

States revisit the death penalty

As DNA tests prove more death-row inmates are not guilty of the crimes for which they were convicted, states are once again examining their laws on capital punishment.

BY CATHERINE COWAN

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The death chamber in Texas. Photo by Bruce W. Moore, Texas Department of Criminal Justice

In February 2001, Earl Washington Jr. was freed from a Virginia prison after being exonerated by DNA tests; he had spent 18 years in prison, nine of them on death row, at one point coming within days of execution. In November 1995, Rolando Cruz was freed from an Illinois prison after a judge overturned his conviction when a police witness acknowledged lying under oath; he had spent nearly 10 years on death row. In June 1993, Kirk Bloodsworth was freed from a Maryland prison after DNA tests showed he could not have been the source of semen found at the crime scene; he had spent eight years in prison, two of them on death row.

These are not the only cases in which wrongly convicted people have been freed from death row. According to the Death Penalty Information Center, 95 people in 22 states have been

released from death row since 1973. DNA tests were a factor in at least 10 death-row exonerations, and have helped to free at least 74 people wrongly convicted of all types of crime.

Such exonerations have alarmed state officials across the United States enough to call for changes in state procedures and laws. In Illinois, Gov. George Ryan declared a moratorium on executions after 13 death-row inmates were exonerated during the same period of time that the state had executed 12. Ryan also appointed a blue-ribbon commission to look into the reasons why so many errors had been made in capital cases. (See Point/Counterpoint, page 10-11.)

Prolific state proposals

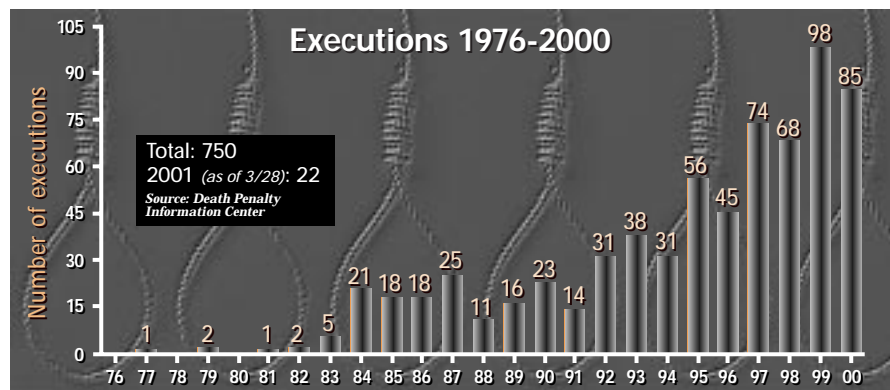
In the 38 states with the death penalty, in the first three months of 2001

more than 20 legislatures have considered bills to suspend or abolish it, and several states have appointed commissions to look into its fairness. Among states considering moratorium proposals as of mid-March were Connecticut, Florida, Indiana, Kentucky, Mississippi, New Jersey, North Carolina, Pennsylvania, Tennessee, Texas and Washington; moratorium proposals have failed in Maryland, New York, Oklahoma and Virginia.

States considering proposals to abolish the death penalty were Connecticut, Illinois, Indiana, Kentucky, Maryland, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oregon and Pennsylvania. An abolition proposal was defeated in Virginia.

Panels were studying various aspects of capital punishment in Arizona, Delaware, Georgia, Illinois, Indiana, Maryland, Nebraska, North Carolina and Virginia, and had been proposed in Florida, Indiana, Kentucky, Missouri, New Jersey, Tennessee, Texas and Washington.

States were considering other proposals to modify laws on capital punishment as of mid-March. Proposals to increase access to DNA tests were being considered in Florida, Kentucky,



North Carolina, Ohio, Texas, Utah, Virginia and Washington. In Virginia, DNA tests would become the major exception to the state's toughest-in-the-nation "21-day rule," which allows those convicted of crimes only three weeks to submit new evidence of innocence. Texas and Maryland passed laws in April allowing inmates greater access to DNA tests.

Other proposals would ensure defendants get a fair chance in court. Proposals to require competent counsel for defendants facing the death penalty were before legislatures in Kentucky, North Carolina and Texas. Alabama and Arizona were considering proposals to fund indigent defense offices, and Washington was considering a proposal to fund an office that

assists on capital cases.

Proposals before a number of states called for protection against racial bias, banning the death penalty for people convicted of crimes committed when they were under 18 and banning it for the mentally retarded. Indiana was considering a proposal that would make it the only state to ban execution of the mentally ill.

