Capital Punishment: Deflecting Abolition

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Capital punishment is an issue fraught with controversy and competing opinions. Recently, media stories of wrongful convictions and the use of DNA technology have emerged. Reports about death row defendants freed after discovery of exculpatory evidence are causing some in the public to doubt that continued use of the death penalty is justified. Despite these problems, opinion polls show that the public favors capital punishment; if the public did not, there would be little reason for its continued use. This paper contends that wrongfully convicted defendants and state governments have entered into a "race" to the U.S. Supreme Court. Unless the present problems are fixed, the Supreme Court will be justified in ending the death penalty. The Innocence Project assists inmates seeking exoneration by using DNA evidence. State legislators are revising death penalty statutes to incorporate language about DNA evidence. DNA technology has made it possible for error to be substantially reduced. To test this argument, the paper applies the theories of Charles Epp (1998) and Idit Kostiner (2003). The paper answers the question of whether it will be innocent defendants or state legislators who win the "race" and explains why they will win.

INTRODUCTION

Capital punishment is an issue fraught with controversy and competing opinions. Although it affects relatively few individuals, it is a pervasive issue incessantly covered by print and broadcast media. The public is barraged with a myriad of opinions, coupled with the media's spin on the issue. On any given day, in any given newspaper across the country, there will likely be a story about the death penalty. Typically, capital punishment stories cover a state's latest execution, the tally of executions carried out for the current year, and the state's capital punishment history. Texas may come to mind for many, as it has a reputation for executing a proportionally higher number of inmates than most states: of the 71 inmates executed in the United States in 2002, 33 were executed in Texas (U.S. Dept. of Justice 2003). More recently, however, death penalty coverage is linked to the issue of innocence. Increasingly, the media is covering stories of innocent people being erroneously convicted of capital crimes who are later freed upon discovery of exculpatory evidence, and the execution of innocent defendants.

For some the media reports cast a shadow of doubt upon justification of the death penalty. With increasing regularity, post-conviction evidence is being used to exonerate inmates and the courts are overturning death penalty convictions on the basis of innocence. Many argue that the system is "broken" and capital punishment should be abandoned altogether. Others argue that the system has merit and that, with reform, risk of erroneous executions can be lessened. But, without reform, continued use of capital punishment is jeopardized. If innocent defendants continue to be sentenced to death, the Supreme Court will inevitably find no justification for capital punishment and will strike the system down.

Despite doubts raised by the media, opinion polls show that the public favors by a considerable margin continued use of the death penalty (Fan, Keltner, & Wyatt 2002; Jost 2001). This support translates into social pressure on legislative bodies to repair the "flaws" in the current system of capital punishment. State governments are responding accordingly with legislative reform efforts. This paper contends that the flaws in the capital punishment system can be substantially lessened and the execution "error rate" can be reduced to as close to zero as is humanly possible before the U.S. Supreme Court deems it necessary to strike it down.

METHODOLOGY AND OVERVIEW

METHODOLOGY

To test this contention, the paper will apply theories set forth by Charles Epp (1998) and Idit Kostiner (2003). In his book entitled The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective, Epp (1998) identifies three "standard" conditions that explain how a rights revolution can occur. They are the Constitution-Centered Explanation, the Judge-Centered Explanation, and the Culture-Center Explanation. Epp argues that existence of these conditions alone is not sufficient to bring about a rights revolution, however. Epp also offers an "alternate" explanation for how rights revolutions arise, identified as the "support structure for legal mobilization" (1998, 17). Existence of the
“standard” conditions supplemented by the presence of the “alternate” explanation is what Epp proposes is necessary for a rights revolution to occur (Epp 1998).

In her article entitled “Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change,” Idit Kostiner (2003) subscribes to a different theory to explain how social change can occur. Kostiner discusses the role that law plays with respect to social change according to three different categories, or “schemas,” which are identified as instrumental, political, and cultural. It is Kostiner’s position that people justify the use of law according to the “meanings that people assign to [law] in their everyday lives” (2003, 329). That justification varies from person to person and, indeed, may vary for one person depending on the specific area to which he or she is applying the law to at a particular time (Kostiner 2003).

OVERVIEW
This paper will focus on two areas for analysis: DNA Technology and Legislative Reform. Within each section, the relevance of public opinion and media attention will be discussed. DNA evidence and the advent of DNA technology are addressed first. In the innocence debate, DNA technology can potentially make the death penalty as error free as is humanly possible. In the second section, the legislative and statutory changes occurring to fix the present capital punishment system will be discussed.

At this point, it is important to take note of the areas the paper does not focus upon. It does not discuss whether the threat of punishment by death penalty has a deterrent effect on the commission of crimes, whether capital punishment is morally right or wrong, whether capital punishment provides a form of retribution for families of victims, or whether juveniles or defendants who are mentally incompetent should be death penalty eligible. Nor will the issues of racial disparity in the imposition of capital punishment sentences, or the problems of mistaken eyewitness accounts, false testimony, and coerced confessions be discussed. These subjects are all worthy of lengthy debate, but as the paper’s thesis is somewhat narrow, they are beyond the scope of the paper’s analysis.

