CQ Researcher

Published by CQ Press, a division of Congressional Quarterly Inc.

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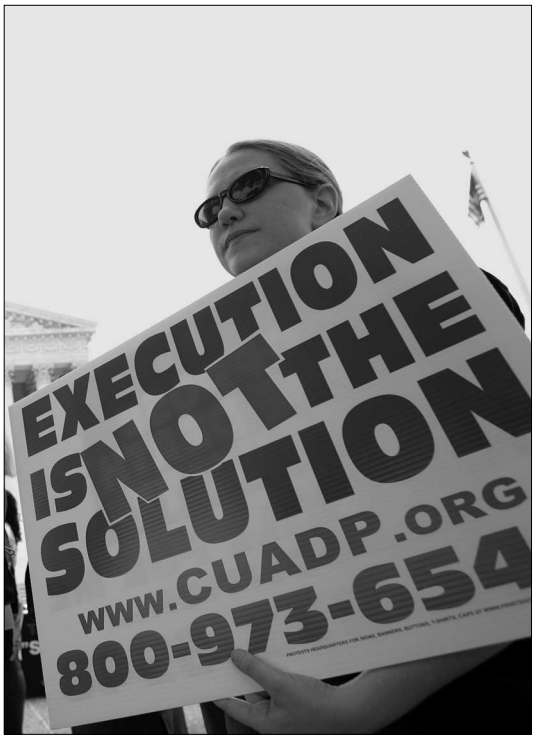
Death Penalty Controversies

Should states impose moratoriums on executions?

Critics and opponents of the death penalty are warning that capital trials and sentencing hearings are so riddled with flaws that they risk resulting in the execution of innocent persons. Supporters of capital punishment discount the warnings, emphasizing that opponents cannot cite a single person in modern times who was executed and later proven to have been innocent. The debate over erroneous convictions has increased in recent years because DNA testing now allows inmates to prove their innocence years after their convictions. The Supreme Court opens its term on Oct. 3 with two closely watched cases pending on rules allowing state inmates to use newly discovered evidence to challenge their convictions in federal courts, based on "actual innocence" as well as constitutional violations. Meanwhile, death penalty critics want states to follow Illinois' example and impose moratoriums on executions.



Death penalty opponents hold their annual vigil outside the U.S. Supreme Court on June 29, 2005.

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The CQ Researcher • Sept. 23, 2005 • www.thecqresearcher.com
Volume 15, Number 33 • Pages 785-808

CQ Press

Recipient of Society of Professional Journalists Award for Excellence ◆ American Bar Association Silver Gavel Award

DEATH PENALTY CONTROVERSIES

Cover: Opponents of the death penalty hold their annual vigil outside the U.S. Supreme Court on June 29, 2005. The court in its upcoming term will hear two cases affecting death-row inmates' ability to challenge their convictions. (Getty Images/Brendan Smialowski)

CQ Researcher

Sept. 23, 2005
Volume 15, Number 33

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CQ PRESS

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CQ Researcher (ISSN 1056-2036) is printed on acid-free paper. Published weekly, except March 25, July 1, July 8, Aug. 5, Aug. 12, Nov. 25, Dec. 23 and Dec. 30, by CQ Press, a division of Congressional Quarterly Inc. Annual subscription rates for institutions start at $625. For pricing, call 1-800-834-9020, ext. 1906. To purchase a *CQ Researcher* report in print or electronic format (PDF), visit www.cqpress.com or call 866-427-7737. A single report is $10. Bulk purchase discounts and electronic-rights licensing are also available. Periodicals postage paid at Washington, D.C., and additional mailing offices. POSTMASTER: Send address changes to *CQ Researcher*, 1255 22nd St., N.W., Suite 400, Washington, DC 20037.

Death Penalty Controversies

BY KENNETH JOST

THE ISSUES

Robin Lovitt says he didn't do it. He says Clayton Dicks was already lying mortally wounded on the floor of the Arlington, Va., pool hall when he came out of the restroom in the early morning hours of Nov. 18, 1998.

The jury in Lovitt's capital murder trial in September 1999 decided instead to believe a witness who testified he was "80 percent" certain he saw Lovitt stab Dicks and a jailhouse informant who said Lovitt later confessed to the crime while in custody.

Lovitt was sentenced to death, and his conviction and sentence upheld on appeal in the state courts. But court-appointed lawyers handling his federal habeas corpus case now say the state has made it impossible for Lovitt to prove his innocence by throwing away the physical evidence introduced at trial.

Getty Images/Tim Boyle

Former death row inmate Aaron Patterson is one of 17 wrongfully convicted men freed in Illinois, the only state with a death penalty moratorium. The American Bar Association has called for a nationwide moratorium on executions, citing documented problems in capital trials and sentencing such as racial discrimination, inadequate legal representation and other constitutional violations.

The evidence that a deputy court clerk discarded — ostensibly to save space in a crowded storage room — included a bloody pair of scissors that prosecutors depicted as the murder weapon. Lovitt's legal team, headed on a pro bono basis by former Whitewater special prosecutor Kenneth Starr, says the clerk's action prevents them from arranging for sophisticated DNA testing that could refute the prosecution's effort to link the scissors to Lovitt.

"The DNA along with the other evidence has been destroyed and destroyed in a very intentional way," says Starr, now dean at Pepperdine University School of Law in Malibu, Calif. Starr remains affiliated with the Washington office of Kirkland & Ellis, which is representing Lovitt, along with Rob Lee of the Virginia Capital Representation Resource Center in Charlottesville.

Lawyers for the state say discarding the evidence was an honest mistake that doesn't matter because the other evidence against Lovitt was so strong. "This case is not a DNA case," says Emily Lucier, a spokeswoman for the Virginia attorney general's office. [1] But the U.S. Supreme Court saw Lovitt's plea as strong enough to order a stay of execution on the evening of July 11, only four-and-a-half hours before Lovitt was scheduled to die by lethal injection.

Lovitt's case awaits further action by the justices at a time when the death penalty debate is focusing more than ever on the risk of convicting and executing an innocent defendant. [2] The advent of DNA testing — which has been credited with "exonerating" more than 160 prison inmates over the last 15 years, including 14 men on various states' death rows — has focused attention on using new technology to prevent executions of innocent defendants. [3]

"These DNA exonerations have proven to everybody that there are far more innocent persons in our criminal justice system than anyone had imagined," says Barry Scheck, the New York defense lawyer who pioneered the use of DNA evidence to support innocence claims. He helped found the Innocence Project at Yeshiva University's Cardozo School of Law to investigate such cases on an ongoing basis and is also president of the National Association of Criminal Defense Lawyers.

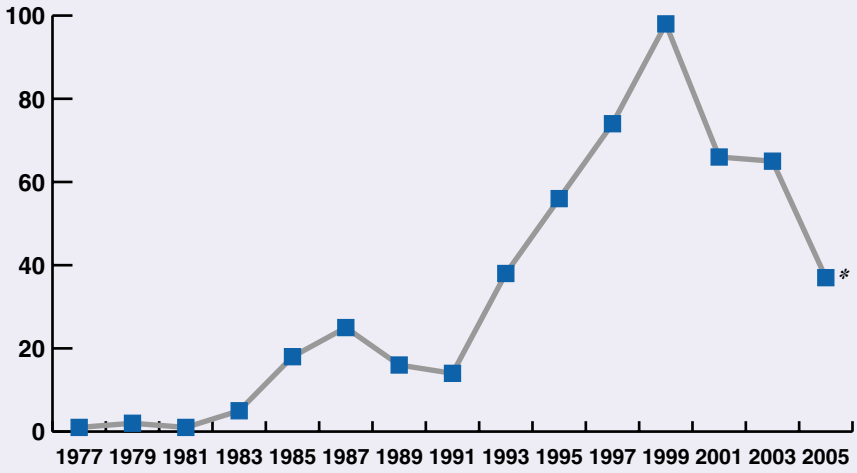
More broadly, the Death Penalty Information Center, which opposes capital punishment, claims that 119 people have been "released from death rows with evidence of their innocence" since 1973. The center calls these releases "exonerations" and counts 36 such cases just since 2000.

Death penalty supporters acknowledge the importance of DNA testing as a forensic technique for both the prosecution and the defense. But they dispute the broad characterization of the death row releases as exonerations and depict "actual innocence" — as opposed to exoneration through a technicality issue — as only a minor aspect of the protracted death penalty litigation in state and federal courts.

U.S. Executions Declined in Recent Years

The number of executions in the United States in the past three decades peaked at 98 in 1999 and then fell to 59 in 2004. Capital punishment opponents say the innocence issue contributed to the decline.

Executions in the U.S., 1976-2005



** As of Sept. 21, 2005*

Source: Death Penalty Information Center

"The intense scrutiny that capital cases receive in the present system is finding and correcting the few cases of wrongful convictions," says Kent Scheidegger, legal director for the pro-law enforcement Criminal Justice Legal Foundation in Sacramento. "Our criminal justice system should be paying more attention to actual guilt and innocence and spending less resources litigating issues that have nothing to do with guilt."

Law enforcement groups emphasize in particular that anti-death penalty groups have yet to document a case in the modern era of someone who was executed and later proven conclusively to have been innocent of the crime.

"They're looking for the innocent defendant who was executed," says Joshua Marquis, district attorney in Clatsop County (Astoria), Ore., and chairman of the National District Attorneys Association's capital litigation committee. "They haven't found one yet. I don't think they're going to find one."

Nevertheless, death penalty opponents credit the innocence issue with contributing to a decline in the number of death sentences and the number of executions in the United States in the past few years. After peaking at 98 in 1999, the number of executions fell to 59 in 2004, according to the death penalty center, and appears likely to end somewhat below that number for 2005. (*See chart, above.*)

"A large part of that is due to revelations about problems with the death penalty — in particular because innocent people were convicted and sentenced to death and in some cases came close to being executed," says Richard Dieter, the center's executive director. "That kept pushing the problem of the death penalty into the public eye."