Other states were considering alternatives to capital punishment. Texas and Wyoming, two of four death-penalty states that do not offer life without parole as a sentencing option, were considering proposals to do so.

In response to cases of innocent people being imprisoned, Alabama was considering a proposal to pay wrongfully convicted people \$50,000 for each year spent in jail. Florida was considering compensating the estate of Frank Lee Smith, a death-row inmate who died of cancer before being exonerated.

Among the dozen states without the death penalty, Minnesota, Rhode Island and Vermont were considering proposals to establish or reinstate it, while such a proposal was defeated in Massachusetts.

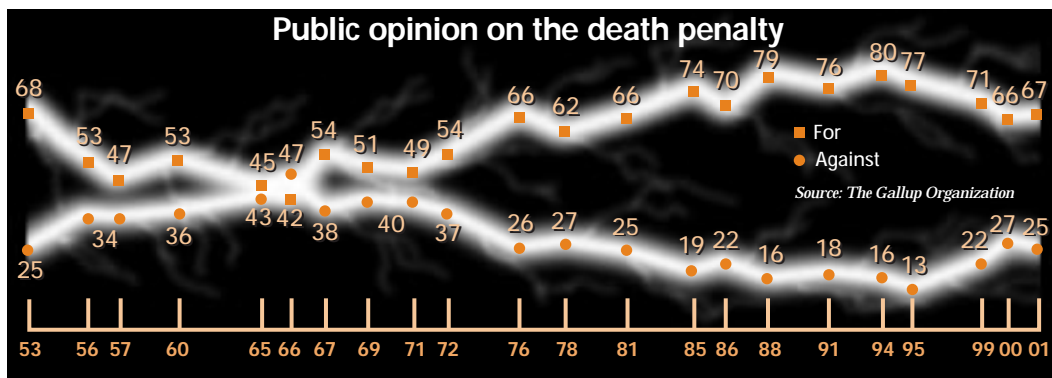
Proposals before some states would expand capital-punishment statutes by adding aggravating factors, such as murder of a child or a police officer, homicide while driving drunk or murder in domestic terrorism or spousal-abuse cases.

When the system fails

Death-penalty opponents say they

Shown is the Terrell Unit in Texas where death row is housed. Photo courtesy The Texas Department of Criminal Justice





have never seen a year when so many proposals to change capital punishment were taken so seriously, particularly in states with a high number of executions such as Texas and Virginia. "A lot of people are embarrassed by how bad the system is," Stephen Bright, director of the Southern Center for Human Rights, told *USA Today*.

Even some supporters of the death penalty say the system is flawed. "I voted for the death penalty on numerous occasions," Virginia Del. Frank D. Hargrove Sr., who sponsored a bill to abolish capital punishment, told *Stateline.org*. "But I was never really certain it was the correct thing to do. There was a huge chance of making a mistake and executing the wrong individual."

This fear of executing an innocent person has driven much of the inquiry into the death penalty, and for good reason. Although 95 people have been freed from death row since 1973, the pace of exonerations has picked up in recent years. From 1973 to 1993, an average of 2.75 people were freed from death row each year; since then, the average has increased to 5 per year. Eight people were freed in 1999 and eight again in 2000.

People are wrongfully convicted for all sorts of reasons, said Barry Scheck and Peter Neufeld, founders of the Innocence Project at the Benjamin N. Cardozo School of Law in New York. In their book *Actual Innocence: When Justice Goes Wrong and How to Make It Right*, Scheck and Neufeld analyze the

factors contributing to the wrongful conviction of the 74 people they helped to prove innocent as of 1999.

Witnesses who made mistaken identifications were a factor in 81 percent of the wrongful convictions. Police misconduct contributed to 50 percent and prosecutorial misconduct to 45



Families of victims often support the death penalty and resent long appeals. Shown is Cary Ann Medlin, who was raped and murdered at age 8 in 1979. Robert Glen Coe, who confessed to the crime and was sentenced to death in 1981, was executed April 19, 2000.

percent. Microscopic hair comparison proved unreliable in 35 percent. Among other factors were incompetent defense in 32 percent of the wrongful convictions, false confessions in 22 percent and testimony of jail informants in 19 percent, Scheck and Neufeld said.

