

EXECUTING THE INNOCENT: THE NEXT STEP IN THE MARSHALL HYPOTHESES*

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I. INTRODUCTION

Supreme Court Justices rarely take into account empirical research when making decisions, and they seem particularly opposed to incorporating social-scientific scrutiny of the death penalty.¹ The Court dismissed an American Medical Association study indicating a two-thirds error rate in the reliability of psychiatric predictions because the study only showed that the experts are wrong “most of the time,” and failed to prove that experts are not “always wrong.”² This remarkable action leads one to wonder whether empirical evidence plays any role at all in the Court’s decision making.³ Perhaps even Supreme Court Justices feel a tension between common sense and specialized social-scientific findings.⁴ Regardless of the reasons for its approach, the Court continues to express reluctance toward accepting such data. The opposite appears true for social scientists. Social scientists appear eager to embrace testable hypotheses suggested by capital cases in the high court.⁵

* The authors would like to thank James Acker, Peter Erlinder and Samuel Gross for their helpful comments. Any errors are ours alone.

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1. See James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986–1989*, 27 LAW & SOC’Y REV. 65, 81–82 (1993) (“[S]ocial science evidence had little influence on the Court’s death penalty decisions. Lead opinions brushed aside convincing empirical evidence . . . and refused to consider social-scientific evidence relevant to capital punishment . . . Nevertheless, by producing systematic empirical research evidence that bears on important issues of capital punishment administration, and thus compelling the justices to explain their decisions against this revealing factual background, social scientists at the very least are making a real contribution to the integrity of the Supreme Court’s decisional process.”).

2. *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983).

3. *Id.* at 900–01.

4. David Baldus, *The Death Penalty Dialogue Between Law and Social Science*, 70 IND. L.J. 1033, 1034 (1995) (citing CHARLES E. LINDBLOM & DAVID K. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND PROBLEM SOLVING* 10 (1979)).

5. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES*, GGD-90-57 (1990) (counting twenty-eight studies of race and capital sentencing); JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE:*

Justice Thurgood Marshall's concurring opinion in *Furman v. Georgia*⁶ ventured two testable propositions that have come to be known as the Marshall Hypotheses: 1) American citizens know almost nothing about capital punishment,⁷ and 2) if people were fully informed of capital punishment's purposes and liabilities, they would find the penalty "shocking, unjust, and unacceptable."⁸ These simple propositions hide a world of complexity. First, what would it mean for a person to be "fully informed"? What level of information suffices?

More importantly, Justice Marshall believed that empirical evidence would have little effect on retributivists.⁹ Since he also believed that retributivism could not serve as the sole basis for the death penalty,¹⁰ and since, in his view, all consequentialist arguments cut against capital punishment, he concluded that the death penalty was constitutionally infirm. Thus, Marshall conceded that empirical evidence would have little impact on retributivists, while dismissing retributivism as the sole remaining basis for the death penalty. Other researchers apparently have followed Marshall's view that empirical evidence would have little or no impact upon the thorough-going retributivist.¹¹

CAPITAL PUNISHMENT IN TEXAS, 1923-1990, at 158-60 (1994) (summarizing future dangerousness studies); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (examining execution of innocent people).

6. 408 U.S. 238 (1972).

7. The first proposition is not really a hypothesis because it is not cast in conditional form. It is, however, an empirical claim which, like the second hypothesis, can be empirically tested. Both propositions have come to be known jointly as the Marshall hypotheses and we will refer to them jointly as such.

8. *Furman*, 408 U.S. at 361-62 (Marshall, J., concurring).

9. *Id.*

10. Justice Marshall argued that retribution by itself was not a "legitimate goal of our society" and that the defense of capital punishment always revolves around deterrence or other similar theories. *Id.* at 363. Many people undoubtedly disagree with Justice Marshall and do argue that retribution constitutes an adequate basis for imposition of the death penalty. See, e.g., Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986) (arguing a variety of justifications for capital punishment but concluding that "it is also the only fitting retribution for murder I can think of." *Id.* at 1669.). Marshall also argued, without directly tying his argument to retributive theory, that the fact that innocent people are executed undercuts the arguments in favor of capital punishment. *Furman*, 408 U.S. at 364.

11. Robert H. Bohm, *Retribution and Capital Punishment: Toward a Better Understanding of Death Penalty Opinion*, 20 J. CRIM. JUST. 227 (1992) (concluding that "if a meaningful distinction between vindictive revenge and just deserts is not uncovered, and it turns out that people support the death penalty primarily for vindictive revenge, then the propriety of retribution as a legitimate justification for capital punishment, at least according to Justice Marshall's standard, should be reconsidered."). Bohm goes on to argue that empirical evidence will have little impact on this group. Of course, Bohm and others could be correct as an empirical matter, but the underlying empirical assumptions here do not appear to have been adequately tested to date. We argue, following the work of Richard O. Lempert, *infra* note 100, that innocence directly undercuts retributive theory. If this is so, it also should affect, contrary to Justice Marshall's supposition, attitudes of people who base their support for the death penalty on retribution. This, in short, is the reason for this research. Does the problem of innocence affect the attitudes of those people for whom other empirical arguments are insufficient? Does it sway the retributivist? Contrary to the

Public opinion regarding the death penalty has changed since Justice Marshall authored his concurrence in *Furman*. Research indicates that the primary justifications currently offered for support of the death penalty are no longer deterrence based, but retribution oriented.¹² Regardless of this shift, social science studies over the years have tended to support Marshall's view that empirical evidence would have little or no impact on the thorough-going retributivist.¹³ The logical conclusion one might draw from these studies is that educating the retribution oriented public further about the death penalty would not affect their level of support for it.