It is also important to take note of this clarifying point: although this paper will not elaborate upon the problems of mistaken eyewitness accounts, false testimony, coerced confessions, or other similar issues that have led to erroneous convictions, it will refer to cases of wrongful convictions that include some of these issues. In the analysis section, the paper contends that DNA technology greatly reduces problems of human error. As such, in cases where DNA evidence exists, false or mistaken eyewitness testimony and coerced confessions will be exposed more often; science alone has the potential to prove guilt or innocence beyond a reasonable doubt.

Finally, it is important to qualify the term “innocence.” For purposes of analysis, the meaning is limited exclusively to “actual” innocence. “Legal” innocence and “actual” innocence have very different meanings. For example, exoneration based on a legal technicality will not be considered to be equal to innocence. As the paper’s topic pertains to cases of genuine innocence, other definitions of the term would cloud the paper’s thesis.

BACKGROUND, LEGAL HISTORY, AND THE “RACE”

BACKGROUND
As discussed above, there is a constant flow of media coverage about erroneous death row sentences. But, in the midst of this coverage, differences have emerged regarding the actual number of erroneously convicted death row inmates.

In order to put the matter into perspective, some statistical information is helpful. As of July 1, 2003, there were 3,517 inmates under sentences of death (Death Penalty Information Center “Death Row” 2003). The U.S. Department of Justice reports that between January 1, 1977 and December 31, 2001, 749 inmates had been executed in the United States (U.S. Dept. of Justice 2002).

The number of exonerated death row inmates rose from two in 1998 to eight in 1999 (DPIC “Exonerations” 2003; Hood 2002). Eight more were exonerated in 2000, five in 2001, four in 2002, and nine so far in 2003 (DPIC “Exonerations” 2003). On January 31, 2000, then Governor George Ryan of Illinois declared an indefinite moratorium on the use of capital punishment in that state after 13 death row inmates had been exonerated of their crimes (Bessler 2003; Economist 2003; Gray 2003; Jost 2001; Hansen 2000; Singh 2000). Ryan, a former death penalty supporter, stated “...I cannot support a system which, in its administration, has proven so fraught with error and has come so close to the ultimate nightmare, the state’s taking of innocent life...” (Gray 2003,163). Three years later, on January 11, 2003, Ryan made history when he commuted the sentences of all 167 death row inmates to life in prison (Cohen 2003; Economist 2003; Gray 2003).

After considering the above data, it is helpful to compare it to the statistics reported by those who have a more personal interest in capital punishment: abolitionists and retentionists. Here, a difference exists regarding the actual number of wrongful capital convictions.

The Death Penalty Information Center (DPIC), an abolitionist organization, currently reports on its web-site’s Innocence List that since 1973, 111 innocent defendants have been released from death row (DPIC “Exonerations” 2003). The DPIC uses this guide to list defendants:

The definition of innocence that DPIC uses in placing defendants on the list is that they had been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at re-trial, or all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence (DPIC “Cases” 2003, 26).

In 2002, Ward A. Campbell (2003), Supervising Deputy Attorney General for California State, presented a paper to
the Association of Government Attorneys in Capital Litigation which disputed the data in the DPIC's Innocence List. At the time Campbell wrote his paper, the DPIC listed 102 defendants on its Innocence List. He argues that of those listed, only 34 defendants had valid claims of innocence and that the other 68 should not have been placed on this list. Campbell's reasoning is based upon his distinction of "legal" and "actual" innocence. In his view, not all defendants found legally innocent are genuinely innocent. As such, defendants who do not meet his definition of "actual" innocence should not be on the DPIC's Innocence List (Campbell 2003). The increasing number of exonerated death row inmates, stories of wrongful executions, the data cited above, and the actions of former Governor Ryan suggest there is a problem with the current system of capital punishment in the United States. Though these examples are far from exhaustive, they are sufficient to illustrate that the death penalty system is flawed. As noted above, numbers regarding actual cases of innocence range from 111 to 34, and it is likely that other cases exist that have not yet been discovered. By design, the death penalty is a punishment with absolute finality. Accordingly, it is a punishment that many would argue should not be so flawed as to allow at least 34 and up to 111 innocent people to be sent to death row.

LEGAL HISTORY

If no action is taken to repair the system, the courts will have cause to end capital punishment. The U.S. Supreme Court has historically been willing to end use of the death penalty in certain circumstances, adding to the probability that the Court may act in a similar manner again. In Furman v. Georgia (1972), the Court ruled that use of capital punishment, as then applied, was "cruel and unusual" and rendered its use "unconstitutional because it was being applied in an arbitrary, capricious, and discriminatory manner contrary to the [Eighth] and [Fourteenth] Amendments of the Constitution of the United States" (Hood 2002, 63; Kronenwetter 2001; Sarat 2001; Singh 2000; Sarat 1998).