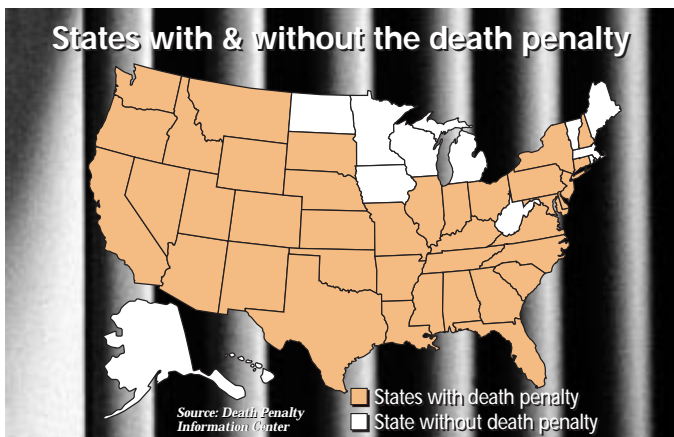
Although the Innocence Project works on behalf of people convicted of all types of crimes, their findings

hold up for death-row exonerations as well. Kirk Bloodsworth was convicted largely on the testimony of two boys who said they saw him near the scene of the crime. Earl Washington Jr., a sharecropper with an IQ of 69, confessed to the crime for which he was sentenced to die –

and to every other crime police asked him about. Misconduct by police and prosecutors kept Rolando Cruz on death row for nearly 10 years after another man had confessed to the crime for which he was convicted. Four police officers and three prosecutors were subsequently indicted for perjury and obstruction of justice.

There are other examples. In Oklahoma, Ronald Williamson was convicted in 1988 of the rape and murder of Deborah Sue Carter largely on the basis of microscopic hair comparison and the testimony of a jailhouse informant. Hair comparison, however, is so unreliable that its use is restricted or even barred in some jurisdictions. In one program to test the proficiency of 240 crime laboratories around the country, the U.S. Law Enforcement Assistance Administration found error rates of 27.6 to 67.8 percent in hair-comparison analysis. Williamson was released in 1999, after DNA tests exonerated him but implicated a witness who had testified against him.

The testimony of jailhouse informants is also widely suspect. Although they can sometimes provide important and truthful testimony, informants have little to lose if they lie and much to gain, such as special treatment in prison and shorter sentences, if they help the prosecution's case. One informant, Leslie Vernon White, admitted lying for prosecutors in dozens of cases in California, then demonstrated how he had done it making five phone calls in which he posed as various state officials to gain insider information about another inmate.



Incompetent defense common

But perhaps the most pervasive reason for wrongful death-row convictions is incompetent defense. In Illinois, Dennis Williams was one of four men convicted in 1979 of kidnapping and murdering a young couple. He was prosecuted largely on the basis of hair analysis and the testimony of a jail informant, and defended by an attorney who was later disbarred after a civil judge found he had mishandled an elderly woman's estate. After spending 18 years in prison, Williams and the three other defendants, one of whom had also been sentenced to die, were proven innocent largely through the efforts of journalism students at Northwestern University.

Williams' attorney is not the only one representing defendants facing the death penalty who was later disbarred or disciplined. According to a 1999 report by the *Chicago Tribune*, the li-

an investigation by the Department of Public Advocacy found 25 percent of death-row inmates had been represented by an attorney who was later disbarred or who had resigned to avoid disbarment. In Louisiana, a 1990 study found 13 percent of inmates executed had been represented by lawyers who were later disciplined, a rate 68 times greater than for the state bar as a whole. The lack of competent representation for defendants facing the death penalty is the major reason the American Bar Association called for a moratorium on executions in 1997.

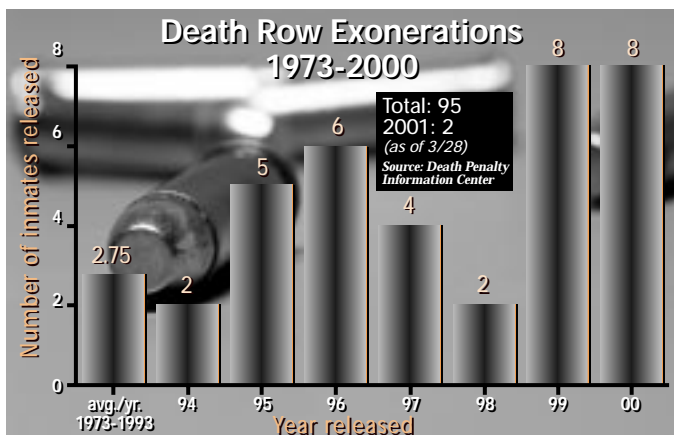
censes of 33 such attorneys in Illinois had been taken away or suspended since 1976. Lawyers for 43 of the last 131 people executed in Texas had been disbarred or disciplined, the *Tribune* said.

