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THE NEW DEATH PENALTY DEBATE: WHAT'S DNA GOT TO DO WITH IT?

by James S. Liebman*

The nation is engaged in the most intensive discussion of the death penalty in decades.¹ Temporary moratoria on executions are effectively in place in Illinois² and Maryland,³ and during the winter 2001 legislative cycle legislation to adopt those pauses elsewhere cleared committees or one or more houses of the legislature, not only in Connecticut (passed the Senate Judiciary Committee) and Maryland (where it passed the entire House, and the Senate Judiciary Committee) but in Nevada (passed the Senate) and Texas (passed committees in both Houses).⁴ In the last year, abolition bills

* Simon H. Rifkind Professor of Law, Columbia Law School. This essay is a revised version of a speech given at the University of California, Berkeley. James S. Liebman, Address at DNA and Human Rights, An International Conference (Apr. 27, 2001). Events described are current through August 2001.

1. See, e.g., Toni Locy, *Push to Reform Death Penalty Growing; Mistakes Could Shake Confidence in System*, U.S.A. Today, Feb. 20, 2001, at 5A; Emilie Lounsberry, *Death Penalty's Fairness Debated Nationwide*, Phila. Inquirer, June 8, 2001, at A9.

2. See, e.g., Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1.

3. See, e.g., Editorial, *Maryland's Execution Pause*, Wash. Post, Apr. 15, 2001, at B6 ("The Maryland Court of Appeals on Thursday accomplished what the state's legislature failed to do a few days earlier—put a temporary halt on executions in the state.").

4. See, e.g., *Support for Death Penalty Drops* (ABC television broadcast, May 2, 2001) (reporting that "major campaigns to suspend executions have been launched in 19 states" in 2001); Death Penalty Info. Ctr., *Changes in the Death Penalty Around the U.S.: 2000–2001*, <http://www.deathpenaltyinfo.org/Changes.html> (last visited Oct. 28, 2001) (on file with *Columbia Human Rights Law Review*).

have passed or come within a few votes of passing in New Mexico⁵ and New Hampshire, although the Democratic governor vetoed the New Hampshire bill.⁶ Comprehensive studies of the death penalty have been legislated or ordered in Arizona, Illinois, Indiana, Maryland, Nebraska, Nevada, North Carolina, Virginia, and at the federal level, and are under consideration in a variety of other states.⁷

Legislation to abolish, or at least to moderate, the use of the death penalty has been considered in the current legislative cycle in at least twenty-six of the nation's forty death sentencing states, and has passed at least a committee vote in twelve or more.⁸ As recently

5. See S.U. Mahesh, *Senate Defeats Bill To Repeal Death Penalty: Aragon's Measure Fails by One Vote*, Albuquerque J., Feb. 10, 2001, at A8 (discussing state Senate's defeat—by a single vote, with one supporter absent—of a bill to abolish the death penalty in New Mexico).

6. See, e.g., Rachel M. Collins, *N.H. Death Penalty Repeal Fails*, Boston Globe, Apr. 6, 2001, at B2 (discussing legislature's vote in 2000 to abolish the death penalty but failure to override Governor Jeanne Shaheen's veto, and a close vote in the House on repeal legislation in the 2001 session).

7. See, e.g., Raymond Bonner, *Justice Dept. Set to Study Death Penalty in More Depth*, N.Y. Times, June 14, 2001, at A28 ("The Justice Department said today that it would undertake a comprehensive study of the federal death penalty to determine whether the system is racially or ethnically biased."); Sean Whaley, *Interim Study Sessions: Lawmakers Enter Research Season; Eight Topics Funded for In-Depth Study Evaluation in Preparation for 2003 Legislature*, Las Vegas Rev.-J., July 23, 2001, at 1 (discussing death penalty study ordered by state legislature, which "will look at a variety of issues, including the use of DNA testing, the cost of implementing the death penalty as opposed to life imprisonment and whether people under age 18 or who are mentally retarded should be sentenced to death"); Death Penalty Info. Ctr., *supra* note 4 (discussing studies in Arizona, Illinois, Indiana, Maryland, Nebraska, North Carolina, and Virginia). As one journalist noted:

No issue dogged this year's Legislature the way Nevada's death penalty did. . . . On Monday an interim legislative committee began in the first of six meetings to tackle the task of recommending bills to the 2003 Legislature that will improve what many believe are inherent flaws in the way capital punishment is carried out in Nevada, which has the largest per capita death row population in the nation. . . . "I think it's one of the most important topics nationally, as well as in the state, of our day," said Assemblywoman Sheila Leslie, D-Reno, who chairs the interim study committee.

Erin Neff, *Lawmakers Tackle Tough Issue of Death Penalty*, Las Vegas Sun, Oct. 30, 2001, at 1.

8. See, e.g. Death Penalty Info. Ctr., *supra* note 4.

as two years ago, a similar count likely would have revealed less than a third as many proposals, and almost no instances of committee approval. A major death penalty reform bill is pending in Congress with bipartisan support and over two hundred cosponsors in the House.⁹

The United States Supreme Court recently agreed to reconsider a twelve-year-old ruling permitting the execution of the mentally retarded,¹⁰ Governor Jeb Bush declared an administrative

9. See, e.g., Hon. Bill Delahunt, *Protecting the Innocent*, Harv. Crimson, May 14, 2001, at 3. According to one report:

In Congress, legislation that would create financial incentives for states to expand access to DNA testing and set standards for legal representation of defendants in capital cases is gathering support in both parties. In the Senate, its 19 co-sponsors include four Republicans and last year's Democratic vice presidential candidate, Joseph Lieberman, who declined to back the bill a year earlier. Its . . . co-sponsors in the House include several members of the GOP's conservative wing.

GOP Rep. Mark Souder of Indiana, one of the co-sponsors, says, "I support the death penalty, [but] I'm a little uncomfortable. We want to be more sure."

John Harwood, *Despite the McVeigh Case, Curbs on Executions Are Gaining Support*, Wall St. J., May 22, 2001, at 1 (alteration in original). See also Eric Lichtblau, *Death Penalty Reforms Gather New Momentum: With Dozens of Death Row Inmates Freed, a Cry Rises for Precautions, Such as DNA Tests*, L.A. Times, June 26, 2001, at A1 (reporting that as of June 2001, the bill had twenty-one co-sponsors in the Senate); Brooke A. Masters, *Executions Decrease For the 2nd Year: Va., Texas Show Sharp Drops Amid a National Trend*, Wash. Post, Sept. 6, 2001, at A1 ("The federal Innocence Protection Act, which would provide DNA testing and set minimum standards for court-appointed defense lawyers, also continues to make progress. The House version has 210 sponsors, close to a majority. In the closely divided Senate, several moderate Republicans have recently come out for the bill.").

10. The nation's highest court recently agreed to revisit the question of executing the mentally retarded. Twelve years after approving such executions, the Court said it would examine the case of a death-row inmate in North Carolina to determine if imposing the death penalty on the mentally retarded violates the Eighth Amendment ban on cruel and unusual punishment. *McCarver v. North Carolina*, 532 U.S. 941 (2001) (mem.) (granting certiorari to reconsider Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), holding that the Eighth Amendment Cruel and Unusual Punishment Clause does not bar executing the mentally retarded); Lounsbury, *supra* note 1, at A9 (discussing Court's decision to reexamine the legality of executing mentally retarded individuals).

halt on executions of the retarded in Florida,¹¹ and legislative bans thereafter passed the legislatures of Arizona, Connecticut, Florida, Missouri, and Texas (the last of which was vetoed by the governor), accelerating the at best one-state-a-year pace of such legislation between the late 1980s and the turn of the century.¹² Texas, the

11. See, e.g., Alisa Ulferts, *Bill Would Prohibit Executing Retarded*, St. Petersburg Times, Feb. 14, 2001, at 5B (noting that Florida "Gov. Jeb Bush, whose capital punishment task force last year recommended against blanket protection for the retarded [in capital cases] said subsequently that he would not sign a death warrant for someone who is retarded").

12. In Missouri, for example, Bill Bell, Jr. commented:

Capital punishment . . . for the mentally retarded would become a thing of the past under legislation on its way to the governor.

House members gave final approval to the bill Friday, voting 107-19; the Senate approved the same measure Thursday night. The sponsor is Sen. David Klarich, R-Ballwin.

Gov. Bob Holden indicated Friday he probably would sign the bill. "I've always said that someone who meets the definition of mentally retarded, I would have serious concerns about ever putting an individual like that to death," he said.