We disagree. The problem with this reasoning is that retributivism is often formulated as an extreme non-consequentialist position¹⁴ and so typically (and, we will argue, mistakenly) has been regarded as wholly indifferent to empirical data. It is true that extreme non-consequentialism, such as Kantian theory, allows empirical consequences to play no role whatsoever in the justification of our actions. It does not follow from this, however, that retributivism is wholly unaffected by empirical facts about the world—such as the guilt or innocence of those being executed. The difference between consequentialist and extreme non-consequentialist arguments in support of the death penalty lies in the nature of their *moral* premises, not in the presence or absence of *empirical* premises. Retributivists may not believe that the death penalty is justifiable based on its empirical consequences, but, like all moral arguments, theirs must rely to some degree on empirical premises if they are to guide human action or social policy formation. These premises must be based upon empirical accounts of the world whose accuracy can be tested. Thus, retributivists may well be, and indeed should be, responsive to empirical data regarding the actual guilt or innocence of those being executed.

conclusion that retribution is unaffected by any empirical evidence, we ask whether undercutting the moral basis for retribution will affect attitudes toward the death penalty.

12. See Bohm, *supra* note 11 (“Retribution appears to be the primary basis of support for the death penalty in the United States.”); see also Robert M. Bohm et al., *Knowledge and Death Penalty Opinion: A Test of the Marshall Hypotheses*, 28 J. RES. CRIME & DELINQ. 360 (1991); Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976); Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50:2 J. SOC. ISSUES 19–52 (1994).

13. Bohm, *supra* note 11, at 234.

14. A consequentialist theory maintains that in assessing the morality of something such as the death penalty, we need only appeal to its consequences. Non-consequentialism denies this, contending either that consequences play no role whatsoever in morality (this is extreme non-consequentialism) or alternatively, that while consequences play some role, they do not suffice (moderate non-consequentialism). Retributivism, as we discuss it in this essay, is a form of extreme non-consequentialism regarding the death penalty. There also are mixed retributivist positions, however, which are not forms of extreme non-consequentialism. We do not consider these positions here, but address them at length in our forthcoming paper: Laurie Anne Whitt, Alan W. Clarke & Eric Lambert, *Innocence Matters: How Innocence Recasts the Death Penalty Debate* (forthcoming 2002).

The retributivist contends that the death penalty is justified because it is being visited on those who are guilty and because the guilty deserve such punishment. If it could be proved that the death penalty cannot be (or at least is not) administered fairly,¹⁵ and in particular that this ultimate penalty exacerbates the problem of convicting the innocent, then even the most thoroughly committed retributivist should take this empirical fact into account. This problem suggests its own testable hypothesis: To what extent will knowledge about the problem of innocence affect those who posit their support for the death penalty primarily on retributivism? Our study indicates that educating people about the execution of innocents—what we call “the problem of innocence”—in fact may change retributivists’ position on the death penalty. This possibility has not been studied previously because the data on the conviction and execution of innocents has been generated mainly in the past decade.

We conducted a small pilot study, using a minimal stimulus and a convenience sample, to determine the plausibility of our theory.¹⁶ The study results indicate that when test subjects, many of whom are likely retributivists, are presented with information about the problem of innocence, the drop in support for capital punishment spans all points on the Likert scale.¹⁷ Across the scale, the majority of test subjects indicated a reduced intensity of support for capital punishment, while only a few subjects had a dramatic decrease in their level of support. Our study suggests that more rigorous testing may demonstrate

15. Some people will see this as merely a problem with the way that the death penalty is applied, and may argue that the problem is simply one of resource allocation: If the system were given more money, the problem of innocence (as well as other problems such as racial disparities) could be solved. Those people may agree with a moratorium on the death penalty solely in order to fix the financial problem so that executions can continue. Such arguments are beyond the scope of this paper and are not addressed herein. We do want to note, however, that we disagree with this position and suggest the following line of argument that we develop more fully elsewhere. One major problem with a moratorium-until-we-fix-the-system position is that it involves unwarranted policy experimentation with human lives. Once fixed, the system must be tested and can only be tested by risking further execution of innocents. Moreover, fixing the system along these lines is improbable except at great cost. By contrast, fixing the system by resorting to life imprisonment without the possibility of parole costs much less and runs no risk of killing innocent persons. See Laurie Anne Whitt, Alan W. Clarke & Eric Lambert, *Innocence Matters: How Innocence Recasts the Death Penalty Debate* (forthcoming 2002).