The key words in Furman are "as then applied." With that language, the Court did not permanently close the door on capital punishment. The states were not ready to close their doors to it either. Following the Furman decision, "all but two of the previously 38 retentionist states decided to redraft their statutes to restrict and more carefully define the class of murder subject to capital punishment so as to avoid the objection of arbitrariness" (Hood 2002, 63). Retentionist states wanted to enact legislation setting guidelines for capital punishment applied in a manner that did not violate constitutional rights (Hood 2002; Kronenwetter 2001; Sarat 2001; Singh 2000; Sarat 1998).

Four years later, the Court overturned the Furman decision when in 1976 it ruled in Gregg v. Georgia (Hood 2002; Kronenwetter 2001; Sarat 2001; Singh 2000; Sarat 1998). The Court upheld Georgia's death penalty law which included sentencing guidelines and bifurcated proceedings. To clarify, bifurcated trials are broken into two phases: the trial stage, where guilt or innocence is decided, and the sentencing stage, where the decision to impose a death or prison sentence occurs (Sarat 2001; Singh 2000; Gregg v. Georgia 1976). The Court found that Georgia's statute ensured "that the death penalty [would] not be imposed arbitrarily or capriciously," and thereby resolved "[the] concerns expressed in Furman" (Gregg 1976).

Thus, Georgia's capital punishment statute changed the course of history. The Court held that use of the death penalty was no longer "cruel and unusual punishment" when is was applied according to the new procedures. The moratorium effectively ended and capital punishment was reinstated (Kronenwetter 2001; Singh 2000, 346).

In the wake of Furman, the states could have done nothing and let the death penalty die, so to speak. They could have allowed the national moratorium to continue indefinitely. But they didn't. To ensure the availability of the death penalty for the most serious crimes, retentionist states enacted laws that conformed to the Court's standards; they implemented bifurcated proceedings and narrowed the scope of death penalty eligible crimes. Currently, in most retentionist states, first-degree, aggravated, or capital murder remain the only death penalty eligible crimes (DPIC "Crimes" 2003; U.S. Dept. of Justice 2002; Kronenwetter 2001).

The states' activity is significant because it shows their responsiveness to public opinion and their willingness to revise death penalty statutes in order to preserve it. Austin Sarat notes that "in Furman's wake, a dramatic pro-capital punishment backlash occurred" both in the legislature and in the public (Sarat 1998, 5-6). This support is acknowledged by the Court in the Gregg decision, which states:

"[I]t is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction. The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman (Gregg v. Georgia 1976, 179; Sarat 1998, 6; Sarat 2001, 164).

This sentiment is also addressed by Kenneth Jost (2001) in "Rethinking the Death Penalty." Jost includes a Gallup Poll measuring the changes in public opinion regarding the death penalty between the years 1936 and 2001. Although public support rises and falls during these years, at no time does opposition outweigh support. Thus, at the time of the Furman decision, approximately 55 percent of the public supported the death penalty. This percentage increased to approximately 65 percent when the Court issued its ruling in Gregg just four years later (Jost 2001, 951).

Court action related to capital punishment certainly did not cease in the wake of the Gregg decision. The U.S. Supreme Court continues to hear many death penalty cases; however few of those cases are about "actual" innocence claims. In his article, Kenneth Jost identifies 20 U.S. Supreme

The issue the Court addressed in Herrera v. Collins was more procedural than substantive. The Court held that Texas appellate courts could bar admission of new evidence if it was not filed within the time frame outlined by Texas statute (Gray 2003; Hood 2002; Jost 2001). However, the Court cautioned that “[executing] an innocent person would be cruel and unusual punishment, violating the Eighth Amendment,” and noted that Herrera could still seek reprieve from the State of Texas by requesting executive clemency (Gray 2003; Hood 2002:168 at footnote 148). Two years later, the Court modified, but did not overturn, its decision in Herrera, when it ruled in Schlup v. Delo that it was procedurally appropriate for appellate courts to consider violation of constitutional rights claims if such violations “probably” caused an “actually innocent” person to be convicted (Hood 2002, 168 at footnote 148; Jost 2001, 958; Radelet & Bedau 1998, 119).

The fact that the Supreme Court heard more than 20 landmark capital punishment cases since 1976 demonstrates its interest in considering death penalty issues, and its willingness to render opinions about capital punishment. The U.S. Supreme Court obtained discretionary control of its docket in 1925 (Epp 1998, 35). Since that time, the Court chose to hear fewer cases dealing with business disputes and, instead, focused its attention on public policy cases and civil rights issues (Epp 1998, 35-36). The fact that the Court heard so many capital punishment cases in the past three decades reflects the Court’s commitment to addressing civil rights issues.