Bill Bell, Jr., *Legislation Sent to Holden Would Ban Death Penalty for Mentally Retarded*, St. Louis Post-Dispatch, May 11, 2001, at A11. See, e.g., *Revised Death Penalty Wins Final Legislative Approval*, Associated Press, June 7, 2001 ("After years of making changes to strengthen the death penalty, state lawmakers approved a bill [in late May] that would exempt mentally retarded people from execution, remove one category of crime from qualifying for capital punishment and require a comprehensive study of how the state imposes the death penalty."); Lounsberry, *supra* note 1, at A9 (discussing Arizona's adoption of ban on executing the mentally retarded in April 2001); *Jeb Bush Signs Bill Barring Executing the Retarded*, N.Y. Times, June 13, 2001, at A30 ("Joining a rising number of states that prohibit the execution of individuals who are mentally retarded, Gov. Jeb Bush extended the ban to Florida today under a bill he signed into law."). See also Raymond Bonner, *Ban on Execution of the Retarded Is Vetoed in Texas: Exception to U.S. Trend*, N.Y. Times, June 18, 2001, at A1. Cf. Paul Duggan, *Texas Legislators Review Use of Death Penalty; National Criticism During Presidential Campaign Reverberates in a Spate of Bills*, Wash. Post, May 14, 2001, at A3 (reporting that as of 1989, "only two states barred capital punishment for mentally retarded defendants," and in the ensuing eleven years (as of 2000), twelve more adopted that ban). See generally Raymond Bonner, *Drawing a Line on Death*, N.Y. Times, June 24, 2001, at 5 ("Capital punishment is a divisive topic in this country, and recently a heated debate has arisen about whether convicted murderers who are mentally retarded should be executed.

execution capital of the free world, adopted three major death penalty reform bills, and it came close to adopting several others.¹³

President Bush jumped in the fray when he said, 'We should never execute the mentally retarded.').

13. The Texas record on death penalty legislation during the 2001 legislative term is as follows:

1. The legislature passed and the governor signed "emergency" legislation to give death row inmates greater access to DNA evidence that might exonerate them.
2. The two houses adopted and the governor signed legislation that for the first time ensures the timely and non-patronage appointment of, and minimum standards for, defense lawyers, provides special assistance to lawyers handling capital cases, and appropriates nearly \$20 million in state money (compared to zero previously) to help defray the costs.
3. A law was adopted raising the amount the state provides to innocent people found to have been erroneously convicted—from \$50,000 (maximum) to \$20,000 for each year served, up to a maximum of \$250,000.
4. Both houses adopted but the governor vetoed legislation banning the execution of the mentally retarded.
5. The state House of Representatives passed a bill banning executions committed before the offender's eighteenth birthday.
6. The Senate Criminal Justice Committee endorsed a resolution that would allow voters to decide whether to impose a two-year moratorium on executions while the state's death penalty is studied.
7. That same committee unanimously voted to approve a bill barring consideration of the defendant's race in deciding whether or not to sentence him to die and providing for hearings to inquire into the matter in individual cases.
8. The governor endorsed but the House of Representatives defeated a bill making life without parole the alternative to a death penalty. Both supporters and opponents of the bill believe the life without parole option cuts down on jurors' willingness to impose the death penalty.

See Christy Hoppe, *Governor Enacts Criminal Justice Laws: Indigent Defense, Racial Profiling Addressed*, Dallas Morning News, June 15, 2001, at 35A; Christy Hoppe, *Senate Approves 'No Parole' Option; Juries Would Have More Leeway in Capital Cases*, Dallas Morning News, May 3, 2001, at 23A; Lounsberry, *supra* note 1, at A9 (discussing Texas's adoption of provisions permitting post-conviction DNA testing); Death Penalty Info. Ctr., *supra* note 4. One reporter analogized Texas's 2001 legislative record to a "death row conversion":

The swaggering and cocky Texas justice system sat down for a

For the first legislative session in literally decades, only two legislative or ballot initiatives to *reinstate* capital punishment in a non-death penalty state came to a vote, in Massachusetts and Maine, and both failed by the most lopsided votes in years.¹⁴

In the last year or so, Republican Governors Ryan of Illinois and Rowland of Connecticut have expressed reservations about the death penalty,¹⁵ as has the Reform Party Governor of Minnesota¹⁶ and

reflective session and came away with something akin to a death-row conversion.

By Monday, gone from law-and-order legislators were their defense of sleeping lawyers and executing the mentally retarded. Silenced was the refrain that innocents never get the death penalty.

Instead, after the national spotlight of a presidential election, lawmakers accepted responsibility for their criminal justice policies and voted overwhelmingly to change them—although many of the same proposals had faced defeat time and again in earlier years.

Christy Hoppe, *A Shift in Scales of Justice: Besieged System Gets an Overhaul*, Dallas Morning News, May 29, 2001, at A1. See also Duggan, *supra* note 12, at A3 (“Texas, which has executed more convicted murderers in the last two decades than most nations of the Western world, is considering a surprising array of capital punishment reforms that could reduce the number of death sentences imposed here, lawmakers said.”); Jim Yardley, *Texas Retooling Criminal Justice in Wake of Furor on Death Penalty*, N.Y. Times, June 1, 2001, at A1 (“Texas, which leads the nation in executions and endured withering criticism of its death penalty system during the presidential campaign last year, is poised to make significant changes in its criminal justice laws and so, supporters of the overhaul say, create a fairer system of capital punishment.”).

14. See, e.g., Editorial, *Waning Penalty*, Boston Globe, Mar. 14, 2001, at A20 (“The 32-vote margin in the Massachusetts House Monday against reinstating the death penalty—compared to the nine-vote difference in 1999—. . . signals a sea change in death-penalty politics. . . .”); Emmet Meara, *Maine Death Penalty Bill Denied*, Bangor Daily News, May 17, 2001, at B1.

15. See, e.g., Laurie Goodstein, *Death Penalty Falls From Favor as Some Lose Confidence in its Fairness*, N.Y. Times, June 17, 2001, at 14 (linking decision of Illinois “Gov. George Ryan, a Republican, to declare a statewide moratorium on the death penalty last year” to “news that 13 prisoners on death row in Illinois were discovered to be innocent”); Gerald F. Seib, *Bush’s Race Issue: What’s the Role of Death Penalty*, Wall St. J., Feb. 28, 2001, at A24 (quoting Governor Rowland, a death penalty supporter, claiming that Republicans and especially the Bush Administration need to take seriously African American citizens’ doubts about the fairness of the death penalty).

the Reverend Pat Robertson,¹⁷ Oliver North,¹⁸ *Washington Post* columnist George Will,¹⁹ *Washington Times* columnist Bruce Fein,²⁰ Bush Administration faith-based czar John DiIulio,²¹ right-wing Clinton antagonist-in-chief John Whitehead,²² the Republican author of Ohio's existing death penalty statute (now a Justice on the Ohio

16. See John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, Wall St. J., Mar. 21, 2000, at A28 (noting that "independent Gov. Jesse Ventura of Minnesota ha[s] abandoned his former support for capital punishment"); David Shaffer, *Though Most in State Back Death Penalty, Support is Decreasing*, Star Trib. (Minneapolis-St. Paul), Mar. 20, 2000, at 1B ("Gov. Jesse Ventura, a one-time death penalty advocate, also has changed his mind. In February, he said on 'Meet the Press' that he no longer supports it because the risk of putting an innocent person to death bothers his conscience. The government has no right to take someone's life, he said.").

17. See Harwood, *supra* note 9, at 1 (noting that "televangelist Pat Robertson, a former Republican presidential candidate, called for a moratorium on capital punishment, after earlier unsuccessfully lobbying Mr. Bush to spare the life of convicted Texas murderer Karla Faye Tucker").

18. See Robert Reno, *Support for Death Penalty Goes Wobbly*, Des Moines Reg., June 12, 2000, at 1 ("The most recent defector . . . from capital-punishment . . . is Oliver North," who recently declared, "I think capital punishment's day is done in this country. I don't think it's fairly applied."). See also Murray Campbell, *Capital Punishment: Bush Faces a Shift in Public's Mood*, Globe & Mail (Toronto), Feb. 21, 2001, at A1 ("The [death penalty] has ceased to split Democrats and Republicans; conservatives such as Pat Robertson, Oliver North and George Will have criticized the death penalty. Even John DiIulio, director of Mr. Bush's new White House Office of Faith-Based and Community Initiatives, is reported to have abandoned his support for capital punishment.").