Prosecutor Marquis acknowledges that the innocence issue has been useful for death penalty opponents. "They succeeded in driving the debate away from the legal or moral issue, which they were losing," he says. But, he notes, polls show a substantial majority of Americans still support capital punishment. (*See chart, p. 792.*)

Public ambivalence about the death penalty is reflected in the seemingly conflicting mix of pending federal and state cases and proposals in Congress and state legislatures. The Supreme Court — which barred execution of juvenile offenders in a landmark ruling on March 1 — is being urged in the new term that begins Oct. 3 to make it easier for death row inmates to get federal court hearings on innocence claims. Congress, on the other hand, is considering restricting state inmates' use of the centuries-old legal procedure called habeas corpus to challenge their convictions or sentences. *

Some state supreme courts are showing increased receptivity to death penalty challenges, and death penalty opponents are urging states to follow the lead of two Illinois governors in imposing a moratorium on executions. The only other statewide moratorium — imposed by a Democratic governor in Maryland — was rescinded by a Republican governor elected later the same year. After New York's highest court ruled that state's death penalty statute invalid, however, lawmakers decided not to enact a new version.

Meanwhile, the perennial issue of deterrence is drawing renewed attention with efforts by some researchers to show that abolishing or suspending the death penalty leads to an increase in murders. Other academics sharply dispute the studies. (*See sidebar, p. 796.*)

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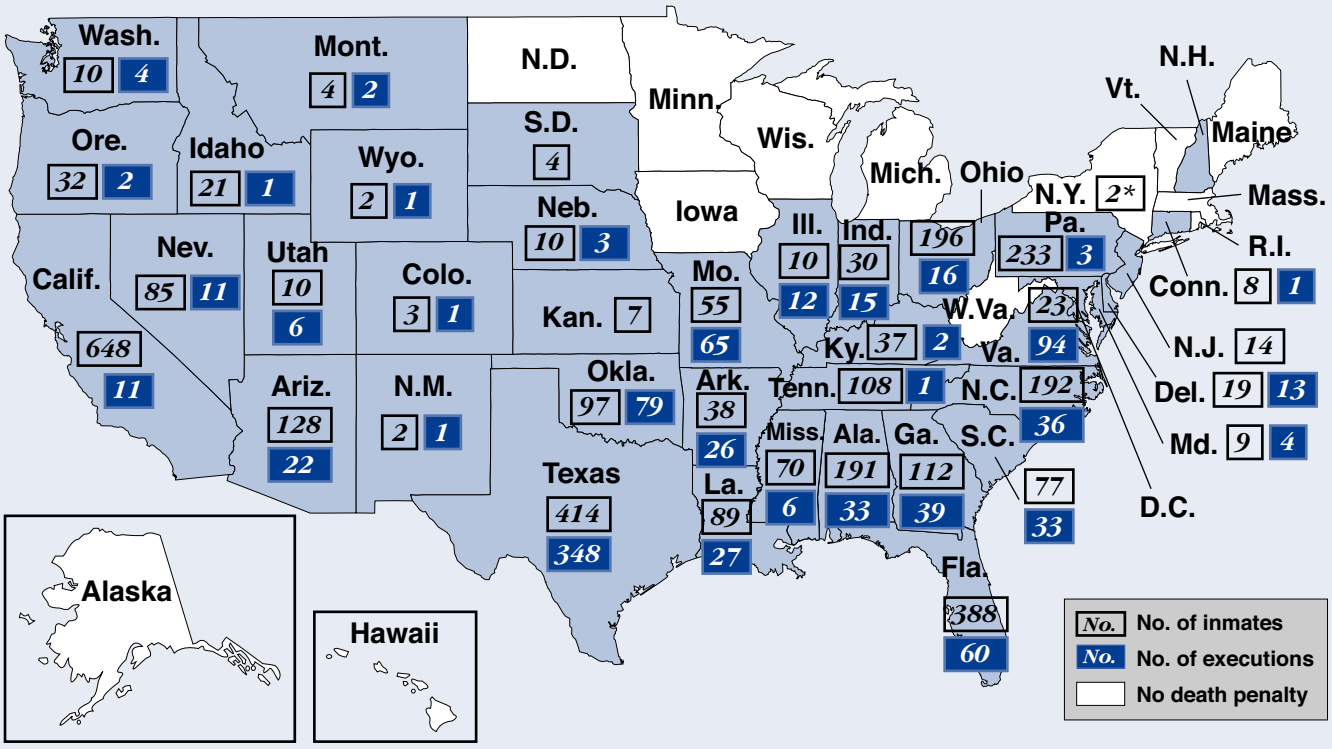
* *Habeas corpus* — Latin for "you have the body" — is a procedure dating from England's *Magna Carta* (1215) that ensures the right of a defendant to petition a judge to determine the legality of his or her incarceration or detention by the government.

Texas Leads States in Executions

Prisons in California, Texas and Florida alone hold 42 percent of the nation's 3,415 death row inmates. Since 1976 there have been 981 executions in the United States, including 37 so far this year. Texas has executed 348 people since 1976, far more than any other state.

Current Death Row Population and Executions Since 1976

(No. of inmates/no. of executions)



** Two inmates remain on death row in New York even though the state legislature failed to enact a new death penalty statute after the state's law was invalidated in June 2004.*

Source: Death Penalty Information Center

As the various death penalty debates continue in Washington and around the country, here are some of the other specific questions at issue:

Should the Supreme Court ease the rules for death row inmates to raise innocence claims?

A jury in rural East Tennessee convicted Paul House of murder in 1986 in the beating death of a neighbor, Carolyn Muncey. Prosecutors argued that House, a paroled sex offender from Utah, killed Muncey after an attempted rape. As evidence, the prosecutors showed that semen found on Muncey's body matched House's blood type.

More than a decade later, however, DNA testing — unavailable at the time of trial — conclusively established that the semen came not from House, but from Muncey's husband, Herbert. Lawyers working on House's federal habeas corpus petition also uncovered other evidence casting doubt on the verdict, including testimony by two neighbors that Herbert Muncey had confessed to killing his wife long after the event.

Despite the evidence, the federal appeals court for Tennessee refused, by an 8-7 vote, to give House a chance to have his newly substantiated claim of innocence heard in federal court. Now, the U.S. Supreme Court is poised to consider House's case in order to decide how to balance the states' interest in maintaining the finality of criminal convictions against what death penalty critics contend is the real possibility of executing an innocent person.

The high court dealt with the issue in two decisions in the 1990s: *Herrera v. Collins* (1993) and *Schlup v. Delo* (1995). [4] In the first case, the court rejected a Texas death row inmate's effort

to reopen his murder case based on late evidence blaming the offense on his brother, who had since died. In the second ruling, however, the court allowed a Missouri death row inmate a hearing to determine whether his innocence claim was strong enough to justify a second chance to challenge his conviction on constitutional grounds.

Together, the two cases created a narrow window for lower federal courts to use an inmate's actual innocence claim — if sufficiently strong — as a "gateway" to belatedly raising a federal constitutional issue. They left open the question whether a free-standing innocence claim — apart from any constitutional violation — could be the basis for a successful request for federal habeas corpus relief.

Death penalty critics emphasize that the first of the decisions was handed down the same year the first death row inmate was released for DNA-related reasons. The number of DNA exonerations since then demonstrates the need for the court to re-examine the decisions, they say.

"They set some very strict standards for actual innocence claims independent of any other constitutional claim," says Dieter of the Death Penalty Information Center. "In light of what we now know, it is time for the court to reflect on the revelations of science and what's happened in the death penalty world and give the lower courts some guidelines."

Prosecutors and law enforcement supporters, however, say the high court should maintain strict standards for state prisoners to meet before asking federal judges in effect to give them a second trial. "If you're going to retry every capital case, you're going to have an even more inefficient system than you have now," says Barry Latzer, a professor at City University of New York's John Jay College of Criminal Justice.

"It's natural for the system to have a very high hurdle for retrial of innocence claims," Latzer says. "The place for that is in the original trial, not on appeal."

But Scheck says there is "no evidence" that states with liberal rules on the use of newly discovered evidence are having significant problems.

In House's case, lawyers with the Federal Defenders Service in Knoxville contend that the Sixth U.S. Circuit Court of Appeals rejected his petition based on a stricter rule than required by the Supreme Court. "The *Schlup* case does not require the elimination of all evidence of guilt," says attorney Stephen Kissinger. "The real test is what [the jury] would have done given all this evidence. The truth of the matter is that no jury has passed on the vast majority of the new evidence in this case."

Lawyers for the state, however, say the appeals court majority correctly followed the rule established in *Schlup*. Under that decision, they argue, House had to show that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." They contend that the new DNA evidence does not contradict the prosecution's case against House and that the appeals court properly discounted other evidence, including Muncey's purported confession.

For his part, Scheidegger says new claims of actual innocence should normally be considered in executive clemency proceedings with federal court review available only as "a last-ditch backup."

"Any time a new avenue for review of capital cases is opened up, the possibility of abuse exists," he says.

But Dieter says governors rarely grant clemency, deferring instead to the courts. "It seems to be a passing of the buck on this issue," he says. In any event, he adds, "Clemency is for the extraordinary case where mercy or reduction of sentence is appropriate. Guilt or innocence is for the courts."

Should Congress pass legislation to limit federal habeas corpus claims?

In an attempt to deal with a growing flood of death row appeals, Congress passed a major overhaul of federal habeas corpus law in 1996 aimed at cutting back death row inmates' use of the procedure to challenge their convictions or sentences. The Antiterrorism and Effective Death Penalty Act — known as AEDPA — gives state inmates a one-year deadline to file a federal habeas corpus petition after all state proceedings are finished. It also generally bars the filing of a second federal petition and requires federal judges to defer to state rulings unless clearly mistaken or unreasonable.

In a steady stream of densely technical cases over the past nine years, the U.S. Supreme Court has been relatively strict in interpreting the act's major provisions. But supporters of the law say some federal appeals courts — especially the Ninth Circuit, which covers California and eight other Western states — have liberally interpreted the act to allow inmates opportunities for hearings that it was intended to preclude.

To fix the supposed problem, two Republican lawmakers — Sen. Jon Kyl of Arizona and Rep. Dan Lungren of California — introduced a bill, the Streamlined Procedures Act, aimed at tightening the deadlines and standards for obtaining federal habeas relief. But an array of opponents — including death penalty critics, the American Bar Association and state and federal judicial bodies — say the bill would do little to speed death penalty challenges while cutting off access to federal courts for legitimate legal challenges and risking execution of innocent persons. [5]

Some supporters of the bill question the need for federal habeas review at all. "It's by and large unnecessary because the cases have already been thoroughly reviewed at the state level," says Latzer. "But if you must have it, it should be more efficient." Others do not go quite that far, but say the bill is needed because of what Scheidegger calls "the evasions" of AEDPA's restrictive provisions by some federal courts.