16. The essays that were used for the test stimulus are provided in the appendices to this article.

17. A Likert scale is a scaling model that assigns statements of attitude or belief to numbers on a 1-to-5 or 1-to-7 disagree/agree response scale. A Likert scale provides a way for respondents to quantify varying degrees of agreement or disagreement with a given statement, thereby measuring the extent to which a person agrees or disagrees with a question. Often, the scale will be numbered as follows: 1=strongly disagree, 2=disagree, 3=undecided, 4=agree, and 5=strongly agree. Each odd numbered scale has a middle value that is labeled as undecided or neutral. A total numerical value can be calculated from all the responses. When we say that a drop in support “spans all points on the Likert scale,” we mean that the original numbers people chose to represent their views on capital punishment changed to reflect a lesser degree of support after they were presented with information about innocence, and that that diminished support occurred for people who originally responded with anywhere from a one to a seven on the Likert scale.

that an individual's knowledge of "the innocence problem" can generate more profound changes in attitudes toward the death penalty than indicated by previous studies of the Marshall Hypotheses.

II.

PREVIOUS STUDIES OF THE MARSHALL HYPOTHESES

Previous attempts to verify Justice Marshall's Hypotheses have been inconclusive. The earliest, and perhaps most famous, attempt was a 1976 study by Sarat and Vidmar.¹⁸ The Sarat and Vidmar study was the first post-*Furman* analysis of attitudes about the death penalty that gave tangible, if qualified, support for the Marshall Hypotheses. The study was administered to 181 randomly chosen residents of Amherst, Massachusetts and consisted of two parts: 1) a series of questionnaires examining the test subjects' knowledge about and attitudes toward the death penalty, and 2) an essay designed to provide factual information about the death penalty.¹⁹ Participants were given one of four essays. The first essay focused on the weaknesses of the deterrence argument.²⁰ The second essay articulated a variety of criticisms of the death penalty, including the psychological effect of remaining on death row for years, racial and socioeconomic discrimination, and botched executions.²¹ The third essay combined information from essays one and two. The fourth essay was a control essay (a non-death penalty essay).²² The results of the study indicated that after reading an essay, the test subjects demonstrated a substantial reduction in their support for the death penalty.²³ The results were of limited applicability, however, due to the structure of the test. The experiment only lasted an hour and consisted simply of reading a short essay, without allowing time for reflection or discussion. Acquisition of the factual information did not induce a majority of the subjects to oppose the death penalty.

The Sarat and Vidmar study was followed in 1981 by a smaller Canadian study, administered by Vidmar and Dittenhoffer,²⁴ which produced similar results. This study surveyed only thirty-nine undergraduate students,²⁵ but otherwise improved on the Sarat and Vidmar test design by substantially increasing both the amount of information conveyed as well as the time allowed for absorbing that information.²⁶ Students in the experimental group were

18. Sarat & Vidmar, *supra* note 12.

19. *Id.* at 180–83.

20. *Id.* at 198–202.

21. *Id.* at 202–06.

22. *Id.* at 182–83.

23. *Id.* at 187–91.

24. Neil Vidmar & Tony Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*,

23 CANADIAN J. OF CRIMINOLOGY 43 (1981).

25. *Id.* at 46.

26. *Id.* at 45.

required to read a 3500 word essay.²⁷ The essays were similar in content to the essays distributed in Sarat and Vidmar, with the addition of updated social science data and additional arguments regarding the death penalty.²⁸ Students were required to read supplemental readings on reserve at the library as well.²⁹ Finally, students met in discussion groups prior to the final attitude measurement.³⁰ The Canadian study produced even more dramatic results than the Sarat and Vidmar study did. Approximately half the pretest subjects supported the death penalty.³¹ Following the study, 71% of the test subjects opposed the death penalty while only 24% continued to favor it.³² The small size of the study population, however, limited the generalizability of this investigation.³³

Of all the studies done on the Marshall Hypotheses since 1981, only the Vidmar and Dittenhoffer study resulted in a significant number of the test subjects changing their minds and opposing the death penalty poststudy. Other studies have either only confirmed slightly or entirely disproved the Marshall Hypotheses. The Ellsworth and Ross study, published in 1983, did not test the Marshall Hypotheses directly; it explored the psychology of attitudes and beliefs toward the death penalty.³⁴ A questionnaire was distributed to 500 Northern California residents.³⁵ The questionnaire asked general attitude questions about the death penalty in order to gauge the respondent's level of support for the death penalty, some factual questions in order to gauge the respondent's knowledge about the death penalty, and then questions to determine how the respondent's attitude towards the death penalty fit in with her general ideological positions.³⁶ The Ellsworth and Ross study found that "few death penalty supporters are swayed by information that it does not deter crime and is arbitrary and unfair."³⁷

A more recent study, conducted in 1991 by Bohm, Clark and Aveni,³⁸ provided qualified support for the Marshall Hypotheses, but produced the same

27. *Id.* at 47.

28. *Id.*

29. *Id.* at 48-49.

30. *Id.* at 47-48.

31. *Id.* at 50.

32. *Id.*

33. *Id.* at 53.

34. Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 *CRIME & DELINQ.* 116, 123 (1983) ("Our most fundamental purpose was to understand, in as many ways as we could, what people mean and what they feel when they say that they favor or oppose capital punishment.").

35. *Id.* at 123.

36. *Id.* at 122.