19. See George Will, *Innocent on Death Row*, Wash. Post, Apr. 6, 2000, at A23.

20. See Bruce Fein, *Death Penalty Ignominy*, Wash. Times, Mar. 20, 2001, at A16 ("For a select category of barbaric crimes, the death penalty is justified . . . [b]ut it is disgraceful for the government in this category of cases to deny an indigent accused at least mediocre defense counsel to bolster what may be the chief safeguard against executing the innocent . . .").

21. See John J. DiIulio, *Abolish the Death Penalty, Officially*, Wall St. J., Dec. 15, 1997, at A23.

22. See John W. Whitehead, *Passing a Moratorium on Federal Executions Would be a Giant Step for a Compassionate Conservatism*, Letter to President George W. Bush (Apr. 3, 2001) (similar letter signed by a number of conservatives, including John W. Whitehead and R. Emmett Tyrrell, Jr., the Editor-in-Chief of *The American Spectator*), <http://www.deathpenaltyinfo.org/CMFEBushLetter.html>.

Supreme Court),²³ and other conservative death penalty supporters at the local level.²⁴

Support for the death penalty in national polls, although still between three-fifths and two-thirds of the population, is at a twenty-year low.²⁵ When presented with the option of life without parole—

23. For example, Alan Johnson recently commented:

Campaigning for attorney general in 1990, Paul E. Pfeifer tore into Democrats for not zealously enforcing the death-penalty law that he'd helped write nine years earlier as a state senator Now, as an Ohio Supreme Court justice responsible for weighing life-and-death cases, the 58-year-old Pfeifer sees the issue far differently . . . [and] has called for Gov. Bob Taft to form a blue-ribbon panel to evaluate all 201 Death Row cases to see how many could be commuted to life in prison without parole.

Alan Johnson, *Justice Has Change of Heart on Ohio Death-Penalty Law*, Columbus Dispatch, Apr. 26, 2001, at 1A.

24. As Peter Beinart noted:

Washington is several years behind public opinion and the states And . . . it is often state and local Republicans who have taken the lead [in reform efforts]. Last year, the Republican governor of Illinois announced a moratorium on executions. Nebraska's GOP-controlled state legislature passed one as well. In overwhelmingly Republican New Hampshire, the state legislature passed legislation outlawing capital punishment altogether. . . . [And] the Texas state legislature, including the Republican-led State Senate [have] now pass[ed] a series of reforms

Peter Beinart, *Mercy Seat*, New Republic, June 11, 2001, <http://www.thenewrepublic.com/punditry/beinart061101.html>. See also Alan Johnson, *Ohio Study of Execution Law Sought*, Columbus Dispatch, June 18, 2001, at A1 ("Ohio's capital-punishment law, used twice in 28 months . . . is under fire from an unlikely source—conservative, faith-based Republicans."); *Senator Says Justification for Death Penalty Study Obvious*, Associated Press, April 21, 2001 (discussing proposal of conservative Nevada Senator Mark James (R-Las Vegas), "who has worked nearly a decade to toughen Nevada's criminal laws, for a moratorium on executions while Nevada's capital punishment system is studied. . . . '[N]ever has the death penalty been the subject of a study in this state that I know of,' said James. 'Never. And the system is broken.'").

25. Compare, e.g., Death Penalty Info. Ctr., *Poll Finds Support for Death Penalty Alternatives and for System Reforms*, Summaries of Recent Poll Findings ("A national poll recently conducted by Peter D. Hart Research Associates found only 60% favored the death penalty for persons convicted of murder."), at <http://www.deathpenaltyinfo.org/Polls.html> (last visited Mar. 15, 2002), with Jeffrey M.

the current *actual* alternative to the death penalty in nearly all death-sentencing states²⁶—public support for capital punishment drops to around fifty percent or less.²⁷ Anywhere from forty-five to

Jones, *Two-Thirds of Americans Support the Death Penalty*, Gallup News Service, Mar. 2, 2001 (“Since [1994], support [for the death penalty] has declined, dropping to the current level of 67%. Even news of the Oklahoma City bombing and the federal government’s seeking (and obtaining) the death penalty for McVeigh in 1995 did not reverse the downward trend.”), and *Sparing Innocents*, Boston Globe, Apr. 3, 2001, at A10 (quoting Harris Poll showing national support for death penalty at sixty-four percent). See also Eric Lichtblau, *Death Penalty Reforms Gather New Momentum*, L.A. Times, June 26, 2001, at A1 (“Recent polls show that, while a majority of Americans still favor the death penalty, the numbers are shrinking. California saw a particularly sharp drop, with support declining from 78% in 1990 to 58% last year, according to a *Los Angeles Times* poll.”); Henry Weinstein, *Support for Death Penalty Drops Sharply in State*, L.A. Times, Nov. 2, 2000, at A3 (“Support for the death penalty in California has declined sharply in the last decade, according to a *Los Angeles Times* poll The poll found that 58% of those surveyed supported the death penalty, down from 78% in 1990.”); Richard Willing, *Even for Death Penalty Foes, McVeigh is the Exception*, U.S.A. Today, May 4, 2001, at 1A (reporting that support for the death penalty drops to 59% when respondents are given choice between supporting the death penalty, opposing it except for mass murder Timothy McVeigh (22%), and opposing it in all cases (16%)). See generally Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans’ Views on the Death Penalty at the Turn of the Century* (Univ. of Mich., Public Law and Legal Theory Research Paper No. 00-05, 2001) (reporting sharp downward trend in support for the death penalty in the United States since 1994), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264018.

26. See Duggan, *supra* note 12, at A3 (“Of the 38 states with capital punishment laws, 35 offer juries the life-without-parole choice”); Editorial, *McVeigh Errors Raise Doubts About Other Capital Cases*, U.S.A. Today, May 16, 2001, at 14A (reporting that Wyoming recently adopted life without parole as an alternative to the death penalty, making it the thirty-sixth death penalty state (out of thirty-eight) to do so).

27. See, e.g., Richard Morin & Claudia Deane, *McVeigh’s Execution Approved, While Principle Splits Public*, Wash. Post, May 3, 2001, at A9 (reporting that in an early May 2001 poll, 46% favored the death penalty over life without parole, while 45% favored life without parole—up from 38% measured two years ago); Death Penalty Info. Ctr., *supra* note 25 (in national poll in mid-March 2001, 38% favor death penalty versus 48% favoring alternative of life without parole and restitution to victim); Jones, *supra* note 25 (in national poll in late February 2001, 54% favor death penalty versus 42% favoring life without parole). See also Jennifer Davis, *Illinoisans Prefer Life in Prison: Poll Shows Less Support for Capital Punishment*, Peoria J. Star, Jan. 30, 2001, at A1 (“More Illinoisans would rather see a murderer in prison for life without the possibility of parole [47% favored this option] than sentenced to death [33% favored this option], according to a survey just released”).

seventy-five percent of Americans currently support a temporary pause in executions while the issue is studied.²⁸ For the first time in decades, a politician's active involvement in imposing or approving death sentences has surfaced as a potential political liability.²⁹

Still, the topic of "DNA and Human Rights" that brings us together³⁰ prompts the question: what's DNA got to do with it? And where is this death penalty debate going to lead—apart, perhaps, from some minor cosmetic surgery on the penalty, thence to its increased legitimacy and longer staying power?³¹

28. A recent ABC-*Washington Post* poll showed:

Fifty-one percent of those interviewed favored halting all executions until a commission is established to determine whether the death penalty is being administered fairly while 43 percent opposed a halt. . . . More than four in 10 [death penalty supporters] supported a moratorium . . . [, and] the proportion [of all respondents] who favored a halt in executions rose to 57 percent when respondents were reminded that the governor of Illinois recently stopped all executions in his state while a commission reviews how the death penalty has been applied.

Morin & Deane, *supra* note 27, at A9. See also Death Penalty Info. Ctr., *supra* note 25 ("72% [of Americans polled in national survey] favored suspension of the death penalty until questions about its fairness can be studied, up from 64% in August 2000."); Jeffrey M. Jones, *Americans Closely Divided on Death Penalty Moratorium*, Gallup News Service, Apr. 11, 2001 ("The public's support for a moratorium ranges between 53% and 42% depending on exactly how the concept is presented to them."). See also Morin & Deane, *supra* note 27, at A9 (reporting that on recent ABC-*Washington Post* poll, "68 percent said the death penalty is unfair because 'sometimes an innocent person is executed,'" while "63 percent agreed that capital punishment is unfair because 'it's applied differently from county to county and state to state'"; for the first time since the question has been asked, starting in 1985, a majority of Americans believe that the death penalty is not an effective deterrent, a view shared by 40% of death penalty supporters).