Continued on p. 792

Is the Defendant Mentally Retarded?

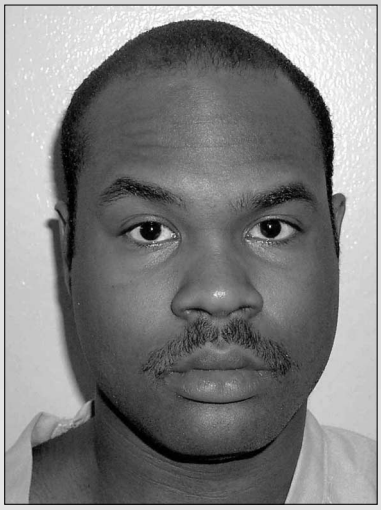
Daryl Atkins won a landmark ruling from the U.S. Supreme Court in 2002 barring the execution of mentally retarded offenders. When Atkins' case returned to Virginia courts, however, a jury found that he is not mentally retarded and left him on death row for a 1996 robbery-murder.

The jury in Yorktown, Va., heard seven days of testimony and deliberated for 13 hours before deciding on Aug. 5 that Atkins is not mentally retarded under Virginia law. Jurors apparently credited testimony offered by prosecution witnesses that the 27-year-old Atkins manages to perform daily life functions over evidence introduced by the defense, including IQ scores below the threshold of 70 set by Virginia law to define mental retardation. [1]

Atkins' lawyers say they will appeal the panel's decision. For now, however, the result is one sign that the Supreme Court's decision in the case that bears his name will not produce the benefits that advocates for the mentally retarded had hoped or expected.

"The promise of *Atkins* has not been realized," says Robin Maher, director of the American Bar Association's death penalty representation project.

States faced no such difficult implementation decisions in applying the Supreme Court's March 2005 decision barring execution of juvenile offenders. The ruling in *Roper v. Simmons* means that anyone convicted of an offense committed under the age of 18 is ineligible for the death penalty. But in banning the death penalty for mentally retarded defendants in *Atkins v. Virginia*, the high court left it to the states to establish their own definitions of retardation.



Virginia Dept. of Corrections

Darryl R. Atkins

Since the *Atkins* case, Virginia and seven other states — California, Delaware, Idaho, Illinois, Louisiana, Nevada and Utah — have changed their statutes to comply with the ruling, according to a compilation by the Death Penalty Information Center. In seven of the states, the judge determines if the defendant is mentally retarded; only in Virginia does the jury decide. [2]

The eight states consider offenders as mentally retarded if their IQ falls below a certain level, generally between 70 and 75, and if they demonstrate deficits in adaptive behavior before the age of 18.

Richard Dieter, executive director of the anti-death penalty group, calls the Virginia procedure "unusual" because mental retardation is determined in other states before the trial begins. Virginia's procedure calls for a trial on guilt or innocence with a hearing on mental retardation afterward before the same jury.

The procedure "colors the decision-making process," Dieter says, because it is hard for jurors to make an objective decision "once you tell the jury they're letting somebody off for the worst punishment."

Atkins was convicted of capital murder for abducting a U.S. airman outside a store, forcing him to withdraw $200 from an automated teller machine, and then shooting him eight times. A co-defendant who pleaded guilty in exchange for reduced charges claimed — but Atkins denied — that it was Atkins who did the shooting.

The ABA's Maher says procedures in other states are also unfair to mentally retarded offenders. "Almost all the statutes inappropriately place the burden of persuasion on the mentally retarded prisoner or require proof that does not comport with professional standards," Maher says. In addition, Maher says that several states with relatively large numbers of death penalty cases — including Texas, Alabama, Mississippi and Oklahoma — have refused to enact laws to protect the mentally retarded from executions.

A leading prosecutor, however, blames the Supreme Court for problems in implementing the decision. "States are lurching along trying to come up with statutes that comply with *Atkins*, but they're having problems because the court didn't really say what they needed to do," says Joshua Marquis, district attorney in Clatsop County, Ore., and chair of the National District Attorneys Association's capital litigation committee.

Courts in Texas, the state with the highest number of executions, have upheld death sentences in several cases involving mental retardation issues following guidelines set by the Texas Court of Criminal Appeals. In a ruling in February 2004, the Texas court rejected a mental retardation plea in upholding the death sentence imposed on Jose Briseno for the 1991 slaying of a local sheriff. The court reasoned that Briseno was not mentally retarded because he was able to devise plans and adjust to his surroundings. [3]

Prosecutors in Atkins' case made a similar argument about his problem-solving ability by offering testimony that while in prison, Atkins had been observed placing his soup bowl in a sink containing hot water to keep it warm. A defense expert, however, reached a different conclusion from the incident, saying that Atkins apparently failed to appreciate that the water would soon cool.

— Melissa J. Hipolit

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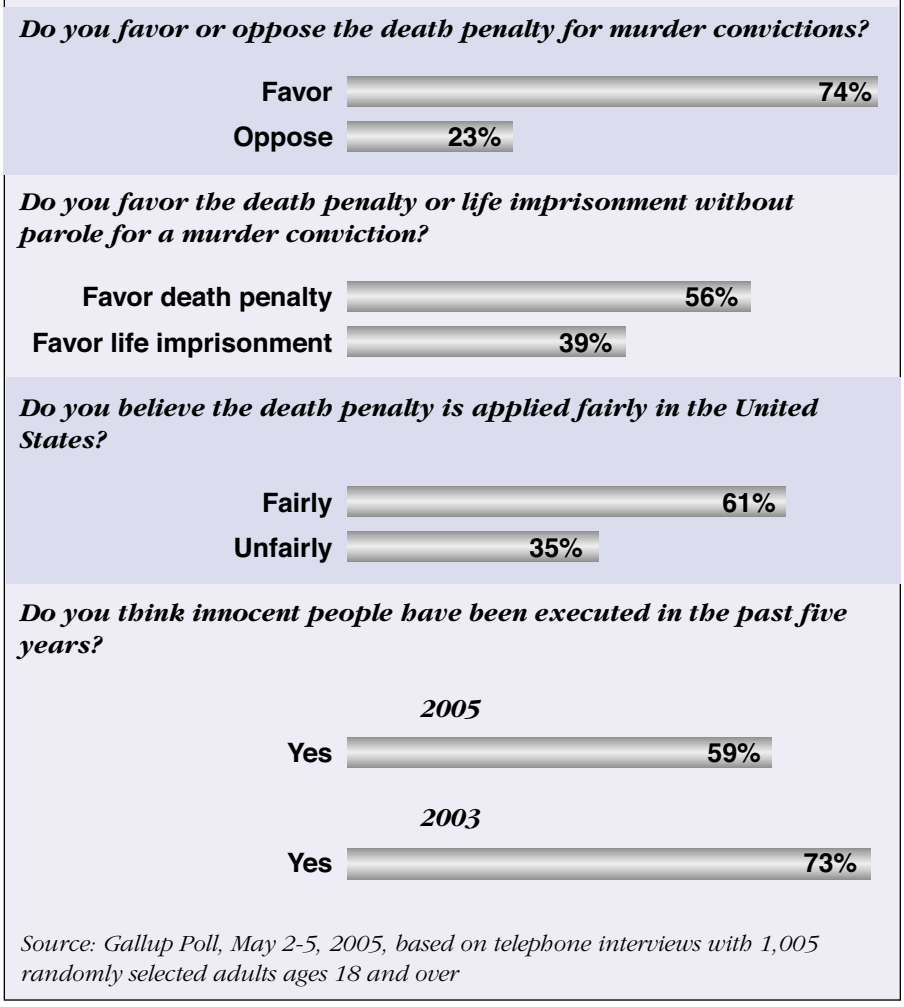
[1] See Maria Glod, "Virginia Killer Isn't Retarded, Jury Says," *The Washington Post*, Aug. 6, 2005, p. A1; Donna St. George, "A Question of Culpability: Mental Capacity of Convicted Virginia Man Is a Murky Legal Issue," *The Washington Post*, July 23, 2005, p. A1.

[2] Death Penalty Information Center, www.deathpenaltyinfo.org/article.php?scid=28&did=668.

[3] Martha Deller and Max B. Baker, "Texas Courts Try to Set Rules for Executing Mentally Retarded Inmates," *Fort Worth Star-Telegram*, July 13, 2005.

Most Americans Support the Death Penalty

Nearly three out of four Americans support the death penalty, but only 61 percent believe it is applied fairly in this country. Most Americans believe that innocent people have been executed within the past five years, but the percentage who feel that way declined between 2003 and 2005.



Source: Gallup Poll, May 2-5, 2005, based on telephone interviews with 1,005 randomly selected adults ages 18 and over

Continued from p. 790

In introducing the bill, Kyl cited statistics showing that the number of habeas cases pending in federal courts increased from 13,359 in fiscal year 1994 to 23,218 in fiscal year 2003. But opponents of the measure say the figures do not show that AEDPA has failed to make it harder for inmates to actually get hearings in federal court or to win their cases. "You're never going to stop prisoners from filing petitions," says Virginia Sloan, president of the bipartisan Constitution Project, who is coordinating a campaign against the bill.

Among its many provisions, the bill would narrow grounds for habeas petitions and limit inmates' ability to amend claims. It would bar federal courts from considering any claim not properly raised in state courts unless an inmate had a "clear and convincing" claim of actual innocence. And it would require federal appeal courts to rule on habeas claims within 300 days of the filing of the inmate's legal brief.

The bill's provisions are "carefully crafted, common sense responses to some of the worst abuses we face," Tom Dologenes, head of the habeas corpus unit in the Philadelphia district attorney's office, told the Senate Judiciary Committee in July.

But opponents argue the bill goes in the wrong direction. "With all the exonerations we've seen in recent years, we should be expanding instead of cutting back on review," says Sloan.

Scheck particularly criticizes the provision that raises the standards for actual innocence claims. "This bill makes everything worse in terms of innocence litigation," he says.