In Kentucky,

neys, many of whom handle a huge number of cases, have little experience with capital punishment and are paid little for their work. Of the 38 death-penalty states, 18 have no public-defender organizations; many others chronically under fund them.

In Texas, where a state bar committee estimated that defending a capital client takes 400 to 900 hours of work, state-funded attorneys are limited to 150 hours of compensation. In Mississippi, attorneys are paid \$1,000 plus a small allowance for overhead to try a capital case. Some jurisdictions award capital cases to the lowest bidder; one attorney in Georgia entered a total of seven motions for his court-appointed

Shown is Menard Correctional Center in Illinois, which houses death-row inmates. Photo courtesy Illinois Department of Corrections



Why are so many defendants facing the death penalty represented by incompetent attorneys? Perhaps the main reason is lack of money. Three-fourths of death-row defendants are represented by court-appointed attor-

clients over five years. Other states randomly assign capital cases, whether the lawyer has any experience dealing with the death penalty or not.

Nor can an innocent person who has been convicted and sentenced to death find relief from the federal government. In 1995 Congress eliminated funding for Post-Conviction Defender Organizations, which had provided counsel for death-row inmates in 20 states. The next year it passed the Antiterrorism and Effective Death Penalty Reform Act, cutting the time death-row inmates had to appeal their cases to federal courts to just six months.

The Supreme Court has supported these actions. In 1984 it ruled in

Other issues in contention

Besides innocence and DNA, states are considering other issues related to the death penalty. Among the most important are its fairness with regard to race, whether it should apply to people who committed crimes as juveniles and whether it should apply to the mentally retarded.

Race. Whether the death penalty is applied fairly across racial lines has long been an issue. As of Jan. 1, 2001, there were 3,726 people on death row in the United States. Of these, 46 percent were white, 43 percent were black, 9 percent were Hispanic, and 2 percent were of other races. Thus, although whites outnumber blacks on death row, the percentage of blacks on death row is three times higher than in the general population.

The situation is reversed when considering the race of the victims. Of the 904 victims, 82 percent were white, 13 percent were black, 4 percent were Hispanic, and 2 percent were Asian. Among those executed for killing someone of another race, 11 whites had a black victim, while 161 blacks had a white victim.

In 1987, the Supreme Court in *McCleskey v. Kemp* held that a statistical analysis showing a pattern of racial disparities in death sentences based on the race of the victim did not prove a constitutional violation of equal protection under the law unless intentional racial discrimination against the defendant could be shown.

Despite this, some states have acted to end racial disparity in the application of the death penalty. In 1998, Kentucky passed the Racial Justice Act, which allows defendants in capital cases to present statistical evidence of racial discrimination to show that race influenced the decision to seek the death penalty. If a judge finds that race was a factor, the death penalty would be barred. Georgia Rep. Bill Holmes, who this year sponsored one of five state proposals to ban imposing the death penalty on the basis of race, modeled his bill (HB 324) on Kentucky's statute.

Juveniles. Another issue facing states is whether people who committed crimes as juveniles should be executed. Of the 3,726 people on death row, 74 were sentenced for crimes committed when they were 16 or 17 years old. Texas has 26 juveniles on death row, the most of any state. Since 1976, 17 people have been executed for crimes committed when they were juveniles.

The Supreme Court has ruled twice on the issue of executing juvenile offenders. In its 1988 decision *Thompson v. Oklahoma*, the Court held that states with no a minimum age for the death penalty could not execute people who commit crimes when they are under 16. But in its 1989 decision *Stanford v. Kentucky*, the Court said that the ban on cruel and unusual punishment does not prohibit the death penalty for people who commit crimes at age 16 or 17. Currently 15 states have laws prohibiting the death penalty for anyone who commits a crime before turning 18.

Mentally retarded. A third issue facing states is whether to execute the mentally retarded. About 10 percent of the prisoners on death row are mentally retarded, meaning they have IQ scores of less than 70. Since 1976, 35 people with mental retardation have been executed. The Supreme Court in the 1989 case *Penry v. Lynaugh* ruled that executing the mentally retarded was not a violation of the ban on cruel and unusual punishment, but mental retardation can be a mitigating factor during sentencing.

At the time of the Penry ruling, only two states – Georgia and Maryland – had laws prohibiting execution of the mentally retarded. Since then, 11 additional states have passed such laws, and this year eight more were considering them. Recently, the Supreme Court has decided to revisit the issue by agreeing to hear the appeal of Ernest P. McCarver, a death-row inmate in North Carolina who has an IQ of 67. Arguments are expected in the fall, and a decision is not likely until early 2002.