29. George W. Bush's tribulations on this point are well known. See, e.g., John Harwood, *Bush May Be Hurt by Handling of Death Penalty Issue*, Wall St. J., Mar. 21, 2000, at A28. Given Ralph Nader's strong abolitionist position, there is an argument that a backlash against Bill Clinton's and Al Gore's avid support for the death penalty helped deny the Democrats another four years in the White House.

30. See *supra* note * (noting that this essay is a revised version of a speech given at DNA and Human Rights, An International Conference, University of California, Berkeley (Apr. 27, 2001)).

31. See, e.g., Carol Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, Ohio St. L.J. (expressing

It is those two questions—the role of DNA in the current death penalty debate, and the direction of that debate—that I address here, making clear along the way why I think the two questions are crucially, if complexly, related.

Every observer of the current death penalty scene has his or her favorite candidate for the event most responsible for igniting the current capital punishment debate. Mine is a November 1998 conference held at Northwestern University that brought national press attention to the fact that as of then, seventy-five men and women whom American juries had sentenced to die in the modern death sentencing era had been exonerated as innocent—over a third of whom were present and honored at the conference.³² That conference, and the press attention it inspired, led more or less directly to:

1. Three powerful multi-part series in the *Chicago Tribune* attacking the fairness of capital and other prosecutions in Illinois, Texas, and elsewhere.³³

concern that current death penalty debate may lead to greater legitimacy for the death penalty without concomitant increases in reliability), <http://www.acs.ohio-state.edu/units/law/LawJournal/steikersympab.htm> (last visited Mar. 5, 2002).

32. As one commentator reported:

One by one, they marched across the stage, men and women who but for a twist of fate would have marched instead toward a gas chamber, an electric chair or a gurney to be injected with poison.

One by one, the 29 stepped up to a microphone. "If the state had its way, I'd be dead today," they intoned, some with defiance, some with a bitterness so deep it seemed to echo in the auditorium.

The joint appearance of the former Death Row inmates was an emotional peak of a three-day conference on innocence and the death penalty at Northwestern University that ends Sunday. The gathering was the first time so many of the 75 Americans known to have been wrongly condemned to death have gathered in one place.

Naftali Bendavid, *Attendees Assail Capital Punishment Former Death Row Inmates Honored at NU Conference*, Chi. Trib., Nov. 15, 1998, at 4.

33. See Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, Chi. Trib., Jan. 10, 1999, at N1 (commencing five-part series on prosecutorial misconduct in capital and other homicide cases); Ken Armstrong & Steve Mills,

2. The treatment by the public and press of each new death row exoneration—we are now up to ninety-six³⁴—as an occasion for reexamining the penalty.³⁵

3. The wide use of a new measure for evaluating the accuracy of the penalty, namely, the ratio of exonerations to executions. That ratio was running at about one to one in Illinois at the time (the figure now is fourteen exonerations to twelve executions)³⁶ and has held at about one to seven nationally

Death Row Justice Derailed, Chi. Trib., Nov. 14, 1999, at N1 (commencing five-part series on a wide variety of injustices and other errors in Illinois capital cases, including those of a number of the attendees at the November 1998 Northwestern University conference); Steve Mills et al., *Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems*, Chi. Trib., June 11, 2000, at N1 (commencing two-part series on problems with administration of capital punishment in Texas).

34. On the ninety-fifth, see *Man on Death Row for Five Years Found Innocent*, Associated Press, May 26, 2001. On the ninety-sixth, see *Sheets Released from Death Row*, Lincoln J. Star (Nebraska), June 13, 2001, <http://www.truthinjustice.org/dinkard.htm>. For a count of exonerated death row inmates, see Death Penalty Info. Ctr., *Innocence and the Death Penalty* ("Since 1973, 96 people in 22 states have been released from death row with evidence of their innocence."), at <http://www.deathpenaltyinfo.org/innoc.html> (last visited Mar. 5, 2002, by which time there were ninety-nine exonerations).

35. See, e.g., Frank Davies, *Alterations Urged to End Flaws in Executions*, News & Observer (Raleigh, NC), June 28, 2001, at A4 (quoting statement of Gerald Kogan, "former chief justice of the Florida Supreme Court" and current chairman of a "broad-based national commission" promoting death penalty reforms, that the recent DNA-based exoneration of Frank Lee Smith after fourteen years on Florida's Death Row was "changing some people's minds' about the fairness and certitude of the death penalty system"); Brooke A. Masters, *Missteps on Road to Injustice: In Va., Innocent Man Was Nearly Executed*, Wash. Post, Dec. 1, 2000, at A1 (lengthy story tracing process that led to the capital conviction, near execution, and exoneration of Earl Washington Jr. in Virginia). As Michael Perlstein commented:

When Michael Ray Graham was exonerated and freed from prison after more than 13 years on Louisiana's death row, he was greeted by one of his attorneys and a small cluster of reporters. . . . Graham has been thrust into a white-hot national debate about the death penalty and a growing push for moratoriums in the 38 states that have capital punishment.

Michael Perlstein, *Death Penalty Moratorium Urged as Releases Increase*, New Orleans Times-Picayune, Jan. 29, 2001, at 1.

36. See James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2049 n.84 (2000) (citing sources revealing that, as of late 2000, exoner-

ever since.³⁷

4. Perhaps the most famous exoneration of all, Anthony Porter, a retarded man whom Illinois came within a hair's breadth of executing before the real killer confessed to some intrepid Northwestern journalism students. Witnesses in fact had immediately identified the real killer to the police (who never followed up) and thereafter to Porter's retained defense attorney, who declined to investigate until Porter coughed up another \$3000, which Porter never could.³⁸ Police now suspect that the guilty man committed a third murder between Porter's arrest and exoneration fourteen years later.³⁹

5. All of these events led directly to Governor Ryan's decision to suspend executions in Illinois and appoint a blue ribbon commission to study it.⁴⁰

A second catalyzing event was the publication in early 2000 of Barry Scheck, Peter Neufeld, and Jim Dwyer's book, *Actual Innocence*.⁴¹ Subtitled *Five Days to Execution and Other Dispatches from the Wrongly Convicted*, the book catalogued the penchant of

ations to executions in Illinois were fourteen to twelve); Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1 (discussing Governor Ryan's reasons for granting moratorium on executions in Illinois, including what then was a twelve-to-twelve rate of exonerations to executions).

37. See *At Death's Door: The Risk of Executing the Innocent* (CNN television broadcast, June 27, 2001) (statement by Barry Scheck of the Innocence Project at Cardozo Law School in New York that "for every seven people executed in this country, one person who is sentenced to death is taken off death row based on new evidence of innocence").

38. See, e.g., Steve Mills, *Porter Case Had Wrongs at Each Turn*, Chi. Trib., Feb. 12, 1999, at 1 (tracing history of the Porter case).

39. See Steve Mills, *Simon Also Suspected in Milwaukee Slaying*, Chi. Trib., Mar. 10, 1999, at 1 (discussing evidence that the man who subsequently confessed to the two murders that put Anthony Porter on Illinois's death row for fourteen years committed a third murder in Milwaukee a few months after Porter's arrest).

40. See, e.g., Steve Mills & Ken Armstrong, *Governor to Halt Executions*, Chi. Trib., Jan. 30, 2000, at 1 (discussing role Governor Ryan assigned to the Porter exoneration and the *Chicago Tribune* stories in Ryan's decision to impose a moratorium).

41. Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000).

American trials to convict and condemn the wrong person, as revealed by DNA.⁴²

In the immediate wake of these events, my colleagues Jeff Fagan, Valerie West, and I issued a (to our surprise) much-remarked study in June 2000.⁴³ The study revealed that, of the thousands of death verdicts imposed and finally reviewed in the United States between 1973 and 1995, at least sixty-eight percent were found by state and federal courts to be too flawed to carry out.⁴⁴ In the subset of cases overturned at the state post-conviction phase, where we have data on the outcome of the resulting retrials, seventy-five percent of those reversals resulted in a sentence less than death. An additional seven percent ended in acquittals.⁴⁵

These events document a crucial story underlying the current reexamination of the death penalty: American capital trials are flawed and unreliable, with the results that their outcomes cannot be trusted and that the justice they are charged with achieving often miscarries. At its worst, this story could end not only with the

42. Scheck et al.'s book was the source, for example, of George Will's recently expressed misgivings about the death penalty. See *supra* note 19 and accompanying text.