Both the U.S. Judicial Conference and the National Conference of State Chief Justices and Court Administrators oppose the bill. In a letter to Senate Judiciary Committee Chairman Arlen Specter, R-Pa., the federal judges said the bill could "complicate" habeas cases and "lead to more, rather than less, litigation." For their part, the state judges adopted a resolution in August warning that the provisions restricting federal habeas relief would have "unknown consequences for the state courts and the administration of justice."

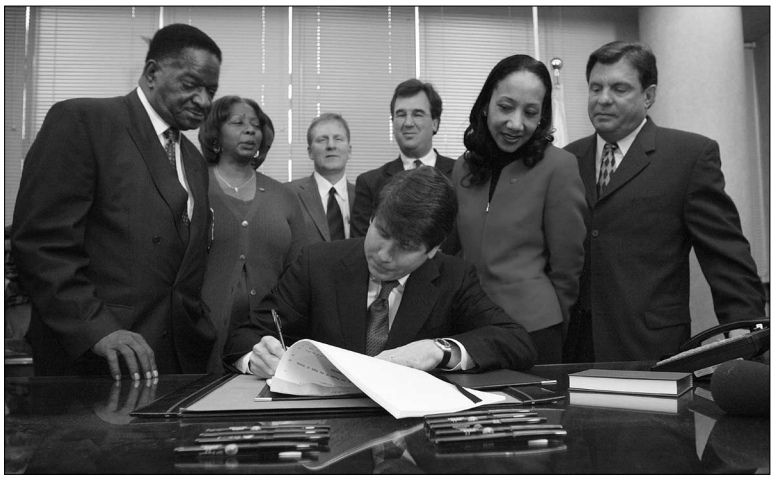
Supporters of the bill, however, say state courts do not need the additional oversight entailed in federal habeas cases. "The issue is whether there is confidence in the state courts, whether they can protect the rights of criminal defendants and death penalty defendants in particular," says Latzer. "I have confidence in them, and that diminishes the need for federal review in my mind."

Should states impose moratoriums on executions?

Illinois Gov. George Ryan, a conservative Republican, had supported the death penalty throughout his 20-plus years in politics. But investigations

by Northwestern University journalism students and *Chicago Tribune* reporters during Ryan's first year as governor in 1999 convinced him that the state's system for sending people to death row was "fraught with error."

So in January 2000 Ryan took the then-unprecedented step of imposing an official moratorium on executions in the state. "Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate," Ryan said. Three years later, just as he was about to leave office, Ryan went further: He pardoned four death row inmates and commuted the death sentences of 164 others to life imprisonment. [6]



Getty Images/Tim Boyle

Illinois Gov. Rod R. Blagojevich signs the final piece of the state's death penalty reform package on Jan. 20, 2004, as state legislators observe. The most comprehensive death penalty reform package in that state's history was prompted by newspaper investigations showing that at least 13 innocent people had been convicted and sentenced to death in Illinois due to bias, errors and incompetence.

Ryan's initial step drew wide praise, even from State's Attorney Dick Devine, the chief prosecutor in Cook County (Chicago). But Devine sharply criticized Ryan's later clemency action as "outrageous and unconscionable." [7]

Ryan followed up the moratorium by appointing a commission to make recommendations for improving the handling of death penalty cases, including providing better legal representation for defendants. Ryan's successor as governor, Democrat Rod R. Blagojevich, has kept the moratorium in effect pending an evaluation of some of the reforms adopted in November 2003. As of September 2005, however, only one other governor — Maryland's Parris Glendening — had followed Ryan's lead; and the move by Democrat Glendening was revoked in 2003 by his Republican successor, Robert Ehrlich.

Moratorium supporters include the American Bar Association, which called for the step in February 1997. Ron Tabak, a lawyer with a prestigious New York firm who works with the ABA committee created to push the proposal, says moratoriums are needed because of the variety of documented problems in capital trials and sentencing, including racial discrimination, inadequate legal representation and other constitutional violations.

"Every jurisdiction should have a moratorium, study the issues carefully, and try to see if they can fix the problems or decide on some other course of action," Tabak says.

Death penalty supporters, however, question the need for further studies and sharply criticize Ryan's actions in Illinois or other proposals for suspending capital punishment. "I don't see any new problems that would call for studies," says Latzer. "This has been studied to death. I don't see any new problem except the problem of delays in carrying out executions."

"That's an abuse of the clemency power," says Scheidegger. "That's not why the governor has a clemency power: to issue a de facto repeal of the capital punishment statute."

"A moratorium is a moral dodge," says prosecutor Marquis. "We [already] have one in this country," he adds. "It's the 12 to 15 to 20 years it takes to get these cases through the courts."

Death penalty critics and opponents, however, echo the ABA's position that flaws in the system — and specifically the risk of executing an innocent person — demand careful study and a suspension of executions in the meantime.

"State moratoriums are an excellent idea," says Stephen Saloom, policy director of the Innocence Project. "They will allow states to stop and take a look at all the factors to be considered in assessing the accuracy of those death verdicts that have been handed down and even more so the potential for error in various parts of their system."

"We don't yet have a system that's totally reliable," says Dieter. "It would be a healthy process for the country to decide how much error we're going to allow, how to get that error down to an absolute minimum, and — knowing these changes are going to cost something — to decide whether it's worth it."

Scheidegger counters by citing a study by University of Houston economist Dale Cloninger that purportedly shows the Illinois moratorium resulted in an increase in murders as a result of reduced deterrence. Instead of adopting a moratorium to guard against a wrongful execution, Scheidegger says, the better step is "a more careful review of the cases to make sure they have the right guy."

For his part, Latzer warns that officials who favor moratoriums risk political

retaliation. "If people in the state support the death penalty and the governor circumvents it, he has to face the consequences in the next election," Latzer says. *

In Illinois, however, initial polls indicated public approval of Ryan's moratorium. And Tabak says public support for the idea has increased over time. "There's been a lot more public education and public understanding since then," he says. "As these efforts get more pronounced, there will be further results along these lines." ■

BACKGROUND

Running Debates

The death penalty has enjoyed popular approval and acceptance throughout U.S. history, but opposition on various moral and practical grounds dates from the nation's founding. Anti-death penalty sentiment rose to a near majority during the 1950s and '60s, and the number of executions declined. But support increased after the controversial 1972 Supreme Court decision to outlaw capital punishment as then administered and has remained generally strong since the court four years later upheld re-enacted death penalty laws. [8]

Capital punishment procedures were significantly changed during the 19th and 20th centuries, sometimes in evident response to public opinion. Abolitionist opponents helped bring about the division of murder into two degrees with the death penalty reserved only for the more serious, first-degree offense. The power to sentence defendants to death was also transferred from judges to juries in the 19th century. Death penalty opponents successfully campaigned against public executions and in favor of replacing the gallows with the supposedly more humane electric chair.

The first scientific poll on the subject, conducted in the mid-1930s, found that Americans supported the death penalty for murder by a substantial margin: 61 percent to 39 percent. [9] Subsequent annual Gallup Polls showed that support peaked at 68 percent in 1953, but fell over the next decade to a low of 42 percent in 1966. A Harris survey that year found near-majority disapproval: 47 percent. The decline coincided with civil rights and criminal-justice reform movements that focused public attention on racial discrimination and procedural injustices in capital trials and sentencing.

Increasing public disquiet about the death penalty also can be inferred from the decline in the number of executions during the same period. From a peak of around 190 a year in the late 1930s, the number of executions dropped to slightly more than 100 per year in the early 1950s and then fell by the mid-1960s to only one in 1965, two in 1966, and none during the decade starting in 1967.

As early as the 1930s some notorious death penalty cases had drawn the Supreme Court into overseeing state criminal justice systems. Most notably, the court in the so-called Scottsboro cases twice intervened to overturn the convictions and death sentences of nine young black men tried in a racially charged atmosphere in Alabama for allegedly raping two white women. By the 1960s, death penalty opponents — including the NAACP Legal Defense Fund — were mounting broader attacks that claimed the death penalty was unconstitutional under either the 14th Amendment's Equal Protection Clause or the Eighth Amendment's prohibition against cruel and unusual punishment.

The campaign climaxed on June 29, 1972, with the Supreme Court's decision in *Furman v. Georgia*, which invalidated all existing death sentences and death penalty statutes. The five justices in the majority each wrote separately: Two found the death penalty unconstitutional as "cruel and unusual punishment" under all circumstances, while three others objected to its arbitrary use. The four dissenters argued that the issue was for state legislatures, not the courts. [10]

However, public support for the death penalty was already growing by the late 1960s, and the Supreme Court's decision created a backlash that accelerated the shift. Gallup Polls conducted in 1972 before and after the *Furman* decision recorded an increase in pro-death penalty responses from 50 percent in March to 57 percent in November. For their part, state legislatures responded to the decision by adopting new laws aimed at curing the defects identified by the high court. Some states passed mandatory death penalty statutes, while others adopted so-called guided-discretion laws that gave juries aggravating and mitigating factors to consider in capital sentencing hearings. In 1976 the Supreme Court ruled the mandatory death penalty laws unconstitutional, but the justices upheld the guided-discretion statutes by a 7-2 vote. [11]

The ruling allowed the resumption of executions, which came slowly at first but gradually reached a peak of 98 in 1999. Public support for the death penalty also continued to rise, peaking at 80 percent in 1994. For its part, the Supreme Court rejected broad challenges to the death penalty, though it somewhat narrowed application of

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* Ryan decided not to seek re-election in 2002 in the midst of a federal investigation of corruption in his administration. He was later indicted on 22 counts of racketeering, mail and tax fraud and other charges; he pleaded not guilty, and jury selection began on Sept. 19, 2005.

Chronology

1950s-1960s

Support for death penalty falls, along with number of executions.

1953
Gallup Poll finds 68 percent support for capital punishment; executions average around 100 per year in early 1950s.

1966
Support for death penalty falls to 42 percent; two executions in a year are the last for more than a decade.

1970s-1980s

Supreme Court first abolishes, then reinstates capital punishment; begins to cut back on use of federal habeas corpus to challenge death sentences.

1972
Supreme Court, in 5-4 ruling, invalidates all existing death sentences; public backlash boosts support for death penalty, while states move to revise capital punishment statutes.

1976
Supreme Court upholds capital punishment under "guided discretion" statutes, but bars mandatory death sentences.

1987
Supreme Court rejects effort to invalidate death penalty because it is most often imposed in murder cases where victim is white.