37. Samuel R. Gross, *American Public Opinion on the Death Penalty—It's Getting Personal*, 83 *CORNELL L. REV.* 1448, 1458 (citing Ellsworth & Ross, *supra* note 34, at 139-49). *See also* Ellsworth & Ross, *supra* note 34, at 162-63 ("Most of our respondents indicated that their attitudes would not change if their beliefs about deterrence were contradicted. Except for the small minority who were undecided on the issue, most of our respondents willingly admitted that their attitudes would remain the same even if it turned out that they were mistaken about deterrence.").

38. Bohm et al., *supra* note 12.

modest results as the original Sarat and Vidmar study. This study analyzed 272 students at a medium sized university in northeastern Alabama, of which 190 were in the "experimental," or noncontrol, group.³⁹ The experimental group took a death penalty class that met two hours a day, five days a week, for four weeks,⁴⁰ while the control group enrolled in other non-death penalty courses.⁴¹ The course covered a variety of issues related to the death penalty, including Supreme Court decisions, public opinion, deterrence (or the lack thereof), inequality of application, religious issues, cost, retribution, and the problem posed by innocence.⁴² The results were a modest but tangible decrease in support for the death penalty.⁴³ The majority of the students in the experimental group, however, still supported capital punishment at the end of the class.

A 1995 study by Wright, Bohm and Jamieson⁴⁴ also concluded that a majority of the public will continue to support the death penalty, at least in the abstract, despite attacks on its morality or efficiency. This latter study provided college students with information on a variety of aspects of the death penalty, including cost, racism, and lack of deterrence.⁴⁵ The experimental group consisted of thirty-eight students in a death penalty course and the control group consisted of sixty-eight students in an introduction to criminal justice course.⁴⁶ The Wright et al. study found a slight decrease in the level of support for the

39. *Id.* at 366. The experimental group consisted of students enrolled in a special class on the death penalty during the Spring of 1985, 1986, 1987, and 1988. A total of forty-four students were enrolled in the 1985 class, forty-one students in the 1986 class, fifty students in the 1987 class, and fifty-five students in the 1988 class. The study's control group consisted of eighty-two students who were enrolled in other courses. There were twenty-seven students in the 1985 control class, and fifty-five students were in the 1988 control class. Bohm et al. do not indicate in what type of classes the eighty-two students in the control group were enrolled, except that the students were enrolled in two courses offered at the same time as the 1985 and 1988 death penalty classes. It is also unclear if the classes taken by the control group covered the issue of the death penalty in any form. Additionally, it should be noted that none of the students involved in the study were assigned randomly to either the experimental or control groups. Because there were no random assignments of the students, the authors utilized a quasi-experimental design. Although quasi-experimental designs frequently are used in social science research, they are less rigorous in controlling for extraneous factors (e.g. self selection reasons, demographic characteristics, etc.) that may influence the outcome measures than true experimental designs are. In a true experimental model, the students would have been randomly assigned to experimental and control groups. For a more in depth discussion of experimental and quasi-experimental research designs, see, for example, PETER H. ROSSI & HOWARD E. FREEMAN, *EVALUATION: A SYSTEMATIC APPROACH* 261-329 (5th ed. 1993).

40. The course met for a total of forty hours, meeting two hours a day, five days a week, for four weeks. The assigned text for the course was HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* (3d ed. 1982). Bohm et al., *supra* note 12, at 367.

41. Bohm et al., *supra* note 12, at 366.

42. *Id.* at 367.

43. *Id.* at 373-77.

44. Harold O. Wright, Jr. et al., *A Comparison of Uninformed and Informed Death Penalty Opinions: A Replication and Expansion*, 20 AM. J. OF CRIM. JUST. 58 (1995).

45. *Id.* at 63.

46. *Id.* at 61.

death penalty, poststudy.⁴⁷ Significantly, the study's results indicated that fewer people would support the death penalty if presented with an alternative punishment of guaranteed life without possibility of parole.⁴⁸

As these examples illustrate, the studies undertaken thus far provide only qualified support for the Marshall Hypotheses. As more people rely on retribution as a justification for capital punishment, however, researchers believe that new information on the death penalty will have little impact on public opinion. Studies testing Justice Marshall's claim that empirical research would have no effect on those who support capital punishment on retributivist grounds are fewer, but, in contrast with the aforementioned studies, the studies addressing this theory indicate strong support for the proposition. None of the studies discuss innocence in as much detail, however, as our current study.

The Sarat and Vidmar study tested Marshall's theory on the effect of empirical research on support of capital punishment.⁴⁹ The subjects were classified as either "high" or "low" in their level of endorsement of retribution based on their responses to the retribution items in the questionnaire.⁵⁰ Of the subjects classified as "high" in their endorsement of retribution, their change in support for the death penalty was minimal, while those who were "low" in their endorsement of retribution showed a more significant alternation in their support for the death penalty.⁵¹ Sarat and Vidmar concluded that the data analysis "appear[ed] to confirm" Marshall's belief that empirical data would not affect those who based their support of the death penalty on retribution.⁵² The essays distributed by Sarat and Vidmar focused only on the death penalty's limited deterrent effect, arbitrariness, sporadic application, discriminatory application, and psychological and physical aspects.⁵³ The Sarat and Vidmar essays did not discuss the problem of innocence at all.