In sum, growing numbers of death row inmates are being released after ex post facto evidence proved their innocence. There is a steadily increasing stream of media coverage about wrongful convictions and exonerations from death row. The former governor of Illinois issued a blanket commutation and emptied death row in his state after evidence convinced him that the system of capital punishment was substantially flawed. And, finally, the Supreme Court’s interest in hearing death penalty cases is demonstrated by granting numerous certiorari petitions in such cases over the past thirty years.

**The “Race”**

If nothing is done to correct the problem and innocent defendants continue to be sentenced to death, some will argue that use of capital punishment is in jeopardy. Abolitionists would no doubt hail the day capital punishment is permanently relegated to the annals of history. Of course, retentionists sing a different tune.

Across the country, state legislatures are responding to criticisms that capital punishment is flawed. They are enacting laws and proposing statutory changes at an astounding rate; in 2001, 10 states revised their death penalty statutes (U.S. Dept. of Justice 2002, 2). This flurry of activity is not going unnoticed by the media or the public. One assumes this activity is noticed by the Justices of the Supreme Court, as well. Paralleling the political action that occurred in the wake of Furman, legislators are not simply sitting idly by. Paralleling Furman, the fire of political activity is fueled by public pressure. Retentionists are putting pressure on the government to fix rather than abolish capital punishment. In light of the problems evident with the current death penalty system, little choice remains but to make some significant repairs if we want to continue using it as a form of punishment.

In response to public interest groups, state governments have entered a race, so to speak. To explain, as more cases of innocence and wrongful conviction are discovered and more defendants are exonerated from death row, legitimate justification for continued use of the death penalty is weakened. Citing the statistics used above, between 34 and 111 cases of actual innocence were discovered in the past thirty years. Even if one subscribed to the lower number, arguing that “only 34” cases of innocence is a justifiable margin of error is a formidable challenge. Just imagine how the Justices of the U.S. Supreme Court would react to such an argument! Thus, state legislators are in a race with innocent defendants wrongfully convicted, with the finish line for this race being the U.S. Supreme Court.

The difference in this race, however, is that the pathway is “vertical” for criminal defendants. They begin at the trial court level, proceed through the appellate courts next, and finally head to the Supreme Court; they can claim their innocence each step of the way. However, if too many cases of wrongful convictions make it to the Supreme Court in this vertical race, it is possible that the justices will again put a temporary end to the use of capital punishment. As noted above, one assumes the justices are aware of both innocent people being exonerated from death row, and that public support for capital punishment is still stronger that its opposition. Certainly, the Court doesn’t always issue opinions that are consistent with public opinion. However, if the justices find inadequate precautions to ensure that defendants are not wrongfully convicted, they might take action of their own.

State governments have intentionally jumped into the race to deny the justices a basis for taking action. Hence, for these actors, the race to the Supreme Court is “horizontal.” State legislators are attempting to cut cases of innocence off at the pass, so to speak. They are taking action to ensure that defendants maintaining their innocence have every opportunity to exhaust their claims, and those currently on death row will not be erroneously executed. The question is: will they win this race?

**Analysis of DNA Technology**

The molecular structure of deoxyribonucleic acid (DNA) was discovered in 1953 by scientists James Watson and Francis
Crick (Watson 2003). Upon making their discovery, Crick bragged that they had “discovered the ‘secret of life’” (Watson 2003, Intro. at xii). In the mid-1980’s, geneticist Alec Jeffreys made a discovery that revolutionized forensic science: he discovered “DNA fingerprinting” (Watson 2003, 262-65; Hansen 2001). The advent of DNA fingerprinting, or DNA typing, effectively blew the capital punishment debate wide open. Because of its unique “fingerprint,” DNA evidence left behind at crime scenes can narrow a list of suspects down to one person or even identify an unknown suspect (Watson 2003; Genge 2002; Hansen 2001; Orrick 2000). Each person’s DNA fingerprint is “absolutely individual,” except for identical twins, whose DNA is identical (Genge 2002, 144; Hansen 2001). Homicide crime scene evidence collection also vastly changed. No longer limited to just latent fingerprints, semen and blood evidence, investigators look for anything that might contain DNA, from hair to fingernail clippings to used envelopes that might contain saliva evidence (Genge 2002, 147; Orrick 2000). Some have hailed DNA typing as “the most significant advance in forensic science since the advent of fingerprinting in the early 1900’s” (Hansen 2001, 38; Evans 1996). In short, DNA evidence can be collected from an extensive number of areas and can conclusively identify a person as the perpetrator of a crime.

The potential for technological error still exists though, because human mistakes cannot be eliminated. Humans collect, process, and analyze DNA and we are subject to error. However, DNA technology is greatly reducing error. As technology is perfected and human application improves, it may yet be possible to eradicate erroneous executions and convictions. Francis Crick’s comment fifty years ago was indeed prophetic. DNA now holds the “secret of life” in a whole new meaning; it holds the key to innocence. Today, DNA is saving innocent people from being executed.