1989
Supreme Court limits use of new constitutional rulings in federal habeas corpus cases; upholds execution of mentally retarded offenders, older teens (16- or 17-year-olds).

1990s

Supreme Court, Congress tighten rules on habeas corpus; death penalty critics warn against risk of executing innocent persons.

1991
Supreme Court says state inmates cannot raise constitutional claims in federal habeas corpus action if they miss deadlines for raising issue in state courts.

1992
Innocence Project founded to use DNA testing of post-conviction claims. . . . Supreme Court limits federal courts' duty to hold hearing in habeas corpus cases unless inmate raises factual innocence claim.

1993
Supreme Court sidesteps question whether stand-alone "actual innocence" claim can be grounds for habeas corpus review in federal court. . . . First wrongly convicted defendant is released based on DNA test results.

1994
Support for death penalty peaks at 80 percent.

1995
Supreme Court slightly eases test for death row inmate to use "actual innocence" claim to revive constitutional challenge to conviction or sentence.

1996
Congress passes Anti-terrorism and Effective Death Penalty Act (AEDPA) limiting and setting one-year deadline for federal habeas corpus petitions.

1997
American Bar Association calls for national moratorium on executions.

1998
Number of executions peaks at 98.

2000-present

Death penalty critics use "innocence" cases to attack flaws in system; supporters say court reviews catch most errors.

2000
Illinois Gov. George Ryan imposes moratorium on executions in state, citing risk of executing innocent person; as he leaves office three years later, commutes 164 death sentences to life imprisonment.

2002
Supreme Court bars death penalty for mentally retarded offenders; three years later, the defendant in the case, Daryl Atkins, is kept on death row after a Virginia jury rules he is not mentally retarded.

2004
New York court rules state death penalty law unconstitutional in June; nine months later, state legislative committee rejects bill to reinstate capital punishment, reducing number of death penalty states to 37. . . . Congress passes law to guarantee inmates right to post-conviction DNA testing.

2005
Supreme Court bars death penalty for juvenile offenders, throws out death sentences in four individual cases. . . . Justice John Paul Stevens says death penalty procedures entail "risks of unfairness." . . . High court due to open term on Oct. 3 with new chief justice, "actual innocence" cases on docket.

Do Executions Deter Killings?

A dozen statistical studies have been published over the past decade claiming to show that capital punishment deters capital crimes. But some researchers say the studies are conceptually and technically flawed. In any case, say death penalty opponents, the question of deterrence has little influence today on public attitudes toward capital punishment. [1]

The effectiveness of executions as a deterrent has been argued at least since 18th-century England when, reportedly, pickpocketing — itself a capital crime — spiked at public hangings. More recently, *The New York Times* published a much-noticed report in 2000 showing that states with the death penalty had higher murder rates than states without capital punishment. [2]

Statistical work on the issue by U.S. economists dates back to the 1970s. Dale Cloninger, one of the earlier researchers in the field and now a professor at the University of Houston's School of Business in Clear Lake, says those early studies showed a deterrent effect. But Joanna Shepherd, an assistant professor at Emory University School of Law in Atlanta and a recent entrant in the field, describes the early studies as inconclusive and unsophisticated by present-day standards.

With more advanced techniques, however, Shepherd says new statistical studies — published in peer-reviewed economics journals — show a deterrent effect from executions. "We controlled for every conceivable factor that we thought might influence murder rates," Shepherd says of the work, including her studies.

Cloninger continues to write on the issue, including two studies linked to death penalty moratoriums: an unofficial, court-imposed lull in executions in Texas in the mid-1990s and Illinois' more recent official moratorium. In each instance, Cloninger says, the state's homicide rate increased during the moratorium; and killings in Texas fell after executions resumed. [3]

In her newest study, however, Shepherd says the effect of executions appears to vary from state to state. She finds a deterrent effect in only six states with comparatively more executions, no effect in others and a so-called "brutalization effect" in some other states — where executions appear to be associated with higher homicide rates. [4] While calling for additional studies, Shepherd suggests that the data show that a state needs to reach a certain threshold number of executions for the "deterrence effect" to outweigh the "brutalization effect."

Richard Berk, a professor of statistics and sociology at the University of California, Los Angeles, and Jeffrey Fagan, a professor of law and public health at Columbia University in New York City, are two veteran academics who sharply dispute the claims of deterrence. In a new analysis of the data, Berk says the claimed deterrent effect exists in only one state — Texas — and is not large there. "If you throw Texas out of the mix," he says, "there's nothing going on." [5]

Fagan, who is studying the issue under a grant from the Soros Foundation-funded U.S. Justice Fund told a legislative committee in Massachusetts in July that the deterrence studies are "fraught with technical and conceptual errors." He says other research also shows that better detection and apprehension would be more effective deterrents.

Cloninger says the deterrence studies show what most economists would expect: that the risk of punishment affects criminal behavior. "To an economist, it's sensible that murderers are sensitive to risk," he says. "Other people are." But Berk and Fagan both say would-be killers are unlikely to know the execution rate in a specific state or, in any event, to think about it before a crime. "This information is not available even if your criminal is a calculating machine," Berk says.

Death penalty supporters say the evidence of deterrence strengthens their position in countering fears of executing an innocent person. "If that were the only consideration as far as tradeoffs are concerned, it would be a very weighty one," says Kent Scheidegger, legal director of the pro-law enforcement Criminal Justice Legal Foundation in Sacramento, Calif. "But you have on the opposite side the very weighty consideration that you might be costing innocent lives" by not enforcing the death penalty.

Death penalty opponents, however, call the academic argument a standoff that does not matter to the overall public debate. "The death penalty is more about punishment and retribution and just deserts," says Richard Dieter, executive director of the Death Penalty Information Center. "Deterrence is not going to be the decisive factor as to whether we keep the death penalty or get rid of it."

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[1] The pro-death penalty Criminal Justice Legal Foundation has listed the studies on its Web site: www.cjlf.org.

[2] Raymond Bonner and Ford Fessenden, "Absence of Executions: States With No Death Penalty Share Lower Homicide Rates," *The New York Times*, Sept. 22, 2000, p. A1.

[3] See Dale O. Cloninger and Roberto Marchesini, "Execution Moratoriums, Commutations, and Deterrence: The Case of Illinois," working paper, August 2005 (http://econwpa.wustl.edu/eprints/le/papers/0507/0507002.abs); "Execution and Deterrence: A Quasi-Controlled Group Experiment," *Applied Economics*, Vol. 33 (2001), pp. 569-576.

[4] Joanna M. Shepherd, "Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States," *Michigan Law Review*, Vol. 4, Issue 2 (forthcoming November 2005).

[5] Richard A. Berk, "New Claims about Executions and General Deterrence: Déjà Vu All Over Again?" *Journal of Empirical Legal Studies*, Vol. 2, No. 2 (July 2005), pp. 303-330.

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capital punishment and also established complex procedural rules for capital sentencing hearings. In one significant line of decisions, the court generally held that juries must be given broad discretion to consider any mitigating factors put forward by the defendant in an effort to avoid a death sentence, such as personal character, social background or minimal responsibility for the offense. [12]

Conflicting Goals?

With the constitutionality of capital punishment settled, supporters and critics of the death penalty pursued seemingly conflicting goals during the 1990s. Supporters, frustrated by the growing number of death row inmates awaiting execution, lobbied Congress successfully for restrictive procedural requirements on the use of federal habeas corpus to challenge state convictions or sentences. Meanwhile, critics and opponents of the death penalty called for more rigorous review of capital cases because of what they depicted as a large number of death row "exonerations" — cases in which condemned inmates had won reversals of their convictions or sentences. [13]

In the 1960s the Supreme Court had opened the door for state inmates to make greater use of federal habeas corpus petitions to try to overturn their convictions or sentences on federal constitutional grounds. By the 1980s, however, a more conservative high court under Chief Justice William H. Rehnquist was moving to limit habeas corpus. In one significant decision, the Rehnquist Court in 1989 generally blocked the use of new constitutional rulings as a basis for overturning convictions or sentences in habeas corpus proceedings. In two others, the court in the early 1990s barred inmates from filing federal habeas corpus petitions if they failed to abide by state procedural rules and made it harder for inmates to have federal courts rule on factual issues unless they raised a claim of actual innocence. [14]

Congress imposed further restrictions in the major overhaul of federal habeas corpus passed in 1996 as part of an antiterrorism bill. The Antiterrorism and Effective Death Penalty Act generally required state inmates to file federal habeas corpus petitions within a year of exhausting state appeals and post-conviction proceedings. The law also barred a second or successive petition except in narrow circumstances as determined by a federal appeals court. And — in a major jurisdictional change — the act required federal courts to defer to state court rulings unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [15]

Meanwhile, critics and opponents of capital punishment were mounting a documented attack on the reliability of judicial proceedings that led to the growing number of death sentences. A combination of events brought the innocence issue to the forefront of public debate. [16] Most important was the new technology of DNA testing, which defense lawyers initially resisted but eventually recognized as potentially valuable to support claims of innocence by convicted defendants, including some on death row.

Two of the defense lawyers who pioneered the use of DNA testing — Scheck and Peter Neufeld — founded the Innocence Project as a nonprofit legal clinic to use post-conviction DNA testing to support innocence claims. By 1999, they claimed in a book that the project had provided "stone-cold proof" that 67 people had been sent to prison for crimes they did not commit, including 11 sentenced to death. [17] Today, the project counts 162 "exonerations," including 14 in death penalty cases.

In addition, in-depth investigations have uncovered evidence of seriously flawed capital cases in Illinois and Oklahoma. In Illinois, students in a journalism course at Northwestern University helped uncover 13 cases of innocent defendants on death row, who were later exonerated. *The Chicago Tribune* put a dramatic headline on its own later, staff-written story: "Death Row Justice Denied: Bias, Errors and Incompetence Have Turned Illinois' Harshest Punishment Into Its Least Credible." [18]

Two years later, a March 2001 FBI report questioned testimony in eight cases by an Oklahoma City police laboratory scientist, Joyce Gilchrist, leading to an extensive re-examination of her role in some 23 capital cases, including 12 in which defendants had actually been executed. But state authorities who reviewed the capital cases expressed confidence that all of the defendants had been properly convicted without regard to Gilchrist's evidence in the cases. The investigation also resulted in May in the release of a defendant serving a sentence for rape. Gilchrist was fired in September because of "flawed casework testimony." [19]

The Supreme Court's two mid-decade rulings in "actual innocence" cases reflected a tentative approach. In the first — *Herrera v. Collins* — Chief Justice Rehnquist's opinion for the 6-3 majority in 1993 held that federal courts had no authority in habeas corpus cases to consider actual innocence claims apart from some independent constitutional violation. But he qualified the holding by saying that even if a "truly persuasive demonstration of 'actual innocence' after trial would render an execution unconstitutional," the inmate's evidence in the case fell "far short of any such threshold."