43. See, e.g., David Broder, *Serious Flaws Revealed in Death Penalty Study*, Wash. Post, June 18, 2000, at B7; Fox Butterfield, *2 of 3 Death Sentences End up Overturned: Study Blames Incompetent Lawyers, Overzealous Police in Successful Appeals*, N.Y. Times, June 12, 2000, at A1. As one editorialist commented:

In June, Columbia Law School issued a devastating report on the inequity in the criminal justice system. Reviewing every death penalty conviction and appeal in the last 23 years, the study found that 82 percent of the convicts received reduced sentences on appeal, and 7 percent were completely exonerated—the condemned were actually innocent.

Editorial, *Waning Penalty*, *supra* note 14, at A20.

44. See James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases*, at http://www.law.columbia.edu/instructional/services/liebman/liebman_final.pdf (June 2000), extract reprinted in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 Tex. L. Rev. 1839 (2000). For a discussion of the sixty-eight percent figure, see Liebman et al., *supra*, at 1846–50.

45. See Liebman et al., *supra* note 44, at 1851–52.

conviction and condemnation of an innocent person, but with his or her execution.⁴⁶

In the mind of the press and public, if not in reality, a central feature of this catalyzing narrative is not just any exoneration, but one by DNA. That was the subject of Scheck, Neufeld, and Dwyer's book, and it is the *leit motif* of many popular examinations of the problem, in the media and the popular conscience.⁴⁷

Why is that so? In fact, of the ninety-six post-1973 exonerations, only a handful, about ten percent, required DNA.⁴⁸ And of all documented DNA exonerations in the United States, only about twelve percent have involved capital prisoners.⁴⁹

This stands to reason. DNA testing requires biological evidence linking the perpetrator at least to the crime scene and, to be conclusive, to the crime itself. Rape with ejaculation is the obvious example. Yet, the typical capital crime in this country is not a rape murder, but a murder in the course of robbery or burglary, or for insurance or hire, and these offenses are only infrequently charac-

46. See, e.g., Masters, *supra* note 35, at A1; Mills & Armstrong, *supra* note 40, at 1.

47. See, e.g., *Hearing before the Senate Judiciary Committee, United States Senate, on "Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases,"* Fed. News Service, June 27, 2001, at 1 (testimony of United States Congressman William Delahunt in favor of death penalty reform bill, arguing that "[t]he catalyst for this sea-change [in views about the death penalty] can be summed up in one word: DNA. Science has given us new forensic tools which can conclusively establish guilt or innocence."), <http://judiciary.senate.gov/oldsite/hr062701pjl.htm>; *At Death's Door: The Risk of Executing the Innocent*, *supra* note 37 (discussing DNA exoneration of Earl Washington); Bill Dedman, *DNA Evidence Frees Two in Murder Case*, Milwaukee J. Sentinel, Apr. 25, 1999, at 20 (discussing two Oklahoma inmates' release from life and death sentences based on DNA exoneration; "the men are the 61st and 62nd inmates in the nation to be exonerated by DNA evidence, according to the Justice Department" and "Williamson is the 78th person in the country since 1970 to be cleared after being on death row"); Evan Moore, *Cloud of Doubt*, Houston Chron., Sept. 12, 1999, at 18 (describing process by which press attention led to intervention of clergy, which led to exposure of egregious police and prosecutorial misconduct and, eventually, exonerative DNA analysis, freeing Kerry Max Cook from Texas's death row after twenty years); *The Case for Innocence* (PBS television broadcast, Jan. 11, 2000).

48. See, e.g., Death Penalty Info. Ctr., *supra* note 34.

49. See, e.g., Scheck et al., *supra* note 41, at 219, 262; Death Penalty Info. Ctr., *supra* note 34.

terized by biological evidence left by the offender.⁵⁰ Not surprisingly, death row exonerations are typically produced not by DNA but by the actual perpetrator's confession, a witness's recanting of crucial testimony against the defendant, documentation of an iron-clad alibi, defects in the state's other forensic evidence, or most often, the overall weakness of the existing evidence of guilt.⁵¹

So what does DNA have to do with it?

A lot, for two reasons.

50. While testifying as a witness before the Senate Judiciary Committee in June 2001, in support of a death penalty reform bill containing reforms going beyond better access to post-conviction DNA testing, former prosecutor and United States Congressman William Delahunt said:

DNA is the spotlight that has enabled us to focus on this problem and our bill would help ensure that defendants have access to testing in every appropriate case. . . . But we should be under no illusion that by granting access to DNA testing we are solving that problem. DNA is not a panacea for the frailties of the justice system. To suggest otherwise would be tantamount to fraud—particularly when, in the vast majority of cases, biological evidence that can be tested does not even exist.

Hearing before the Senate Judiciary Committee, United States Senate, on "Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases," supra note 47, at 1–2.

51. See, e.g., Death Penalty Info. Ctr., *supra* note 34 (summarizing bases for death row exonerations in all ninety-nine cases since 1973). For numerous examples, see Liebman, *supra* note 36, at 2048–51 n.84 (discussing the Gerald case (exoneration based on demonstration that confession was coerced), the Manning case (exposure of dishonest jailhouse informant), and the Mazzan case (accidental police disclosure of files implicating other killers)); *id.* at 2070 n.118 (discussing the Porter case (journalism students tracked down and secured confession from actual killer)); *id.* at 2082–83 n.142 (discussing the Stoker case and the D. Williams case (discovery of multiple infractions by police and prosecutors)); *id.* at 2083 n.143 (discussing the Cruz, Hernandez, and McMillian cases (all involving discovery of prosecutorial suppression or misrepresentation of evidence)); *id.* at 2084–86 n.145 (discussing the Brandley, Chaney, Cruz, Jent, Kyles, Miller, and Willis cases); *id.* at 2087–88 n.148 (discussing the Brown, Burrows, and Carriger cases (revelation of witness perjury)); *id.* at 2088–89 n.149 (discussing the Manning, Munsey, and Reasonover cases (jailhouse informants)); *id.* at 2089–91 n.151 (discussing the Reynolds case (coerced confession)); *id.* at 2092–93 n.154 (discussing the Nelson case (discovery of faulty forensic work)); *id.* at 2094–96 n.160 (discussing the Bowen and Munson cases (both exonerated following discovery of suppressed police reports) and Richardson case (discovery of exculpatory police reports as a result of a burglary)).

The first reason is evident. When DNA is an available investigative technique, it can provide seemingly conclusive proof of innocence.⁵² True, prosecutors have become more sophisticated about hypothesizing the existence of “unindicted co-ejaculators” (to borrow Peter Neufeld’s phrase) to explain how the defendant can still be guilty, though another man’s semen is found on the rape-murder victim.⁵³ But, particularly where the DNA allows its donor to be identified, and especially when he turns out to be, say, a convicted rapist on the lamb with no connection to the defendant,⁵⁴ the co-conspirator line won’t wash.

There is, however, another less-remarked reason why DNA exonerations have such a hold on the popular imagination. They involve something like divine intervention—the inscrutable and unpredictable intercession by grace of a power to see an otherwise unknowable and undiscoverable truth, that truth being the inherent fallibility and corruption of humans and their institutions.

Consider first how most non-DNA death row exonerations occur—a defendant who claims he is innocent is tried capitally, convicted, and condemned. So begins what now on average is a twelve-year period of *legal* challenges to the verdict.⁵⁵ Crucially, innocence for the most part is not a viable legal basis for such a legal

52. See, e.g., Scheck et al., *supra* note 41, at 122 (characterizing “DNA testing . . . as a gold standard for truth telling”).

53. See, e.g., *The Case for Innocence*, *supra* note 47 (quoting prosecutors and judges offering this basis for resisting the release of individuals convicted of rape-murders but excluded by DNA from being the source of the semen found at the crime scene).

54. This is what happened, for example, in the case of Earl Washington’s exoneration. See Masters, *supra* note 35, at A10. See also Moore, *supra* note 47, at 18 (describing the exoneration of Kerry Max Cook and noting that the DNA found on the victim but not tested until twenty years later matched her estranged paramour, a respected university librarian; acceptance at face value of the librarian’s denial that he had any contact with the victim in the period around her death diverted suspicion from him to Cook, who spent twenty years on death row for the crime before being released).

