, August 12, 2003 (internal citation omitted) (emphasis added); see A. Liptak, "U.S. Judge Sees Growing Signs That Innocent Are Executed," N.Y. Times, Aug. 12, 2003.

[56] U.S. District Judge Ponsor's remarks following the federal capital trial of Kristen Gilbert are in Boston Globe, July 8, 2001 (op-ed) (emphasis added).

[57] United States v. Fell, No. 2:01-CR-12-01 (Sessions, J., D. Vt. 2002).

[58] See, e.g., "Stevens Faults Death Penalty But Says It's Constitutional," Associated Press, May 13, 2004 (Washingtonpost.com).

[59] Report of the Commission on Capital Punishment, Illinois, April 2002.

[60] See "Illinois Reforms System for Death Penalty," Associated Press, in Washington Post, Nov. 20, 2003.

[61] The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001).

[62] See L. Post, "Adopted Nowhere: ABA death penalty guidelines languish – opponents point to cost as supporters argue for better representation," National Law Journal, January 5, 2004.

[63] See, e.g., B. Rankin, "Georgia Indigent Defense Bill Ok'd," Atlanta Journal-Constitution, March 15, 2004; "State Supreme Court Takes Steps to Even Scales of Justice," Seattle-Post Intelligencer, June 7, 2002.

[64] See Alex Kozinski and Sean Gallagher, "For an honest death penalty," N.Y. Times, Mar. 8, 1995.