Two years later, though, a liberal majority held in *Schlup v. Delo* that a death row inmate was entitled to a hearing on a second federal habeas petition if he or she could show that a constitutional violation "probably resulted" in the conviction of an innocent person. Rehnquist led the dissenters in the 5-4 ruling.

After the decade's end, the pivotal justice in the two cases — Sandra Day O'Connor — acknowledged her own concerns about the issue. Speaking to a meeting of women lawyers in Minneapolis in July 2001, O'Connor said, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." After noting that Minnesota had no death penalty, O'Connor added, "You must breathe a sigh of relief every day." [20]

Changing Views?

Support for capital punishment sagged somewhat in the early years of the 21st century, seemingly in response to the work of death penalty critics and opponents. In the most dramatic event, Illinois Gov. Ryan specifically cited the risk of executing innocent persons in declaring his death penalty moratorium in January 2000 and then, as he left office in January 2003, commuting death sentences for the state's 164 condemned inmates. Meanwhile, the Supreme Court became somewhat more receptive to death row inmates' pleas by barring capital punishment for mentally retarded and juvenile offenders and setting aside death sentences in some individual cases because of racial discrimination, trial errors or inadequate legal representation.

During the Illinois moratorium, the commission Ryan created to study the state's flawed capital trials and sentencing procedures recommended a broad reform package, adopted in November 2003 after Ryan had left office. [21] The law gave defense lawyers access to all police notes, tightened police lineup procedures and mandated pretrial hearings on reliability of testimony from jailhouse informants. It also provided funding for pretrial or post-conviction DNA testing and removed the time limit on actual innocence claims in state courts.

Death penalty critics described the package as "historic," though it fell short of some recommended changes — including statewide oversight of death penalty cases. For his part, Gov. Blagojevich said he would keep the death penalty moratorium in place while the changes were put into effect.

In Maryland, Democrat Glendening followed a different sequence from Ryan's in first commissioning a study of racial bias in capital sentencing in 2001 and then imposing a death penalty moratorium in May 2002 while awaiting the results. The study found evidence that the death penalty was more likely to be sought in cases with white victims than in cases with black victims. But it was released in January 2003 — after Glendening had been defeated for re-election by the conservative Republican Ehrlich, who had vowed during his campaign to lift the moratorium. [22] The state has carried out one execution during Ehrlich's tenure: the lethal injection of convicted triple murderer Steven Oken on June 17, 2004. [23]

In Washington, death penalty critics were using the innocence issue to lobby for legislation to help inmates have access to post-conviction DNA testing. The five-year legislative fight culminated in October 2004 with passage of the Innocence Protection Act, which guarantees federal inmates the right to DNA testing within specified time limits or with court approval. The act also uses federal grants to encourage states to make DNA testing available to state inmates as well. [24]

Meanwhile, the Supreme Court was moving to narrow application of the death penalty and to exercise more critical oversight of state courts' handling of capital cases. In two landmark decisions, the court in 2002 and 2005 ruled that the Eighth Amendment's prohibition on cruel and unusual punishment barred the death penalty for mentally retarded or juvenile offenders. [25] In another case with broad application, the court in 2002 ruled that only juries, not judges, could make factual determinations needed to make defendants eligible for the death penalty. [26]

Equally significant, the court set aside death sentences in several individual cases. Many of the reversals appeared to rebuke two of the most conservative federal appeals courts that handled cases from states with large numbers of executions: the New Orleans-based Fifth Circuit with jurisdiction over Texas and the Richmond-based Fourth Circuit with jurisdiction over Virginia. In two Virginia cases, for example, the court upheld death row inmates' pleas — rejected by the Fourth Circuit — that their lawyers had provided constitutionally inadequate representation by failing to investigate social histories potentially useful as mitigating evidence to avoid the death penalty. In two Texas cases, the court ordered new hearings — refused by the Fifth Circuit — for condemned inmates' claims of racial discrimination in jury selection and improper withholding of damaging information about a key prosecution witness. [27]

The high court's critical scrutiny of capital cases peaked during the 2004-05 term. In addition to the ruling on juvenile offenders, the justices in four other cases set aside death sentences that had been upheld through appeals or post-conviction proceedings in federal and state courts:

- In a Pennsylvania case, the court somewhat strengthened the requirement that defense lawyers investigate defendants' background for potential mitigating evidence.
- In a Missouri case, the court ruled that the defendant was improperly shackled during the sentencing hearing.
- In a Texas case, the court summarily threw out a death sentence because the trial judge's instructions did not allow jurors to consider the defendant's mental retardation as a mitigating factor.
- And in a follow-up to the earlier Texas racial discrimination case, the court sharply set aside the Fifth Circuit's decision to uphold the death sentence in the face of the high court's earlier ruling. [28]

Death penalty critics took heart from the high court's rulings as well as a decline in the number of executions and a dip in approval of the death penalty. Executions fell from a high of 98 in 1999 to 59 in 2004, according to the Death Penalty Information Center. Meanwhile, support for the death penalty in Gallup Polls fell to 66 percent in 2002 before climbing back to 74 percent in 2003 and 2005.

Group Says Innocent Man Was Executed

Larry Griffin maintained his innocence until the day he was executed in 1995 for a drug-related, drive-by shooting 15 years earlier. Now the St. Louis prosecutor's office is re-examining the case after a year-long investigation by a civil rights advocacy group concluded Griffin was innocent. [1]

The law professor who supervised the NAACP Legal Defense Fund (LDF) investigation says Griffin's case is an actual instance of a wrongful execution. If true, Griffin would be the first man in modern times proven to have been executed for a crime he did not commit. But the original prosecutor defends Griffin's 1981 verdict, and says the LDF just wants to use Griffin as "the poster child for the proposition that an innocent man was executed." [2]

Griffin was convicted of the June 26, 1980, shooting death of Quintin Moss, shot 13 times by men firing from a slow-moving car as Moss was selling drugs to another man, Wallace Conners, in a neighborhood used as an open-air drug market.

The case against Griffin consisted chiefly of identification by an eyewitness, Robert Fitzgerald, and evidence of motive: Moss was suspected of having murdered Griffin's older brother. Conners never identified Griffin, however, and moved away.

Moss' family, which had always doubted the case against Griffin, sought the LDF's help. Fund investigators found Conners in Los Angeles, where he told them Griffin was not among the shooters and that eyewitness Fitzgerald was not at the scene.

"He's innocent, and we've got very strong proof of it," says University of Michigan law professor Samuel Gross. If the case were brought to trial now, he added, "We'd win hands down."

But Gordon Ankney, the prosecutor in the case and now a private attorney in St. Louis, still believes in the verdict. "The truth . . . was presented in the courtroom under oath," he said recently.

After the LDF's report was released in June, St. Louis Circuit Attorney Jennifer Joyce assigned two lawyers to re-investigate the case. The investigation is expected to take several months.

[1] The 11-page report — a June 10, 2005, memorandum to attorneys representing the family of the homicide victim — can be found on the Web site of the *St. Louis Post-Dispatch* (www.stltoday.com) or on sites maintained by anti-death penalty groups, including Truth in Justice (www.truthinjustice.org). Account drawn from Terry Ganey, "Case Is Reopened 10 Years After Execution," *St. Louis Post-Dispatch*, July 12, 2005, p. A1.

[2] See Ganey, *op. cit.*; Gordon Ankney, "Judge Him on Evidence, Not on Opinion," *St. Louis Post-Dispatch*, July 25, 2005, p. B7.

And a majority of respondents — 73 percent in 2003, 59 percent in 2004 — said they believed an innocent person had been executed in recent years.

Supporters of capital punishment, however, emphasized the poll results showing that most Americans continue to support the death penalty. "They are concerned about executing an innocent person," says Latzer of the John Jay College of Criminal Justice. "But notwithstanding their concerns, they still overwhelmingly favor the death penalty." ■

CURRENT SITUATION

State Issues

Death penalty supporters appear to be somewhat on the defensive in state capitals around the country, but they continue to have the strength to block proposals to impose moratoriums on executions or abolish capital punishment. [29]

In one battleground state, for example, death penalty supporters and critics in North Carolina squared off all summer after a Senate-backed moratorium proposal won narrow approval in the House Judiciary Committee on May 31.

House Speaker Jim Black, a Democrat who supported the measure, put the bill on the chamber's calendar the next day. Fearing a defeat, however, Black never scheduled a vote before the legislature adjourned in early September. Instead, Black said he would create a special committee to study the death penalty, focusing on procedures for considering innocence claims by death row inmates. In announcing the plan, Black repeated his view that innocent people are now serving time in the state's prisons. "That is a horrendous thing for the state of North Carolina," he said. [30]

In one of the year's most important legislative fights, death penalty critics claimed victory when Texas Gov. Rick Perry, a Republican, signed a law on June 17 allowing a life sentence without possibility of parole as an alternative to the death penalty in capital murder cases. Some prosecutors and victims' rights groups had opposed the measure, fearing it would make death sentences harder to obtain. The law took effect on Sept. 1. [31]

Texas leads the country in executions with 349 since the Supreme Court allowed reinstitution of capital punishment in 1976. With an average of nearly 12 executions per year, Texas outpaces the average for the second-ranking state — Virginia — by a factor of nearly 4-to-1.

Earlier, New York's legislature left the state without a death penalty after the State Court of Appeals invalidated the state's capital punishment statute. After a round of sometimes-emotional hearings over the winter, the New York Assembly's Codes Committee on April 12 rejected, 11-7, a bill to adjust the death penalty law to comply with the appeals court's ruling. [32]

Eleven Democrats voted against the bill, while three Democrats and the committee's four Republicans voted to send it to the Assembly floor. The state Senate had previously approved a virtually identical bill. New York had gone without a death penalty law until 1995, when the state's newly elected Republican governor, George E. Pataki, fulfilled a campaign pledge by signing a capital punishment statute into effect. Six defendants had been sentenced to death under the law, but none had been executed before the Court of Appeals decision.