55. See, e.g., Bureau of Justice Statistics, U.S. Dep’t of Justice, Bulletin: Capital Punishment (1999) (study of executions occurring in 1999, concluding that on average the time from death sentence to execution was twelve years), <http://www.ojp.usdoj.gov/bjs/abstract/cp99.htm>; Liebman, Fagan & West, *supra* note 44, at 9–10 (in the 1973–95 period, the average time from a death verdict to execution was nine years, rising to nearly eleven years by the end of the period).

challenge even if it can be proven.⁵⁶ In most states, pure-innocence-based attacks on criminal convictions are legally limited to the first few weeks or months following conviction.⁵⁷ Thereafter, the *only* basis for a challenge to the verdict is the identification of procedural error.⁵⁸ Although that error typically is not reversible unless it is shown to have probably affected the outcome of the trial, it is the procedural error, not any question of innocence, that is the decisive requirement.⁵⁹

This, of course, prompts appellate lawyers to examine the case for reversible, outcome-affecting procedural error. As our study last year showed, such error exists in most capital cases.⁶⁰ Typical violations involve egregiously incompetent lawyering that failed to discover evidence of innocence or mitigation, prosecutorial suppression of such evidence, or a judge's jury instruction telling the jurors to ignore or short shrift such evidence when it is introduced.⁶¹ Reversal leads to attempted re-prosecution and retrial. There the weakness of the very evidence whose procedural mishandling at the original trial led to reversal on appeal causes the prosecutor or a jury to see that the defendant is innocent or at least is not demonstrably guilty.⁶²

56. See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that there is no constitutional bar to convicting, and even executing, an innocent prisoner, leaving no remedy for innocent prisoners seeking federal habeas relief absent proof of a procedural violation in their case).

57. See, e.g., *Scheck et al.*, *supra* note 41, at 218 ("In thirty-three states, any claim of innocence based on new evidence must be brought to court within six months of the final appeal. Only seven states permit the motion at any time.").

58. The U.S. Supreme Court explained:

Our . . . cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a . . . petitioner may have an independent constitutional claim [of, usually, procedural error] considered on the merits, even though his habeas petition would otherwise be regarded as . . . [procedurally barred].

Herrera v. Collins, 506 U.S. at 416.

59. See, e.g., *id.*

60. See *supra* notes 43–45 and accompanying text.

61. See *Liebman, Fagan & West*, *supra* note 44, apps. c & d.

62. Or, the process can work the other way. Evidence that *was* produced at trial—a jail house informant's testimony or a confession—can be shown to be invalid, because it is the product of prosecutorial dissembling and collusion, in

Notice the message this typical non-DNA exoneration tells: Yes, our trials are flawed. But we humans (or, at least, those we employ as lawyers) can *spot* those flaws. And our appellate courts can—indeed, they are designated to—overturn capital verdicts for those very procedural reasons. Retrials can then cure the mistakes. To be sure, all this occurs at debilitating cost and too frequently and repetitively to reveal a well-functioning system.⁶³ But there is at least some sense in which it can be said that, “the system [eventually] worked.”⁶⁴ If there is a problem with a capital verdict, it is the kind of flaw our system finances lawyers and appellate courts to look for, and provides retrials to correct. Any such error that might exist is catchable and curable in the regular course of business.

Now, compare the typical DNA exoneration. Here, too, an individual claims innocence and appeals his verdict. Maybe—as, for example in the Ronald Williamson case in Oklahoma, detailed in *Actual Innocence*⁶⁵—he wins on some legal ground, say, that his lawyer failed to inform the jury of his mental disorder.⁶⁶ He then goes back for a retrial, where it fortuitously is also discovered that there is biological evidence that, by oversight or the crudeness of prior technology, was never tested. Tests are conducted and they exclude the defendant.⁶⁷ Here, notice that the exoneration occurs for a reason entirely *disconnected* from what the appellate lawyers and courts found in the original death verdict as a basis for reversal; it occurs as

the case of the informant, or of police brutality or coercion in the case of the confession. Reversal on that ground leads to exclusion of the procedurally tainted and unreliable evidence at retrial, and in turn to the defendant's exoneration. For examples of both these phenomena, see *supra* note 51.

63. See, e.g., Liebman, *supra* note 36, at 2129–36 (documenting costs to victims, defendants, taxpayers, courts, state officials, and the integrity of the capital system).

64. For claims of this sort, see *Hearing before the Senate Judiciary Committee, United States Senate, on “Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases,” supra* note 47 (testimony of South Carolina deputy prosecutor Kevin S. Brackett).

65. See Scheck et al., *supra* note 41, at 126–57.

66. See *Williamson v. Ward*, 110 F.3d 1508, 1523 (10th Cir. 1997) (affirming reversal of capital conviction on habeas because appointed counsel, who was paid the statutory maximum of \$3200, failed to investigate a videotaped statement by another person confessing to the crime, and extensive evidence of the defendant's mental illness and likely incompetence to stand trial).

67. See Scheck et al., *supra* note 41, at 147–57.

a result of the sheer happenstance that there was some biological evidence in the case that had not previously been a matter of attention or concern.

Even more daunting are cases like that of former Virginia death row inmate Earl Washington, whom all of the reviewing courts approved for execution, finding no procedural error.⁶⁸ But for the grace of God, and a couple of relentless lawyers, Washington would then have been executed.⁶⁹ But an initial, literally eve-of-execution DNA test raised enough of a doubt to get a gubernatorial commutation to life without parole, giving his lawyers the seven *more* years they needed, along with strides in DNA technology, to produce an airtight exoneration last year.⁷⁰

Only in hindsight, after the exoneration occurred for other reasons, was it possible to see what actually had happened in the Williamson and Washington cases. In the first, some informants and witnesses had lied, but they did so in ways impervious to legal attack.⁷¹ And in *Washington*, it turned out that a retarded man had confessed to a series of crimes he did not commit—another error immune to attack, as multiple state and federal courts rejected Washington's challenges to his confession, finding the admission trustworthy and legal.⁷²

Thus, the real errors eventually exposed by these typical DNA exonerations are *not* the kinds that lawyers and appellate courts are capable of discerning and retrials are designed to cure. If it were not for the sheer accident that a biological sample happened to

68. See, e.g., *Washington v. Murray*, 952 F.2d 1475, 1485 (4th Cir. 1991).

69. See *At Death's Door: The Risk of Executing the Innocent*, *supra* note 37 (discussing extraordinary work on Washington's behalf by three tenacious lawyers in New York and Virginia); *Masters*, *supra* note 35, at A1.

70. See, e.g., *Masters*, *supra* note 35, at A1.

71. See *Scheck et al.*, *supra* note 41, at 142 (noting that Williamson's "disgraceful" outbursts and threats during the testimony of the chief witness against him—calling her "a liar" and saying "you're going to pay for that"—although taken by his own and the state's lawyers, the trial judge, and no doubt the jury to have supplied perhaps the worst strike against him—later turned out to be truthful).

72. See *Washington v. Commonwealth*, 323 S.E.2d 577, 585–86 (Va. 1984) ("The entire record . . . furnishes strong factual support for the trial court's findings that the defendant made knowing and intelligent waivers and that his confession and admissions were voluntary.").

be available, the miscarriage never would have been discovered. Williamson might well have been re-convicted and re-sentenced to die, and Washington's date with the electric chair quite assuredly would have gone off as planned.

Here, then, is not a process of error-detection we designed that (albeit at great cost) can be trusted to work as planned. Instead, it is a process that works in mysterious ways; a force or process that is divinely penetrating and all-seeing, insofar as the fallibility and corruption of humans and their institutions are concerned—*when* it chooses to reveal itself—but one that is entirely inscrutable and unpredictable insofar as the occasions for that revelation are concerned. Suddenly and starkly, DNA reveals us and our institutions to be what they strive to escape notice for being: inherently but often unknowably—and thus incurably—flawed, unreliable, and untrustworthy.

It is this sense of insecurity in the face of an only infrequently and arbitrarily—but, when it occurs, infallibly—revealed truth about our and our institutions' weaknesses that DNA most forcibly instills, and that, in turn, most powerfully motivates our national doubts about the current application of the death penalty.

But divine as it may be, the power of DNA in the current debate might be domesticated, and turned back on itself. If DNA tests reveal the disturbing truth, then legislating more of them, more quickly, may have the opposite effect, in two ways.