On June 28, 1993, Kirk Bloodsworth became the first death row inmate to be exonerated by DNA evidence (Dao 2003; Evans 1996). Bloodsworth spent nine years in prison, and time on death row, for the rape and murder of nine year old Dawn Hamilton in 1984. An anonymous tipster informed police that Bloodsworth resembled a composite sketch. Based upon that tip, he was arrested, tried and convicted, despite having alibi witnesses testifying as to his whereabouts on the day of the murder (Evans 1996). Bloodsworth maintained his innocence and finally, in 1992, physical evidence in the case was reexamined using new forensic technology that had evolved since his conviction. After DNA tests were processed, the results proved Bloodsworth’s innocence (Radelet and Bedau 1998; Evans 1996). When additional DNA evidence from the 1984 Hamilton murder case was analyzed and submitted to the national DNA database in August of 2003, a match was made and investigators were finally able to identify the real killer: Kimberly Shay Ruffner (Dao 2003). In the end, DNA technology not only exonerated an innocent man, it conclusively proved the guilt of the real killer.

Today, Kirk Bloodsworth’s story is nothing new; stories like his appear with increasing frequency in newspapers, scholarly conversations, and courtrooms. Many of those stories are being told by members of a new social movement: Innocence Project activists. The Innocence Project is a public interest law clinic in New York, co-founded in 1992 by Barry Scheck, a law professor and former public defender, and Peter Neufeld, also a former public defender (Gray 2003; Hansen 2001; Orrick 2000). This clinic “pioneered the use of DNA evidence to free the wrongly convicted from prison” (Hansen 2001, 77). It “provides pro bono legal assistance to inmates who are challenging their convictions based on DNA testing of evidence” (Orrick 2000, 284).

Inmates who were convicted before the advent of DNA technology do not hesitate to take advantage of its current availability. Upon opening its doors, the Innocence Project was deluged by requests for assistance. Scheck and Neufeld enlisted the assistance of volunteers to help them “handle the flow” (Gray 2003, 82). By 2000, the Innocence Project had helped 39 inmates, eight of whom were on death row, gain post-conviction exonerations based upon DNA evidence (Orrick 2000). By that time, approximately 73 inmates had obtained post-conviction exonerations across the United States. The fact that the Innocence Project assisted more than half of them indicates its level of activism (Orrick 2000). By August 2002, the number of erroneously convicted inmates freed with the Innocence Project’s assistance stood at 103 (Gray 2003). This 103rd inmate, Eddie Lloyd, was convicted of rape and murder 17 years earlier in the State of Michigan. He was spared a death row sentence only because Michigan is an abolitionist state, but when he was sentenced, the judge “lamented the fact that he couldn’t sentence him to death” (Gray 2003, 189). The Innocence Project worked on Lloyd’s case for seven years, before the courts finally exonerated him (Gray 2003). But for the dedicated efforts of this activist group, this innocent man would still be locked away.

**Support Structure for Legal Mobilization**

Epp’s Constitution-Centered condition exists here, and its presence explains the growing movement to free all those who were erroneously sent to death row. In this view, "the crucial conditions for a rights revolution are structural judicial independence and a foundation of constitutional rights guarantees" (Epp 1998, 11). The Supreme Court demonstrated its "judicial independence" when it handed down its ruling in Furman v. Georgia. Though some argue that the justices’ rulings are in line with public opinion, this is not always the case. The fact that the Court ruled in a manner contrary to public opinion in Furman, spurred both abolitionists and retentionists into action. To explain, abolitionists know that the Court struck down capital punishment once before, so they have every reason to believe they could spur the Court to do it again. Thus, it is in their interest to mobilize and bring as many cases of wrongful convictions as possible to the Supreme Court’s attention. Using DNA typing to prove inno-
ence bolsters their argument. Likewise, retentionists have every reason to mobilize and fix the system to prevent the Court from having reason again to suspend use of capital punishment. In this camp, using DNA typing to determine guilt supports the argument that the death penalty can be applied with minimal error.

Additionally, the “foundation of constitutional rights guarantees” is present for criminal defendants. The Bill of Rights guarantees criminal defendants access to legal counsel, the right of due process, and protection from cruel and unusual punishment. Thus, the courts are more readily accessible to criminal defendants than they are to many activist organizations. A defendant claiming “actual” innocence can appeal that claim all the way to the Supreme Court.