Bills to abolish the death penalty have been introduced in at least 16 other states in the past two years, according to the National Conference on State Legislatures, though none has passed. [33] In Connecticut, the state House of Representatives rejected an abolition bill on March 30 by a vote of 89-60, with Democrats providing all but four of the votes in support of the measure. On May 13 the state carried out its first execution since 1960, when Michael Ross was put to death by lethal injection for killing eight young women in the early 1980s. Ross had waived further appeals.

Similarly, moratorium bills were introduced in at least seven states in 2005 in addition to North Carolina, but none passed. A group of Democratic lawmakers in California announced a plan in June to introduce a moratorium bill in 2006. With 648 inmates on death row, California has the largest death row population of any state; it has carried out 11 executions since 1976.

In North Carolina, moratorium supporters relied on claims that six innocent persons had been sent to death row in recent years, sometimes on documented instances of prosecutorial misconduct — chiefly, withholding of evidence. "We've had innocent people end up on death row, and there's no accounting for why that happened," says David Neal, a Durham defense lawyer who heads the North Carolina Committee for a Moratorium.

The state's district attorneys conference opposed the measure, describing it as a ploy to abolish the death penalty and disputing the likelihood of executing an innocent person. "We feel the processes are in place to check, double-check and double-double-check," says Peg Dorer, director of the North Carolina Conference of District Attorneys. She notes that a new law requires prosecutors to turn over all information to defense lawyers before trial.

Death penalty opponents say the legislative efforts — even if unsuccessful — contrast sharply with the moves in previous years to speed up appeals. "There's a realization that mistakes were made in the past, and we have to do better in the future," says Dieter.

But prosecutor Marquis says states for the most part are leaving death penalty laws alone. "You have states like New Mexico and North Carolina, where significant moves were made against the death penalty, and states like Iowa, Minnesota and Wisconsin, where significant moves were made to reinstate it," Marquis says. "None of the proposals passed."

High Court Cases

As the Supreme Court prepares to open its new term, presumably with a new chief justice and a vacancy to be filled, it has four death penalty cases already slated for review.

The successors to the late Chief Justice Rehnquist and Associate Justice O'Connor could leave the court as closely divided as before on death penalty issues or might tip the scales slightly in favor of upholding challenged convictions or sentences in capital cases.

Federal Judge John G. Roberts Jr., President Bush's nominee for chief justice, appears on the verge of Senate confirmation following hearings before the Judiciary Committee that began on Sept. 12. Bush had originally named Roberts to succeed the retiring O'Connor but nominated him to be chief justice instead following Rehnquist's Sept. 3 death from thyroid cancer.

O'Connor apparently plans to be on the bench at the opening of the new term on Oct. 3 while awaiting action by Bush and the Senate on filling her post. In announcing her retirement on July 1, she said she would remain in office until her successor was nominated and confirmed.

Rehnquist had been a fairly consistent vote for upholding death sentences throughout his 33 years on the court, while O'Connor sometimes broke from the conservative majority to vote to overturn death sentences or narrow death penalty laws.

In confirmation hearings, Roberts gave only general hints of his likely views in death penalty cases — which he has not had to face in his two years on the federal court in Washington. Questioned about a memo written as a Reagan administration lawyer in the 1980s criticizing habeas corpus review, Roberts noted that reforms by the Supreme Court and Congress have eliminated the frequent practice of "repetitive" petitions.

Roberts said the current system of state and federal review of death was aimed at minimizing the risk of executing an innocent person, but he added that some risk is inevitable. "There is always a risk in any enterprise that is a human enterprise," Roberts said. The most effective way to reduce the risk of error in capital cases, he noted, was to make sure defendants have "competent counsel at every stage of the proceeding."

The Judiciary Committee was due to vote on Roberts' nomination on Sept. 22, with a vote in the full Senate expected

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At Issue:

Should states adopt moratoriums on executions?

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WRITTEN FOR THE *CQ RESEARCHER*, SEPTEMBER 2005

Post-conviction DNA testing has exonerated 162 inmates (and counting), identified numerous real assailants and proved the innocence of 14 men sentenced to death. These exonerations have not just demonstrated the real risk of executing an innocent person but also exposed serious weaknesses in the state criminal-justice systems, indicating that moratoria are needed on executions.

DNA testing is not a panacea; it will not make any state's death penalty fair, accurate or just. It does not offer probative evidence in the vast majority of criminal cases.

Indeed, DNA exonerations have created a learning moment, an opportunity to deal with the causes of wrongful conviction that victimize the innocent and allow the real criminals to go free: Mistaken eyewitness identification, false confessions, incompetent defense lawyers, poor forensic science and law enforcement misconduct. These issues can and must be addressed to prevent execution of the innocent.

This is the heart of the death penalty moratorium debate. Reasonable people can differ about the morality of capital punishment. But it is not reasonable to excuse inequities in the administration of capital punishment. As the president has acknowledged, capital lawyers are not adequately trained or properly funded. Until the American Bar Association's Guidelines for the Administration of Capital Punishment are implemented, no citizen can be confident about the guilt of all death row inmates.

Consider as well scientific advances that come too late. Texas executed Cameron Willingham in 2004 despite exhortations from a leading expert that the arson evidence underlying Willingham's murder conviction was proven false by new scientific data. Soon afterward, Texas exonerated Ernest Willis from his arson murder death sentence when prosecutors agreed with the same expert and science offered in Willingham's case. Nothing could be done for Willingham — likely an innocent man — because the state had already killed him.

Are fair-minded supporters of capital punishment willing to make the system fair and accurate? Should Louisiana, whose indigent-defense system was already in fiscal crisis, spend millions now to pursue executions? Why not invest in better crime labs, decent defense counsel and eyewitness and police reforms? How can states fail to enact these good law enforcement measures that protect against wrongful executions and help apprehend real murderers?

Until states address these known systemic failures, they must impose moratoria on executions.

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WRITTEN FOR THE *CQ RESEARCHER*, SEPTEMBER 2005

Should the execution of Danny Rolling stay on hold when his current, and hopefully last, appeal is decided? That is what the moratorium backers propose. They want to hold every execution in America, regardless of how clear the murderer's guilt or how clearly deserved his sentence. They have yet to come up with a single convincing reason for such a drastic step.

There is no doubt whatever of Rolling's guilt. It was proven by both DNA and his confession. In a spree of rape, mutilation and murder he killed five college students in Gainesville, Fla., in 1990. Eleven years have passed since his sentence, while multiple courts have repeatedly considered and rejected arguments that have nothing to do with guilt or innocence.

This is not unusual. Only a handful of capital cases involve genuine questions of innocence. By all means, we should put those few on hold as long as it takes to resolve the questions, and the governor should commute the sentence if a genuine doubt remains. At the same time, we should proceed with the justly deserved punishment in the many cases with no such questions, and considerably faster than we do now.

The other arguments against the death penalty have failed. The claim of discrimination against minority defendants is refuted by the opponents' own studies. So, too, is the claim of bias on the race of the victim, when the data are properly analyzed.

It has also been shown that lawyers appointed to represent the indigent get the same results on average as retained counsel. For example, Scott Peterson, with the lawyer to the stars, sits on death row, while the public defender got a life sentence for the penniless Unabomber. The mitigating circumstance of Theodore Kaczynski's mental illness made the difference, not the lawyers.

On the other hand, a powerful reason for the death penalty becomes clearer every year. Study after study confirms that the death penalty does deter murder and does save innocent lives when it is actually enforced.

Conversely, delay in execution and the needless overturning of valid sentences sap the deterrent effect and kill innocent people.

To minimize the loss of innocent life, the path is clear. Take as long as we need in the few cases where guilt is in genuine question and proceed to execution in a reasonable time in a great bulk of cases where it is not.

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to follow the next week — in time for Roberts to preside at the opening session Oct. 3.

The four cases that the justices have already agreed to hear during the new term include the actual innocence plea by Tennessee inmate House and appeals by three states — California, Kansas and Oregon — seeking to reinstate challenged death penalty laws or procedures. The justices are also due to consider the plea by Virginia death row inmate Lovitt in their private conference on Sept. 26 and could add the case to the list for the term later that week.

In their filings, lawyers for House asked the high court to hear the case to resolve "inconsistency and confusion" among lower federal courts about the rules for considering post-conviction claims of actual innocence. They claimed that "powerful" new evidence, including DNA evidence, showed that House had been "wrongly convicted" of the murder of his former neighbor.

Lawyers for the state countered that the district court judge and the Sixth Circuit appeals court had correctly applied the Supreme Court's decision requiring a very strong showing of actual innocence to belatedly raise a constitutional claim. House's evidence did not meet that threshold but was "countered and undermined in virtually every respect," wrote Jennifer Smith, associate deputy Tennessee attorney general.

In the most significant of the other three cases, lawyers for the state of Kansas are seeking to reinstate a death penalty law struck down by the state's high court in December 2004. [34] In a 4-3 decision, the Kansas Supreme Court ruled the law unconstitutional because it required a death sentence if the jury determined that aggravating circumstances were "not outweighed" by mitigating circumstances. "Fundamental fairness requires that 'a tie goes to the defendant' when life or death is at issue," the majority wrote, quoting an earlier Kansas decision.

The case stems from the capital murder conviction and death sentence of Michael Marsh for the 1996 killing of a woman and her infant daughter. They were killed in their home during an extortion plot aimed at her husband that went awry when she unexpectedly arrived at the house instead of him. Lawyers for the Kansas attorney general's office contend that the state justices misinterpreted the governing Supreme Court precedent on weighing aggravating and mitigating circumstances.

In a second case, lawyers for the Oregon attorney general's office are asking the justices to reverse a state high court decision that death penalty defendants have a constitutional right to offer evidence of innocence during the sentencing phase after a guilty verdict. They argue that a capital defendant is entitled only to present evidence of "moral culpability" during the sentencing phase and not to "reargue his legal culpability or guilt." [35]

The final case is an appeal by lawyers for the state of California trying to reinstate a death sentence struck down because of what the Ninth Circuit appeals court ruled was a prejudicial jury instruction. [36] The California Supreme Court had ruled the error did not affect the sentence, but the federal appellate judges disagreed.