The Ellsworth and Ross study did not test directly Marshall's claim regarding the effect of empirical evidence on retributivists. But it did find that, when exposed to new information, supporters of the death penalty whose attitudes were not based on retributive principles were more likely to change their level of support than were supporters who relied more heavily on retributive justifications for their support of the death penalty.⁵⁴ The Ellsworth and Ross study did ask if people believed that innocent people had been

47. *Id.* at 67.

48. *Id.* at 81. The Wright et al. study found an increase, poststudy, in the experimental group's support for life in prison without possibility of parole as an alternative to the death penalty. *Id.* at 73, 76.

49. Sarat & Vidmar, *supra* note 12, at 191-94.

50. *Id.* at 192.

51. *Id.* at 193-94.

52. *Id.* at 194.

53. *Id.* at 182, 198-206.

54. Ellsworth & Ross, *supra* note 34, at 161.

executed,⁵⁵ but Ellsworth and Ross did not present any information to their test subjects about the number of people who had been exonerated or the high rate of error in capital proceedings.

The Bohm, Clark and Aveni study did test the validity of Marshall's theory on empirical knowledge and retribution using just the experimental group students from the 1985 and 1988 classes.⁵⁶ Students who supported the death penalty were classified as "high" or "low" on retribution based on their agreement with an eight item list of retributive statements.⁵⁷ Those with "high" retribution scores had statistically insignificant changes in their pretest and posttest level of support for the death penalty, while those with "low" retribution scores had a significant drop in their level of support.⁵⁸ This study did present the students with information about the problem of innocence, but, as discussed below, the results are of limited applicability since the study was administered before much of the new data on innocence was generated.

None of the aforementioned studies presented their test subjects with all the possible reasons for opposing or supporting the death penalty. In particular, none of these studies separately examined the effect that knowledge about the problem of innocence might have on people's level of support for the death penalty. Since the problem of innocence in capital cases directly implicates retributive theory, the public's confidence in capital punishment may be particularly sensitive to information about wrongful convictions. Such information also may undercut the public's confidence that the death penalty can be fairly administered.

III.

THE PROBLEM OF INNOCENCE

A. *Defining Innocence*

For capital defenders, innocence has many definitions. Innocence does not merely refer to a situation where the State has convicted the wrong person. The death penalty's exquisitely refined jurisprudence has spawned the conceptually odd concept of innocence of the death penalty (or more properly, innocence of a capital crime). Innocence in the death penalty context can mean one of three things: 1) actual complete innocence of any form of murder, 2) innocence of a capital crime, or 3) innocence of the death penalty. Actual complete innocence refers to a situation where the person has not committed the crime of which she

55. Approximately 46% of death penalty supporters believed that innocent people had been executed, compared to 52% of the subjects who were undecided about the death penalty and 69% of death penalty opponents. Ellsworth & Ross, *supra* note 34, at 142.

56. Bohm et al., *supra* note 12, at 377–78.

57. *Id.*

58. *Id.* at 378.

is accused. Innocence of a capital crime is when, although the person has committed a homicide, she is ineligible for the death penalty because the crime does not meet the definitional criteria for a capital crime. Finally, innocence of the death penalty is where a defendant, although found guilty of a capital crime, may escape the death penalty if the jury were persuaded that the capital crime was not sufficiently aggravated to merit the death penalty (or is sufficiently mitigated such that the death penalty is not merited).⁵⁹

Although the problem of innocence in all its forms is important, our study focuses on the first type of innocence—actual complete innocence of any form of murder and, correspondingly, of the death penalty. The number of people mistakenly convicted of crimes they did not commit is probably larger than the number of known exonerations. Even though a significant number of people have been exonerated and released from death row, a 2000 Liebman, Fagan, West, and Lloyd study indicates that “serious and geographically dispersed error pervades the capital punishment machinery,”⁶⁰ making it likely that there are innocent people on death row. This important study combines cases involving actual complete innocence, and those that involve innocence of the death penalty.⁶¹

The study’s findings suggest that the systemic problem of serious error, most clearly illustrated by capital cases resulting in reversal due to new evidence of an accused’s innocence, “substantially undermines the reliability of the guilt finding or death sentence imposed at trial.”⁶² Additionally, systemic error makes it improbable that a state with low reversal rates has less real error. Our focus, however, is not on the disturbing problem of widespread serious error in capital trials. As important as that issue is, many people will see rough justice in executing a murderer who may not quite have fit the criteria and who should have received a lesser sentence. Few would argue that we should execute the completely innocent.⁶³ Thus, our inquiry is whether attitudes would change if it

59. See Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus* (pt. 2), 30 U. RICH. L. REV. 303, 338–431 (1996) (discussing innocence and the death penalty).

60. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000).

61. *Id.* at 1852.

62. *Id.* at 1850.

63. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court found no due process violation in the execution of someone who was arguably innocent. In *Herrera*, petitioner was a death row inmate who possessed no other constitutional claim beyond newly discovered evidence which, if believed, might prove his innocence. The court allowed the execution to proceed but left open the possibility that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional.” *Id.* at 417. The burden here of requiring “truly persuasive” evidence of actual innocence is both very high and singularly ill defined. Although it cannot be said that the *Herrera* majority advocates for execution of the innocent, the nearly unscalable obstacle that they have placed in the path of innocent death sentenced prisoners suggests a toleration for the execution of the innocent in that court. *Herrera* was executed by the State of Texas on May 12, 1993. Death Penalty Information Center,

could be shown that substantial numbers of innocent people are being sentenced to death.