First is an "if you can't beat 'em, join 'em" effect. Legislating more and faster state-funded DNA tests can convey the message that we and our institutions do not consider the truth to be so disturbing, that the weaknesses and fallibilities that DNA reveals are fewer and farther between than we think. Indeed, it assures us that DNA can be harnessed to *improve* our institutions of justice.⁷³

73. Conservative John Podhoretz, writing in the *New York Post*, has recently made just this argument:

[O]pponents [of the death penalty] should probably hesitate before they take too much heart [from recent unease generated by the discovery of innocent men and women on death row]. For the fact of the matter is that even passionate supporters of the death penalty are horrified by the thought of an innocent being put to death by the state. And the existence of DNA evidence points the way not to a ban on capital punishment but

This tactic works well for cases with biological evidence through which DNA can reveal the otherwise unknowable truth. It does not, however, cure the insecurity that DNA exonerations have instilled in regard to the majority of innocence cases, where testable biological evidence is not available to reveal that truth. Here intercedes a second, and more powerful, effect of more and faster DNA testing: the “out of sight, out of mind” effect.

DNA exploded on the scene because of its power—incessantly, it has lately seemed—to reveal what is otherwise invisible. If incessance is replaced by “all at once,” therefore, DNA will explode off of the scene. In that way, the hits our capital system and sense of security have so constantly taken lately would be concentrated, then quickly dissipated. As a result, the backlog of existing post-trial cases in which there is DNA evidence to test will not be replenished, and the divine clarity with which they reveal the system’s flaws will be lost. This is especially so because pretrial

to a new consensus in favor of it that the American public will (I believe) find palatable.

Why? Simple: State and federal sentencing guidelines can be changed to make it possible to impose the death penalty only in cases where the physical evidence makes it absolutely certain that the accused is indeed the killer. When the evidence is circumstantial, the death penalty will not be sought.

This is the logical extension of the Illinois moratorium, and represents a political and moral solution that will be palatable to Republicans and Democrats of the Clintonite persuasion (who probably oppose the death penalty in their hearts but know a losing cause when they see one).

John Podhoretz, *Why DNA Will Save the Death Penalty*, N.Y. Post, June 19, 2001, at 33. See also Christina Nuckols, *Gilmore Signs Bill Opening DNA Window*, *Virginian-Pilot & Ledger-Star*, May 3, 2001, at A1 (noting that Governor Jim Gilmore of Virginia, a Republican, former prosecutor, and staunch death penalty supporter, was reluctant to extend rights to death row inmates, including to post-conviction DNA testing but “ultimately endorsed the legislation in hopes that it will assuage public concerns raised recently about Virginia’s system for meting out capital punishment” and quoting the bill’s chief sponsor, Kenneth W. Stolle, a Republican, former police officer, and strong death penalty supporter that one “reason for this legislation was to fix the problem that was eroding public confidence in the criminal justice system”); Craig Timberg, *Time Limit Lifted for DNA Appeals*, *Wash. Post*, May 3, 2001, at B1 (noting that in the preceding year and a half, fifteen states had passed laws giving death row inmates the right to DNA testing).

testing of biological material became routine a few years ago—at about the same time as enhancements in DNA technology plateaued.

From one important perspective, this outcome creates a win-win situation. Henceforth, cases with DNA-testable material will be more reliably processed at trial, and resulting verdicts will less likely ‘blow up’ on appeal. And although other cases, without DNA material, will not be more reliably tried, they, too, will be unlikely to be overturned on appeal or in post-affirmance exonerations. Any errors that are caught on appeal will lend themselves to the comforting version of the appellate story about how well, if slowly and expensively, our system works. Gone from view would be the disturbing story about “there, but for a mysteriously occurring (or non-occurring) act of truth-revealing grace would go another innocent inmate to his death at the hands of the state.”

What DNA giveth to the death penalty reform impulse, therefore, DNA reform can taketh away. Small wonder, therefore, that by far the most commonly enacted death-penalty-related reform in this last wave of legislation has been the adoption of expanded, “all at once” access to post-conviction DNA testing.⁷⁴ And small wonder that in strongly pro-capital punishment states like Texas, Virginia, Missouri, and Florida the agents of that reform have been staunch death penalty supporters.⁷⁵

74. See Timberg, *supra* note 73, at B1 (reporting that “[i]n the past year and a half, 14 other states [in addition to Virginia], including Texas, have passed laws giving death row inmates new rights to DNA testing” and a sixteenth state did so by court rule); Death Penalty Info. Ctr., *supra* note 4 (cataloguing recent legislative initiatives).

75. See, e.g., Fein, *supra* note 20, at A16 (discussing sponsorship of DNA legislation in Virginia by a staunch death penalty supporter and former police officer who is now a powerful state senator); *House Sends DNA Bill to Governor*, Associated Press, May 2, 2001 (discussing sponsorship of DNA bill by Republicans “Rep. Randy Ball, a former homicide investigator, and Sen. Alex Villalobos, a former prosecutor . . . in the wake of several cases in which DNA evidence has exonerated prisoners in Florida”); Bob Lewis, *Bill Would Give Inmates New Avenue to Prove Innocence*, Associated Press, Jan. 4, 2001 (puzzling over “why [Virginia Assembly Delegate Terry] Kilgore,” who “has no problems sending people to . . . death row,” as he did while working as a state prosecutor, “and other law-and-order lawmakers [have] lined up behind legislation” allowing post-conviction DNA testing for death row inmates); Joseph Morton, *3 Prosecutors Get Behind DNA Testing*, Omaha World-Herald, Apr. 16, 2001, at 18 (“Prosecutors in Nebraska’s three most populous counties have thrown their support behind a bill to make DNA testing available to the state’s prisoners.”). In

Lest I overstate my claim about the power of DNA reform to undo what the explosion of DNA technology has recently accomplished, let me close with eight caveats.

To begin with, let me say that DNA reform is a good thing for truth and justice. If innocent people are in prison, or on the verge of going there, we must certainly find and release them.

Second, DNA reform will not, in fact, occur all at once, because of the continuing opposition to it of some pro-death penalty advocates, prosecutors, and other officials.⁷⁶ For instance, in Virginia, the conservative legislature's self-proclaimed effort to 'save' the death penalty via quite grudging DNA reform was initially opposed by the equally pro-death penalty attorney general, and came close to being vetoed by the pro-death penalty governor.⁷⁷ Moreover, as in the Virginia case, a number of the bills are deficient, because they essentially require prisoners to prove conclusively that they are innocent

Texas, Republican Governor Rick Perry used his power to identify a few pieces of proposed legislation as "emergency matters" to speed DNA reform through the legislature and into law. *See, e.g.*, Emilie Lounsberry, *Death Penalty's Fairness Debated Nationwide*, Phila. Inquirer, May 11, 2001, at A1 (discussing recent Texas DNA legislation). By contrast, Governor Perry vetoed a bill to bar execution of the retarded. *See* Bonner, *supra* note 12, at A1. In Missouri, post-conviction DNA testing was adopted by the state supreme court, which has the second strictest record in the country of turning down death row appeals. *See* Post-conviction Motion for Forensic DNA Testing not Available at Trial, In re Adoption of a New Subdivision of 29.17 (Mo. Feb. 20, 2001). *See* Liebman, Fagan & West, *supra* note 44, at 59 fig. 6 (documenting Missouri Supreme Court's low reversal rate in capital cases).

76. *See* Steve Mills, *Texas Revisits Death Penalty: Legislators Weigh Reform in Nation's Execution Leader*, Chi. Trib., Mar. 25, 2001, at 14 (discussing opposition of "victims' rights groups, such as Justice for All" to "efforts at changing the capital punishment system," including provision of post-conviction DNA testing). *See also* *At Death's Door: The Risk of Executing the Innocent*, *supra* note 37 (presenting arguments by Kent Scheidegger, director of right-wing criminal justice think tank, opposing DNA testing except in a narrow class of cases where innocence has already come close to being established).

77. *See, e.g.*, Editorial, *Gov. Gilmore and DNA (Cont'd)*, Wash. Post, Apr. 8, 2001, at B6 (discussing Governor Gilmore's unsuccessful effort to limit an already narrow provision for post-conviction DNA testing and his threat to veto the law without that limitation); Christina Nuckols, *Virginia Panel Wants Ban on New Evidence Eased*, Virginian-Pilot & Ledger-Star, Nov. 16, 2000, at A1 (reporting initial opposition of state attorney general's office to plan for post-conviction DNA testing).

as a prerequisite to getting the DNA testing that alone can prove they are innocent.⁷⁸

Third, the pretrial availability of DNA in cases currently being tried is not 100 percent, due to incomplete evidence-gathering, a reluctance on the part of police and prosecutors to conduct DNA analysis where they otherwise believe they have made a viable case against the defendant, incompetent and occasionally dishonest laboratory procedures, and insufficient support or inadequate legal representation to enable indigent defendants to conduct their own tests. As a result, the cases of a few inmates newly admitted to death row each year will present occasions for divinely revelatory and insecurity-instilling exonerations by DNA.