Arguments in the California case are set for Oct. 11, while the Oregon and Kansas cases are to be heard on Dec. 7. Arguments in the House case are scheduled for early 2006. Decisions in all four cases are due by the start of the court's recess at the end of June. ■

OUTLOOK

'Risks of Unfairness'?

Justice John Paul Stevens has become the latest member of the Supreme Court to voice strong concerns off the bench about the way that death penalty cases are handled in the United States. In a speech to the American Bar Association on Aug. 6, Stevens noted the "substantial number" of erroneously imposed death sentences and then suggested the need to re-examine jury-selection and sentencing procedures to eliminate what he called "special risks of unfairness" in death penalty cases. [37]

Stevens had gone even further three months earlier. In a speech in May to lawyers and judges at the Seventh Circuit Bar Association, the 85-year-old leader of the court's liberal bloc said, "This country would be much better off if we did not have capital punishment." [38]

At least three other justices have publicly criticized death penalty procedures in past speeches: O'Connor in 2001 and President Clinton's two appointees, Ruth Bader Ginsburg and Stephen G. Breyer, earlier. No one expects the current high court to abolish capital punishment, but death penalty critics and opponents are encouraged by what they see as a re-examination of the issue by the justices that parallels a similar reconsideration by the public at large.

"The court is part of the whole changing of focus on the death penalty," says Dieter of the Death Penalty Information Center. "It's stimulated because of the cases of innocence that everybody knows about."

Death penalty supporters minimize the significance of the court's recent decisions barring execution of juveniles and mentally retarded offenders and invalidating individual sentences in other cases. "That's not a veering away from the death penalty for moral or constitutional grounds but a recognition that it should be reserved for the most serious crimes," says prosecutor Marquis. As for Stevens' speech, Marquis says it reflects "the justice's personal abhorrence for capital punishment."

Marquis predicts that Roberts' anticipated confirmation as chief justice and the nomination of a successor to O'Connor will shift the court, if at all, slightly more toward law enforcement positions in death cases. He speculates that Roberts will vote much as Rehnquist did in capital cases, while Bush's choice of a successor for O'Connor is likely to be "more supportive" of prosecutors than she was on death penalty issues.

The ABA's Tabak, however, tentatively forecasts continued critical scrutiny of death cases from the high court. "If they do not backtrack with changes in membership, they will continue to be somewhat more vigilant, as they have been in recent years," he says.

The decisions by the Kansas and Oregon supreme courts illustrate that some state tribunals are critically examining death penalty laws in their jurisdictions, though the Supreme Court's decisions to hear the states' appeals could signal that the justices think the state courts are going further than necessary to protect defendants' rights.

In state legislatures, meanwhile, lawmakers are tinkering with death penalty procedures while stopping short of endorsing moratoriums on executions. "Legislatures in states that have a death penalty are attentive to making it fair and workable," says Donna Lyons, criminal justice program director for the National Conference of State Legislatures.

In Washington, Congress is working on legislation that would increase federal aid to the states for DNA and other forensic testing. In his 2005 State of the Union address, President Bush unveiled plans to ask for $1 billion over five years to expand DNA testing capacity in order to guard against the risk of wrongful convictions. [39] State crime labs, supported by anti-death penalty groups, urged that the initiative be expanded to include other forensic techniques. By mid-September, both the House and the Senate had included forensics funding in Justice Department appropriations bills, with the final amount to be determined in a joint conference committee.

In his final year on the Supreme Court in 1994, Justice Harry A. Blackmun became convinced that it was impossible to administer the death penalty fairly. "From this day forward, I no longer shall tinker with the death penalty," Blackmun wrote in an impassioned, 7,000-word dissent from the court's refusal to take up a plea from a Texas death row inmate. [40]

Justice Antonin Scalia responded by accusing Blackmun of trying to "thrust a minority's view on the people." Since then, more than 750 defendants have been executed in the United States and the nation's death row population has increased by nearly one-fifth to its current level of slightly over 3,400. ■

Notes

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[2] For previous coverage, see these *CQ Researcher* reports: Kenneth Jost, "Rethinking the Death Penalty," Nov. 16, 2001, pp. 945-968; Mary Cooper, "Death Penalty Update," Jan. 8, 1999, pp. 1-24.

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[5] The bill numbers are S 1088 and HR 3035.

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[9] Public opinion data taken from Robert M. Bohm, "American Death Penalty Opinion: Past, Present, and Future," in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.), *America's Experiment with Capital Punishment* (2d ed.), 2003, pp. 27-54. For current polling data, see the Web site of the Death Penalty Information Center (www.deathpenaltyinfo.org).

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[13] Some background drawn from Franklin E. Zimring, *The Contradictions of American Capital Punishment* (2003). Zimring, a professor at the University of California's Boalt Hall School of Law in Berkeley, is a strong opponent of the death penalty.

[14] The decisions are *Teague v. Lane*, 489 U.S. 288 (1989); *Coleman v. Thompson*, 501 U.S.

About the Author

Associate Editor **Kenneth Jost** graduated from Harvard College and Georgetown University Law Center. He is the author of the *Supreme Court Yearbook* and editor of *The Supreme Court from A to Z* (both *CQ Press*). He was a member of the *CQ Researcher* team that won the 2002 ABA Silver Gavel Award. His recent reports include "Right to Die" and "Supreme Court's Future."

722 (1991); and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). For more background, see Savage, *op. cit.*, pp. 295-300.

[15] See *1996 CQ Almanac*, p. 5-18.

[16] See Zimring, *op. cit.*, pp. 157-162.

[17] Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (1999).

[18] Ken Armstrong and Steve Mills, "Death Row Justice Denied: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment into Its Least Credible," *The Chicago Tribune*, Nov. 14, 1999, p. 1.

[19] See Jim Yardley, "Oklahoma Retraces Big Step in Capital Case," *The New York Times*, Sept. 2, 2001, p. 12.

[20] "O'Connor Questions Death Penalty," The Associated Press, July 3, 2001.

[21] For coverage, see John Chase and Ray Long, "Death Penalty Reform Passes," *The Chicago Tribune*, Nov. 20, 2003, p. 1. For more complete information, see the Center for Wrongful Convictions' Web site, www.law.northwestern.edu/wrongfulconvictions.

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[24] Jennifer A. Dlouhy, "Add-Ons End Years of Wrangling, Clear Path for DNA Testing Bill," *CQ Weekly*, Oct. 16, 2004, p. 2442.

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[27] The cases are, respectively, *Terry Williams v. Taylor*, 529 U.S. 362 (April 18, 2000); *Wiggins v. Smith*, 539 U.S. 510 (June 26, 2003); *Miller-El v. Cockrell*, 537 U.S. 322 (Feb. 25, 2003); and *Banks v. Dretke*, 540 U.S. 668 (Feb. 24, 2004).

[28] The cases are, respectively, *Rompilla v. Beard* (June 20, 2005); *Deck v. Missouri* (May 23, 2005); *Smith v. Texas* (Nov. 15, 2004); and *Miller-El v. Dretke* (June 13, 2005). Citations to *U.S. Reports* not yet available.

[29] Information on legislative proposals can be found on Web sites of opposing advocacy groups: Justice for All (www.prodeathpenalty.com) and the Death Penalty Information Center (www.deathpenaltyinfo.org).

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[31] Mike Ward, "Life Without Parole Among 600 Laws Signed by Governor," *Austin American-Statesman*, June 18, 2005, p. A15.

[32] Patrick D. Healy, "Death Penalty Bill Is Blocked by Democrats," *The New York Times*, April 13, 2005, p. B1. The decision is *People v. LaValle*, June 24, 2004. The court ruled the law unconstitutionally coerced jurors because it allowed a judge to impose a life sentence with parole eligibility if jurors were deadlocked between the two more severe alternatives: death and life without parole.

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[35] The case is *Oregon v. Guzek*, 04-928.

[36] The case is *Brown v. Sanders*, 04-980.

[37] Gina Holland, "Stevens Focuses on Death Penalty Flaws," The Associated Press, Aug. 7, 2005. The text of Stevens' speech can be found on the Supreme Court's Web site: www.supremecourtus.gov.

[38] Quoted in Monica Thomas, "O'Connor Exit 'Wrenching,' Stevens Tells Lawyers Here," *Chicago Sun-Times*, Aug. 7, 2005.

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[40] The case is *Callins v. Collins*, 510 U.S. 1141 (1994). See Linda Greenhouse, "Death Penalty Is Renounced by Blackmun," *The New York Times*, Feb. 23, 1994, p. A1.

FOR MORE INFORMATION

American Association on Mental Retardation, 444 N. Capitol St., N.W., Suite 846, Washington, DC 20001; (202) 387-1968; www.aamr.org. The largest and oldest organization devoted to mental retardation and related disabilities.

Criminal Justice Legal Foundation, P.O. Box 1199, Sacramento, CA 95816; (916) 446-0345; www.cjlf.org. A pro-death penalty public-interest law organization working to ensure that the courts respect the rights of crime victims and law-abiding society.

Death Penalty Information Center, 1101 Vermont Ave., N.W., Suite 701, Washington, DC 20005; (202) 289-2275; www.deathpenaltyinfo.org. An anti-death penalty organization furnishing analysis and information on issues concerning capital punishment.

Innocence Project, 100 5th Ave., 3d floor, New York, NY 10011; (212) 364-5340; www.innocenceproject.org. Seeks to exonerate the wrongfully convicted through DNA testing and to effect reforms to prevent wrongful convictions.

National Association of Criminal Defense Lawyers, 1150 18th St., N.W., Suite 950; Washington, DC 20036; (202) 872-8600; www.criminaljustice.org. Works to ensure justice and due process to persons accused of crimes.

National Conference of State Legislatures, 1560 Broadway, Suite 700, Denver, CO 80202; (303) 830-2200; www.ncsl.org. A bipartisan organization that provides a forum for state legislators and their staffs to discuss state issues.

National District Attorneys Association, 99 Canal Center Plaza, Suite 510, Alexandria, VA 22314; (703) 549-9222; www.ndaa.org. Helps prosecutors by providing training, research and legislative advocacy.

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CITING *THE CQ RESEARCHER*

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Jost, Kenneth. "Rethinking the Death Penalty." The CQ Researcher 16 Nov. 2001: 945-68.

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