The Judge-Centered condition is also present. According to the parameters set forth in this condition, “significant judicial protection for individual rights results primarily from supportive judges who have the power to focus on the cases that interest them” (Epp 1998, 14). This condition is supported by the fact that the U.S. Supreme Court has discretionary control of its docket (Epp 1998). Epp observes that existence of this condition can be limited by the justices’ “institutionalized reluctance to decide issues that have been the subject of little sustained litigation in lower courts,” and because “in order for an issue to reach the agenda, the issue typically must be taken repeatedly to the Supreme Court itself” (Epp 1998, 36-37). These limitations have been overcome with respect to the death penalty debate, however. Capital punishment cases have sustained substantial litigation in both trial and appellate courts. Further, the 20 major death penalty cases heard by the Supreme Court since 1976 demonstrates that these cases are “repeatedly” taken to the Court and that the justices have an “interest” in hearing them (Jost 2001, 958; Epp 1998).

The existence of the Judge-Centered condition supports the argument of the Court’s interest in protecting criminal defendants’ rights and, likewise, making sure its decisions protect innocent people from being executed. If state governments and legislators do not take any steps to eliminate the flaws in the current death penalty system, the Court might decide that the only way to prevent erroneous executions is to eliminate all executions.

In this analysis, the presence of the Constitution-Centered explanation and the Judge-Centered explanation are indeed supplemented because a support structure for legal mobilization also exists. As Charles Epp (1998) theorizes, the existence of the “standard” explanations, independent of any mobilizing factors, are not sufficient to bring about change. Mobilization is an essential ingredient in the recipe for social change. To explain simply, using Epp’s description, “cases do not arrive in supreme courts as if by magic” (1998, 18). In other words, the doors of death row will not automatically swing wide open for criminal defendants simply because they proclaim their innocence. Defendants need a legal support system to make claims in court and access to DNA testing to prove innocence. The Innocence Project nicely fulfills the requirements of a support structure for legal mobilization as defined by Epp.

The Innocence Project provides the type of rights advocacy for wrongfully convicted death row inmates necessary to bring about social change. It has proven effective at grabbing media attention and spreading the word about the “broken” system of capital punishment. Further, the Innocence Project continues to show its willingness to go the distance to help defendants prove claims of innocence. Thus, the Innocence Project assisted inmate Eddie Lloyd in pursuing his claim of innocence for seven years, never giving up until he was finally proven innocent based upon DNA evidence and freed (Gray 2003).

Applying Charles Epp’s theory explains why and how criminal defendants are “running” the previously described “vertical race” to the Supreme Court. Criminal defendants have constitutional rights guaranteeing their access to the courts. There is an upsurge in the number of post-conviction innocence claims brought before the courts because of the advent of DNA fingerprinting. The Innocence Project is providing the support structure for legal mobilization all the way to the U.S. Supreme Court. Thus, both the “standard” explanations and the “alternate” conditions are present. Epp’s requirements for social change have been met. All the necessary elements are in place for the Court to strike down capital punishment if nothing is done to deter this social change movement and the “vertical race.”

THREE SCHEMAS OF LAW AND SOCIAL CHANGE

Attention will now be given to Idit Kostiner’s use of the “three schemas” theory of law and social change. Kostiner (2003) identifies the “Instrumental Schema” as the one activists follow when their main concerns are meeting concrete, basic, and short-term goals. These activists wish to “serve others” and they view the role of law as valuable “because it has the power to help them achieve concrete...results” (Kostiner 2003, 349).

The instrumental schema applies to the issue of capital punishment with respect to the basic, concrete constitutional rights criminal defendants have, including guaranteed access to legal counsel and representation. This schema also applies to the Innocence Project activists. As discussed, they assist defendants in presenting post-conviction claims of innocence based upon DNA evidence, and help exonerate numerous death row defendants who were erroneously convicted. Thus, the “others” the Innocent Project activists “serve” are wrongfully accused defendants and the “goal” they seek is to prevent innocent people from being executed. For these activists, use of law is invaluable because it helps to achieve a very “concrete” result: saving innocent lives.

Activists who adhere to the “Political Schema,” focus on oppression-related problems (Kostiner 2003). Their goal is to help those who are oppressed gain power through self-help tactics, uniting, mobilizing, and organizing rallies. Activists in
this category view the role of law and the use of legal strategies rather critically. For them, resorting to legal tactics puts people in a position of asking for help, thereby weakening them. Instead of resorting to legal remedies to achieve their goals, these activists prefer to “act locally” by organizing groups, demonstrations, and rallies. Despite their critical view of law, these activists acknowledge it as a “powerful social institution” and see it as “supplemental” to promoting social change (Kostiner 2003, 352).

Though the political schema theory may offer better support for other areas of social change, this model has applicable value to the issues of capital punishment and innocence. Death row defendants are not in a position to “organize” or “rally” in the manner Kostiner describes. However, advocates for those wrongfully accused, such as Innocence Project activists, do have the freedom to organize, picket, and rally on behalf of incarcerated defendants. The Innocence Project is quite effective in attracting media attention to its cause with these “self-help” tactics. The bottom line is that they have the ability to mobilize because they are not incarcerated. Additionally, the only tools criminal defendants have available to them for achieving justice is the law. Even the Innocence Project activists must ultimately pursue their cause through legal channels, such as the legislatures or the courts, in order to directly benefit wrongfully accused defendants. Breaking an erroneously convicted death row inmate out of prison is not an available option.