B. *Research on Innocence*

There have been remarkable advances in our knowledge about the death penalty since the latest of the aforementioned studies was completed. Perhaps the most startling new information is the revelation that the risk of executing innocent people is far greater than most people ever imagined.

Researchers have found the ratio of the number of people executed to the number of those released because of actual innocence to be one exoneration for every five to seven executions.⁶⁴ ⁶⁵ These are all proven cases of innocence using the most conservative criteria possible.⁶⁶ It seems likely, however, that the number of innocent people on death row is even higher than the number of known exonerations suggests due to strict state procedural default rules and the high rate of error in capital sentencing.

Some states' procedural rules make the discovery of innocence much more difficult.⁶⁷ The death penalty is imposed in thirty-nine federal jurisdictions. Some states, like Virginia, almost never overturn a death sentence. Virginia's reversal rate in death cases is the nation's lowest—6%—compared with the national average of about 33%.⁶⁸ This is in part because Virginia's stringent procedural default rule refuses to consider newly discovered evidence that may prove a defendant's innocence if the evidence is not produced within twenty-one days after the conviction is handed down.⁶⁹ It is the most rigid procedural

Executions in the U.S. 1993, at <http://www.deathpenaltyinfo.org/dpicexec93.html>.

64. Bruce Shapiro reports that since the reinstatement of the death penalty in 1976, "seventy-five convicted people have been exonerated and freed from death row." Bruce Shapiro, *Wrongful Deaths*, THE NATION, Dec. 14, 1998, at 6. There is "one exoneration for every seven executions, a staggering indicator of the unreliability of the criminal justice process." *Id.* An earlier study, conducted in 1996, showed the figure to be an even higher one in five. Michael L. Radelet et al., *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 COOLEY L. REV. 907, 916 (1996).

65. We used the correspondence of exonerations to executions in our test stimulus essay because that is the way Radelet and Bedau, as well as others, have reported their findings in the scholarly literature. See e.g., Radelet et al., *supra* note 64; Radelet & Zsembik, *infra* note 85; Radelet & Bedau, *infra* note 100.

66. Radelet et al. identify an additional five prisoners executed throughout the country in recent years despite doubts as to their guilt. "We also limit this study to cases in which the innocent prisoner has been released from death row." Radelet et al., *supra* note 64, at 914.

67. See Clarke, *supra* note 59, at 352–53.

68. Stephen C. Fehr, *Virginia's Efficient System of Death*, WASH. POST, Apr. 4, 1999, at C1.

69. VA. SUP. CT. R. 1:1. Virginia is in the process of mitigating some of the harsher aspects of this rule. As of May 2, 2001, a limited exception allows certain prisoners to seek DNA testing to prove actual innocence, if, and only if, the evidence or the testing was unavailable at the time of trial. VA. CODE ANN. § 19.2-327.1 (Michie 2001). Effective November 15, 2001, the Virginia Supreme Court will have the power to issue a writ of actual innocence. VA. CODE ANN. § 19.2-327.2 (Michie 2001). It is uncertain how much this legislation will help persons who do not have DNA evidence that might exonerate them, and it will not help those whose trial counsel failed to

default rule in the nation⁷⁰ and it prevents meritorious issues of any kind from being heard on any basis other than a procedural one. Additionally, commentators have identified Virginia's tolerance of substandard defense lawyering and restrictions on the ability to petition the court for a new trial based on newly discovered evidence as factors bearing upon Virginia's low rate of reversals on appeal.⁷¹ Ironically, there appears to be no constitutional impediment against the execution of innocent people,⁷² except in extraordinary cases of "truly persuasive demonstration[s]" of "actual innocence."⁷³ Thus, Virginia commits no legal error even though its rules limit the possibility of discovering erroneous convictions in capital cases. Although states vary in their tolerance of error in capital cases, Virginia's high execution rate and low reversal rate makes it an outlier.⁷⁴ Nevertheless, other states also are markedly efficient in their death penalty machinery.⁷⁵

In a more forgiving state, where claims of innocence are allowed to be heard, people inevitably will discover that some of those who have been sentenced to death actually are innocent. This does not mean that such a state will not execute the innocent; it only means that there will be a better opportunity to discover erroneous capital convictions. The state of Illinois is illustrative. As of spring 1999, Illinois had executed twelve persons.⁷⁶ As of December 2000, Illinois had exonerated thirteen others from death row.⁷⁷ Thus, Illinois has freed more individuals than it has executed. This fact does not prove that the system

seek available DNA evidence. It appears that the new law will soon be tested as the Newport News Commonwealth's Attorney has agreed to allow DNA testing of a prisoner convicted fourteen years ago of rape, and a Newport News Circuit Judge has approved use of DNA testing in this case. Tom Jackman, *DNA Test Ordered for Va. Inmate*, WASH. POST, Aug. 2, 2001, at B1.

70. See Clarke, *supra* note 59, at 367.

71. See Liebman et al., *supra* note 60, at 1858 n.57.

72. "We may assume, for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold for showing such an assumed right would necessarily be extraordinarily high." *Herrera*, 506 U.S. at 417.