Strickland v. Washington that in order to be granted a new trial on the basis of ineffective counsel, a defendant must show not only that his attorney was incompetent, but also that the attorney was so incompetent he undermined the just result of the trial. Then in 1993 the Court ruled in *Herrera v. Collins* that new evidence of innocence is not reason enough to be granted a new trial. Instead, it said, death-row inmates claiming actual innocence should seek clemency or pardons from their states' governors.

Congress is currently considering legislation to reverse some of its recent action on the death penalty. The Innocence Protection Act (S2073), sponsored by Vermont Sen. William Leahy, would ensure that convicted defendants are allowed access to DNA testing, help states provide competent legal services at every stage of a death-penalty prosecution and enable inmates who can prove their innocence to be compensated for wrongful imprisonment.

DNA results vary

More than any other factor, the increasing number of death-row exonerations through DNA testing has driven many state officials to re-examine the capital-punishment system. However, these tests are not a magic bullet.

First, DNA testing can be done only in cases in which biological evidence has been left behind. Thus, while DNA tests are relevant in most sexual assault and some murder cases, they do not apply to many crimes.

Second, even if DNA has been left at a crime scene, it must be collected, handled and stored properly. If police don't use rubber gloves when collecting DNA evidence, it can be contaminated, or if they don't store DNA evidence in a freezer, it can be destroyed.

Third, if death-row inmates are to have access to DNA tests, the evidence must be preserved, sometimes

for decades. Yet as Scheck testified before Congress, 75 percent of the time the Innocence Project looked for DNA evidence, it had been lost or destroyed.

Fourth, even if the DNA evidence has been preserved, the state and

said in testimony before the U.S. Congress.

Finally, even if DNA testing is applicable and all parties agree it should be done, the results vary. Sometimes DNA tests reinforce the inmate's guilt, sometimes there is other convincing evidence of guilt; and sometimes the tests are inconclusive. In addition, DNA testing has improved in recent years, meaning that a more recent test might have a different result than an earlier one.

Because DNA testing cannot help all inmates, and because the courts do not agree on whether inmates have a right to such tests, the U.S. Department of Justice has weighed in on how requests for DNA tests should be handled. In their 1999 report *Postconviction DNA Testing: Recommendations for Handling Requests*, Jeremy Travis, director of the National Institute of Justice, and Christopher Asplen, executive director of the National Commission on the Future of DNA Evidence, recommended that prosecutors "adopt a cooperative attitude" by

responding quickly to requests for DNA tests, acting to prevent destruction of relevant evidence, and locating crime-scene samples. By opting not to take the usual adversarial stance, Travis and Asplen say, prosecutors can save the state time, labor and money by exonerating the wrongly accused, or even by letting defense counsel know about a test that confirms the defendant's guilt.



A Texas death row cell. Photo courtesy The Texas Department of Criminal Justice

prosecutor must tell the inmate about it, give the inmate access to it and often must pay for the test. While some prosecutors are eager to exclude an innocent suspect, others refuse to allow DNA testing. And while California, Illinois, New York and Ohio allow inmates who claim they were wrongly convicted to take DNA tests, other states – particularly Florida, Louisiana and Missouri – have resisted allowing access to tests, Scheck

Public support for death penalty

According to a Gallup poll conducted in February, 67 percent of people say they support the death penalty while 25 percent are opposed. Of those who favored the death penalty, 48 percent said it was "an eye for an eye," 20 percent said it saved taxpayers money, and 10 percent saw it as a deterrent for crime. Although a majority of those polled favor the death penalty, the percentage is only slightly higher than the 19-year low measured by polls last year. When asked whether the death penalty or life in prison with no possibility of parole was a better punishment for murder, 54 percent chose the death penalty, while 42 percent chose life without parole.

Americans are divided over whether the death penalty is administered evenly. When asked whether the death penalty is applied fairly or unfairly, 51 percent said fairly while 41 percent said unfairly. But when asked whether an innocent person has been executed in the past five years, 80 percent said yes. When asked whether a poor person is more likely to receive the death penalty than someone of average or above average income, 65 percent said yes. And when asked whether a black person is more likely to be sentenced to death than a white, 50 percent said yes.

Conclusion

The increasing number of exonerations of death-row inmates has raised new questions about capital punishment and about the U.S. justice system. As more inmates seek DNA tests in hopes of proving their innocence, states must not only create procedures for granting such requests, but also must re-evaluate the system that has sent some innocent people to prison and death row. Whatever state officials think about the death penalty, it is certain they will be grappling with these issues in the years to come. ★