Activists who fit into the Kostiner’s “Cultural Schema” category focus on changing assumptions, unconscious biases, and other prejudices held by society because they view these beliefs as the cause of social injustice (2003). They believe social justice cannot be fully achieved until people’s “thoughts” change to conform with what these activists deem as acceptable thinking. They believe people must first consciously recognize the assumptions they hold and voluntarily change their ways of thinking. These activists seek to “transform” assumptions through education and training. They tend to marginalize law because they believe their goals cannot be achieved through legal remedies (Kostiner 2003). For them, “cultural acceptance is something that cannot be legally mandated but rather has to emerge out of free will” (Kostiner 2003, 354). The cultural schema is applicable to the topic of capital punishment and innocence, though not exactly as Kostiner sets forth. For some, the notion that a death row defendant might be innocent was preposterous until exculpatory DNA evidence proved a “guilty” defendant innocent. Former Governor Ryan, previously a death penalty supporter, publicly changed his assumption when he emptied death row earlier this year (Gray 2003). The assumption that only guilty people are sentenced to death row is shattered when new evidence proves the innocence of even one person. No court of law could change the mind of a person convinced that only the guilty are executed, but the discovery of exculpatory evidence might change that belief.

Concluding this and the previous sections, clearly the system of capital punishment is flawed; it is broken, and abolitionists and the Innocence Project activists are making sure everyone knows it. The Supreme Court Justices are among those who are listening. As evidence of this, in 2001 The Washington Post published an article entitled “O’Connor Expresses Death Penalty Doubt; Justice Says Innocent May Be Killed” (Lane 2001, A1). One person who heard Justice O’Connor speak stated: “[she’s] saying that there are problems with the administration of the death penalty, and that they are serious problems” (Lane 2001, A1). Thus, it is only a matter of time before the justices tire of simply listening and act to stop the injustice plaguing our criminal justice system.

**ANALYSIS OF LEGISLATIVE REFORM**

State legislators are the other actors attempting to do something about the injustice plaguing death row. Many have jumped into action to fix the flaws in the capital punishment system to prevent erroneous executions. Significant statutory changes have occurred to incorporate language about DNA evidence and ensure defendants’ access to post-conviction DNA testing. Because DNA technology provides a tool where guilt can be proven beyond reasonable doubt, it stands to reason that it is possible to recreate the capital punishment system so that when the death penalty is used, doubt is reduced as much as possible. If this trend continues, it will offer the Supreme Court little reason to strike down capital punishment.

One substantial piece of legislation receiving much attention is the Innocence Protection Act proposed by Senator Patrick Leahy (D-VT) in 2000 (Orrick 2000). In the same Washington Post article cited above, Justice O’Connor’s comments about the bill were positive. Leahy, a member of the Senate Judiciary Committee, stated that “Justice O’Connor’s frank assessment of these problems will add to the Innocence Protection Act’s momentum” (Lane 2001, A1). Of course, the Innocence Protection Act did not become law in its original form. It was absorbed by a more comprehensive bill entitled the “Advancing Justice Through DNA Technology Act of 2003” (U.S. House 2003). On November 5, 2003, H.R. 3214 was passed in the U.S. House of Representatives and is now awaiting approval of the Senate (U.S. House 2003; CQ Staff 2003). If enacted into law, the bill would be a significant step in preventing erroneous convictions because the bill expands the DNA testing capacity of Federal, State, and local crime laboratories, develops new technology to collect and use DNA evidence, and provides post-conviction testing of DNA evidence to exonerate the innocent (U.S. House 2003).

Discussing H.R. 3214, Representative James Sensenbrenner (R-WI) was of the opinion that “the bill’s emphasis on improving capital defense and post-conviction DNA testing ultimately might help preserve the death penalty” (CQ Staff 2003). Sensenbrenner went on to say that:
Representative Sensenbrenner's sentiments were echoed in an article the Economist published earlier this year. It stated that former Governor Ryan’s actions were “a nice idea. But, [his] actions may have helped the death penalty survive” (Economist 2003, 36). It went on to state that the “tighter standards” being used with implementation of capital punishment may “make the death penalty look fairer and more efficient” and that efforts to repair the system are “proceeding at a particularly vigorous pace” (Economist 2003, 36).