73. *Id.* The opinion in *Herrera* is not a model of clarity. Some people read the opinion as allowing even the probably innocent to be lawfully executed. If the cited language does provide a constitutional mechanism for exoneration of the truly innocent (absent independent constitutional claims other than those grounded solely in the Eighth Amendment), it is not clear what evidence could possibly satisfy the test of "truly persuasive" evidence.

74. See Liebman et al., *supra* note 60, at 1858.

75. See Clarke, *supra* note 59, at 366 n.312.

76. See Editorial, *Innocents on Death Row*, N.Y. TIMES, May 23, 1999, at A16. See also Anne E. Duprey, *Virginia's "21 Day Rule" and Illinois' Death Row Debacle: A Comparative Study in Capital Justice and the Relevance of Innocence*, 10:2 VA. CAP. CASE CLEARINGHOUSE 82, 85 (1998) (reporting that as of Spring 1998, nine death row inmates had been found innocent and freed and eleven had been executed).

77. Death Penalty Information Center, *Innocence and the Death Penalty*, available at <http://www.deathpenaltyinfo.org/innoc.html#state>.

in Illinois works, however; two of the people freed were exonerated as a result of investigations conducted by a journalism class at Northwestern University,⁷⁸ not as a result of any actions by people involved with the criminal justice system. Florida also has released twenty-one people from death row since 1972.⁷⁹ The situations in Illinois and Florida support the conclusion of the Staff Report for the House Judiciary Committee that, “[j]udging by past experience, a substantial number of death row inmates are indeed innocent and there is a high risk that some of them will be executed. The danger is inherent in the punishment itself and the fallibility of human nature.”⁸⁰

Close analysis of the judicial system by legal scholar Samuel R. Gross demonstrates that the problem of executing the innocent is systemic, a byproduct of the peculiar nature of capital punishment rather than something that can be corrected by tweaking legal procedures.⁸¹ Professor Gross convincingly argues that “the nature of capital cases multiplies the likelihood of error.”⁸² One factor that increases the incidence of error is the fact that many death penalty cases are infamous, and infamous cases generally get sensationalized in a way that easily creates room for error. Sensational homicides that are heavily publicized can be easily affected by the tides of public opinion, especially in situations where no potential juror could have avoided receiving highly charged information about the details of a given case. Other factors, however, stem solely from “the demand for the death penalty itself.”⁸³ The fact that a person’s life is on the line in a given case changes the dynamic from the start since

the death penalty itself undermines the accuracy of our system of adjudication, [and] ‘tends to distort the course of the criminal law.’ As Justice Frankfurter put it: ‘When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly. The effect . . . is very bad.’ If true, abolishing capital punishment would reduce the number of erroneous convictions of all sorts in those cases in which we now seek the death penalty, and not merely limit the harm of those errors that do occur.⁸⁴

If Professor Gross is correct, and his analysis appears plausible, the need to measure the effects of his propositions on the attitudes of the general public is clear because the incidence of execution of the innocent is much higher than we

78. Duprey, *supra* note 76, at 88.

79. The death row inmates were released after “evidence surfaced that they were innocent, or at least wrongly convicted because of serious judicial errors.” See Sydney P. Freedberg, *Ex-Death Row Inmate Gets Walking Papers*, ST. PETERSBURG TIMES, Mar. 17, 2000, at A1.

80. Radelet et al., *supra* note 64, at 909.

81. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common In Capital Cases*, 44 BUFF. L. REV. 469 (1996).

82. *Id.* at 472.

83. *Id.* at 475.

84. *Id.* at 475 (citations omitted).

previously thought.⁸⁵ This fact, combined with the systemic nature of significant error in the judicial process when it comes to capital punishment, argues for considerably more study.

C. *The Importance of Innocence*

Studies and poll data indicate that people believe it is wrong to execute the innocent. The 1995 Taylor, Schwartz, Russek, and Sechrest study surveyed 286 individuals who were psychology students, staff, and faculty at the University of Arizona and members of the community from outside the University.⁸⁶ Forty percent of those surveyed supported the death penalty, 56% opposed the death penalty, and 4% did not answer.⁸⁷ More than 90% of those surveyed, however, felt that it would be wrong to execute a person on death row where there was a "serious possibility" of innocence.⁸⁸ In a similar survey of 707 undergraduate students, Weinstock and Schwartz⁸⁹ found that 65% of the students felt that innocent individuals had been executed.⁹⁰ Moreover, they found that 70% of respondents felt it was unacceptable to execute any innocent person.⁹¹ A poll conducted by the National Law Journal and DecisionQuest in 2000 found that recent exonerations of death row inmates, both by DNA tests and outside

85. See *id.* at 470 n.4. Professor Gross indicates that as late as 1978, Frank Carrington wrote: 'our legal system examines capital convictions with such an intense scrutiny that . . . when there is the slightest doubt of guilt (even after conviction), a commutation will usually result, or the individual will otherwise be spared, thus lessening the chance of execution the innocent.'

FRANK CARRINGTON, NEITHER CRUEL NOR UNUSUAL 123 (1978). Notwithstanding Carrington's assertions about the availability of executive clemency, in practice that safety valve has become unavailable. See, e.g., Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-91); Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1983); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency In Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289 (1993); Joseph B. Schimmel, *Commutation of the Death Sentence: Florida Steps Back from Justice and Mercy*, 20 FLA. ST. U. L. REV. 253 (1992). Thus, the legal system misses cases of innocence in capital cases, and unlike earlier eras, the error is not corrected by orders of executive clemency.