Fourth, reform or not, DNA evidence will continue unexpectedly to surface, permitting occasional, if not incessant, acts of truth-revealing grace.

Fifth, other new technologies—or means of discrediting old ones—may surface. A court in Iowa recently admitted so-called ‘Brain Fingerprinting’ evidence that proceeds from the previously Hitchcockian, but now perhaps provable, claim that brains keep something like a retrievable videotape of what did and did not occur.⁷⁹ Recent documentation of the longstanding misuse of fingerprints by forensic scientists—it turns out that different individuals’ prints often are similar enough to fool even skilled examiners—may provide a more likely source of unnerving revelations about the system’s imperfections.⁸⁰

78. For criticisms of the Virginia legislation, see, for example, Frank Green, *Death Penalty Foes Rap Bill*, *Richmond-Times Dispatch*, Jan. 29, 2001, at B1.

79. See David Akin, *Science: The Recognition Factor*, *Globe & Mail* (Toronto), Nov. 3, 2001, at F9; Chris Clayton, *No to ‘Brain Fingerprinting’: Judge Says Science is Not Good Enough to Allow it as a Defense*, *Nat’l L.J.*, Mar. 19, 2001, at A4; Kevin Dowling, *Brainwave That Could Clear Downing*, *Daily Express*, Feb. 12, 2001, at 1; Editorial, *Judge Wisely Rejects Brain Fingerprint*, *Omaha World-Herald*, Mar. 7, 2001, at 20.

80. As one commentator noted:

[T]he relevant question isn’t whether fingerprints could ever be exactly alike—it’s whether they are similar enough to fool a fingerprint examiner. And the answer, it’s increasingly, unnervingly clear, is a resounding yes. A recent proficiency test found that as many as one out of five fingerprint examiners misidentified fingerprint samples. In the last three years, defendants in at least 11 criminal cases have filed motions

Sixth, old-style exonerations can sometimes have the truth-revealing, security-shattering effect of DNA. Revelations—as in the Earl Washington case and the *Ochoa* case in Texas, where previously convincing pretrial confessions turned out to be false and coerced—may sometimes have that same effect.⁸¹

Seventh, even old-fashioned discoverable and curable error has real-world and rhetorical force. A system like our current one that seems to exist for the sole purpose of making errors, then trying to catch and cure them, is an untenable system—for death penalty supporters as well as opponents—even if it mostly succeeds in its now twelve-year-long Rube Goldberg regress of error and cure, error and cure.

Finally, there is one frontier in the death penalty wars that DNA reform has not thus far aimed to close, and probably cannot be closed: the cases of perhaps forty to seventy-five among the 700 men and women who have been executed in the modern capital-sentencing era in this country in whose police files lie untested, but potentially exonerative, biological samples. Despite the urgings of the press, families of the executed, the Catholic Church, and others, the responsible officials have thus far resisted post-execution DNA testing, and they certainly have not promoted it “all at once.”⁸² The

arguing that fingerprinting does not meet even the basic requirements for technical evidence [including Richard Jackson, who was released after two years in a Pennsylvania prison after demonstrating that the three experts who matched his prints to those found at a murder scene were wrong]. . . . There's no way to say how these cases . . . will be decided, but it is clear that puncturing the myth of fingerprint's infallibility and scientific validity poses a grave threat to its century-long reign.

Simon Cole, *The Myth of Fingerprints*, N.Y. Times Magazine, May 13, 2001, at 6.

81. On the Earl Washington case, see, for example, Masters, *supra* note 35, at A1; Brooke A. Masters, *DNA Clears Inmate in 1982 Slaying*, Wash. Post, Oct. 3, 2000, at A1. On the *Ochoa* case, see, for example, *Exonerated*, Boston Globe, Jan. 17, 2001, at A2; *Lessons from Ochoa's Case*, Austin Am.-Statesman, Jan. 17, 2001, at A10; Richard Willing, *DNA Tests Free Texas Man in Rape-and-Murder Case*, U.S.A. Today, Jan. 17, 2001, at 3A.

82. John Aloysius Farrell, *DNA Scrutiny Tests Judicial System*, Boston Globe, June 26, 2001, at A1 (noting that “the families of three executed men in Texas and Virginia have gone to court to try to use DNA to prove their relatives were not guilty” after officials refused to make the relevant evidence available for testing); Frank Green, *DNA Tests Not Likely After an Execution: Virginia Op-*

posing *Third Request of its Kind*, Richmond Times-Dispatch, Mar. 26, 2001, at A1 (discussing refusal of Virginia to release biological material for testing that would reveal whether three inmates executed for separate offenses in that state were accurately convicted and executed for rape murders); *id.* ("The Catholic Diocese of Richmond sought the DNA in the O'Dell and Barnabei cases [both O'Dell and Barnabei consistently proclaimed their innocence before and after trial and in their last words before being executed] using a state law that permits evidence to be donated to a charity once it is no longer needed. The requests were turned down and, in the O'Dell case, the evidence was destroyed by Virginia Beach Circuit Court order [on request of the local prosecutor]."); Brooke A. Masters, *New DNA Testing Urged in Case of Executed Man: Post, Others Ask Va. Court to Release Evidence*, Wash. Post, Mar. 28, 2001, at B1 (discussing thus far unsuccessful efforts of press, charities, and members of the family of executed individuals to secure access to DNA-testable biological samples in cases of individuals executed by Virginia, despite consistent claims of innocence); *DNA Evidence in Coleman Case to Stay in California*, Associated Press, Aug. 25, 2001 (discussing ruling of Virginia circuit judge that the *Boston Globe*, *Washington Post*, *Richmond Times-Dispatch*, *Virginian-Pilot* and Princeton, N.J.-based *Centurion Ministry* would not be permitted to test DNA of Roger Keith Coleman who was executed in 1992 for a rape murder he consistently contended he did not commit; noting that the "Virginia attorney general's office [has] opposed the new testing," and that a "Virginia court has never allowed DNA testing on evidence in a case where the convicted person has been executed [despite a string of] post-execution requests [including] in the cases of Joseph O'Dell III, who was executed in 1997, and Derek R. Barnabei, who was executed last year"). *Cf. id.* (quoting the clerk of the Norfolk Circuit Court, who has custody of the files in the Barnabei case, "As long as I am the clerk, we will not destroy the evidence without a court order."). One commentator reported:

An Arlington courthouse clerk threw away all the evidence from a 1999 death penalty case in violation of Virginia law, despite warnings from two colleagues that the material contained DNA and that the inmate's appeals were pending, according to court documents filed yesterday. . . . At least 50 exhibits, including the murder weapon, were thrown out May 23.

Brooke A. Masters, *Va. Evidence Destroyed Despite Warnings to Clerk*, Wash. Post, Oct. 18, 2001, at B3.

States—including Louisiana and Virginia in 2001—and localities are even adopting laws and policies permitting the systematic destruction of evidence that could confirm or disconfirm the accuracy of executions. *See id.* ("A new law passed in the recent [Virginia] General Assembly says evidence in a capital case need only be kept by the state's Division of Forensic Science until the execution has been carried out."). According to a report on NPR:

DNA has become one of the most powerful tools to prove the guilt or innocence of a criminal defendant. And in recent years, dozens of convicted prisoners have been released after the

power of a message conveyed by a provably erroneous modern execution is, well, unknown and inscrutable, but probably great. Whether, and under what conditions, post-mortem exonerations, along with the other seven factors above, can maintain the momentum of death penalty reform will only become clear over time.

original biological evidence was tested again. But now prisoners wanting to take advantage of this new science are hitting a roadblock. Police and courts across the country are destroying the biological evidence that could determine whether a person has been wrongly convicted.

Barbara Bradley, *DNA Testing in Crime Cases Causing Distrust in the Criminal Justice System* (NPR Morning Edition, Aug. 29, 2000) (also discussing decision of officials in Houston, Texas to destroy biological evidence contained in court files of scores of rape and rape-murder cases).