At the state level legislators are enacting laws and revising statutes at a tremendous rate. For example, in 2003, Nevada enacted a law to “[allow] DNA testing to be used as evidence on appeal cases tried prior to the development of DNA testing” (DPIC “Changes” 2003, 9). In 2001, Texas enacted a law “[requiring] the state to preserve DNA evidence and allow prisoners access to DNA testing if it was not available at trial” (DPIC “Changes” 2003, 14). And in 1999, Oregon made a statutory procedural amendment that “set forth circumstances under which a person other than the defendant may file for post-conviction relief on behalf of the defendant” (U.S. Dept. of Justice 2000, 2).

Epp’s Culture-Centered explanation is present in this area. He states that “[under] the culture-centered explanation for rights revolutions, popular culture is thought to influence judicial protection of individual rights...”(1998, 15). Epp specifically applies this explanation as one condition for judicial activism (1998). But, this essay argues that applying this theory to state legislators and governments has explanatory value: legislators respond to the desires of their constituents and public opinion. As we live in a culture that favors capital punishment, it affects the decisions that are made on capitol hill. This mobilization of state legislators provides the support structure to achieve success. With each new law, we come one step closer to an error-free death penalty system.

Concluding this section, states’ actions will ensure that capital punishment can be preserved. Although the system is changing dramatically, this is not inconsistent with what the public wants. It is evident that much of the public supports changes that ensure the death penalty system will continue. In 2001, approximately 65 percent of the public still supported capital punishment despite the recent problems with the system (Jost 2001, 951). Accordingly, it is plausible that the public would support limiting use of capital punishment to cases where DNA evidence exists, if such a limitation substantially reduced doubt about innocence, and if this was the only way to guarantee that use of the death penalty could continue. Even if DNA evidence exists in only a few cases, that number is still greater than zero and the probability of wrongful execution is reduced substantially. For retentionists, it is not a matter of how many inmates are death penalty eligible, only that some are. Doubts about guilt will exist in some cases, even those with DNA evidence, but judges and juries can impose sentences of life in prison, instead of the death penalty, when guilt cannot be proven beyond a reasonable doubt.

Attempting to find out how many of the 3,500 current death row cases have DNA evidence available, Robert Deans, Information Specialist at the Death Penalty Information Center, was contacted via email. In response to this question, Deans stated: “I don’t think there is any answer to this one at all. Certainly, with physical evidence, the potential exists for DNA testing...[T]here has been no census of those currently on death row in terms of DNA evidence testing or availability” (Email correspondence December 2, 2003, December 3, 2003, and December 4, 2003). Even without available data, a safe guess is that some of the 3,500 current death row cases have physical evidence available and that some of that evidence contains DNA. DNA evidence is an invaluable tool that can create a nearly error-free capital punishment system and can ensure the Supreme Court will not strike the system down.

**FINDINGS**

With respect to the “DNA Technology” section of this essay, it seems that all of the elements are in place for the Supreme Court to end use of the death penalty. No longer can a convincing argument be made that no problems exist with our system of capital punishment. Post-conviction DNA evidence is used with increasing regularity to prove the innocence of defendants sentenced to death row, some who were sent there years ago. Fortunately, DNA evidence is also confirming the guilt of countless others. Charles Epp’s “standard” conditions exist as does the “alternate” condition, namely a support structure for legal mobilization. The Innocent Project activists are mobilizing a social movement, and creating attention about the problems at hand. In attracting media attention, the Innocent Project activists are changing assumptions and transforming thoughts that some of the public held about capital punishment, as Kostiner sets forth in her cultural schema model.

With respect to the “Legislative Reform” section of this essay, state legislators are doing everything possible to fix the system of capital punishment. Their timely actions to accomplish social change can prevent the Supreme Court from ending the death penalty. Thus, legislators can win the “horizontal” race to the U.S. Supreme Court. The majority of the public will applaud them as they cross the “finish line.”

**CONCLUSION**

We have come a long way since the Furman and Gregg decisions. As Justice Marshall lamented in Furman v. Georgia: “No matter how careful courts are, the possibility of perjured
testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain there were some" (1972, 367-68). Certainly the course of history would be different if DNA testing existed in the 1970s. Yet today dramatic steps are being taken to ensure that erroneous convictions such as those of Kirk Bloodsworth and Eddie Lloyd never happen again. State legislatures are repairing the "broken" system by amending the laws to include provisions for DNA evidence. Such changes will occur before it becomes necessary for the Supreme Court to strike down the capital punishment system.

In the future one can safely assume that death penalty stories will still be found in the media. Because of DNA technology, more of those stories will likely be about capital punishment being applied without error. Human error of the past will be reduced considerably as technology continues to improve. In cases where DNA evidence exists, "perjured" or "mistaken" testimony will be of little consequence because truth about a person's guilt or innocence can be found at the heart of science. Doubt and the error rate can be reduced substantially. If we continue improving the system, the next time someone asks the Supreme Court how many cases there are of innocent people being executed, perhaps we will hear them say: "We are certain there are none."

REFERENCES
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Death Penalty Information Center. "Death Row Inmates by State and Size of Death Row by Year."