86. David Weinstock & Gary E. Schwartz, *Executing the Innocent: Preventing the Ultimate Injustice*, 34 CRIM. L. BULL., 328, 335-37 (1998) (citing Christopher Taylor et al., *A Matter of Life or Death: Organizational Change in the Real World*, J. EDUC. MGMT. (1998)).

87. *Id.* at 335.

88. *Id.* at 336.

89. *Id.* at 338. The sample was 55% female and 45% male. The average age was nineteen, and the overall age range was from seventeen to fifty-four. Fifty-seven percent indicated that they supported the death penalty and 17% opposed the death penalty.

90. *Id.* at 339. Of those who supported the death penalty, 63% believed innocent individuals had been executed. Of those who opposed the death penalty, 82% held the same belief.

91. *Id.* at 340. Of those who supported the death penalty, 61% believed it was unacceptable to execute any innocent people at all. Of those who opposed the death penalty, 94% held the same belief.

investigations, have made 31% of potential voters more inclined to vote for life imprisonment instead of the death penalty.⁹²

Historically, proof that innocent people are being executed has affected the level of support for the death penalty. For example, Michigan abolished the death penalty in 1846, due in part to a widespread revulsion at the execution of an innocent man in neighboring Ontario, Canada.⁹³ In 1837, Patrick Fitzpatrick was hanged for the rape of a nine year old girl.⁹⁴ Doubts must have existed about Fitzpatrick's guilt, because people on both sides of the border protested the sentence.⁹⁵ A clemency petition was signed by magistrates, ministers, and members of the jury that convicted him. Three years after the execution, another man confessed to the rape.⁹⁶ The Detroit newspapers used the incident to oppose capital punishment.⁹⁷ The Fitzpatrick case seemed to prove to opponents of capital punishment the inability of the legal system to prevent the execution of innocent persons.⁹⁸

The problem of innocence can be a strong challenge to the philosophical arguments in support of the death penalty. Unlike consequentialist arguments, which rely on the lack of deterrence,⁹⁹ cost, and arbitrary and capricious application, the problem of innocence directly undermines the retributive basis for the death penalty.¹⁰⁰ If, as we hypothesize, people who base their support for capital

92. David E. Rovella, *Scandal Damages Cop's Credibility*, NAT'L L. J., Dec. 11, 2000, at A1.

93. See Robert Ankeny, *Gallows Tale with a Twist*, DETROIT NEWS, May 23, 1985, 1A.

94. *Id.* at 10A.

95. *Id.*

96. *Id.*

97. *Id.* at 1A.

98. *Id.* at 10A.

99. Some argue that the death penalty has little deterrent effect because of its racist application. Cf. Death Penalty Information Center, *Time Magazine Poll, 1997*, available at <http://www.deathpenaltyinfo.org/Polls.html>; Death Penalty Information Center, *Newsweek Poll, 1997*, available at <http://www.deathpenaltyinfo.org/Polls.html>; ABC News Poll, *Press Release, 4/24/01, embargo 5/2/01*, available at <http://www.deathpenaltyinfo.org/Polls.html> (indicating prevailing beliefs that the death penalty is not a deterrent to murder and is racist in its application). Many studies have demonstrated that racism also infects states' capital punishment regimes. For studies demonstrating racial disparities in death sentencing in the present U.S. capital punishment regime, see, for example, David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984). This issue may constitute another important problem in the administration of the death penalty that could affect the attitudes of retributivists in the same way that innocence does. Our focus, however, is solely on the problem of innocence and we do not analyze whether racial disparities would also affect the attitudes of death penalty supporters.

100. See Michael L. Radelet & Hugo Adam Bedau, *ABA's Proposed Moratorium on the Death Penalty: The Execution of the Innocent*, 61 L. & CONTEMP. PROBS. 105 (1998). For a sophisticated analysis of the retributive basis for the death penalty and the problems that execution of innocent people poses for retributive theories, see Richard O. Lempert, *Desert and Deterrence*

punishment on retribution are less likely to be swayed by consequentialist arguments, then investigation of issues focusing directly on retributive justifications appears important. Such investigation is important both because of the increasing number of people who are adopting a belief in retribution as a basis for retention, and because other, consequentialist, arguments are unlikely to have much effect on this group. Scholars actively working in the area have called for research into the relative effect on attitudes that this new research brings to the scholarly endeavor.¹⁰¹

D. Prior Studies on the Effect of Dissemination of the Issue of Innocence on Support for Capital Punishment

We have not found any studies that directly test the impact of innocence on support for the death penalty.¹⁰² A few studies indirectly have examined the impact of this issue, but, as we argue below, the fact that innocence was conflated with other issues, and the fact that new studies demonstrate far more instances of innocent people being convicted of capital crimes than was previously thought have limited the relevance of these studies to our thesis.

The Bohm, Clark, and Aveni study is the only study to present the issue of innocence to its test subjects. Innocence was only one of many subjects covered by the experimental group who participated in the death penalty class. The course also covered the costs of the death penalty, racist application, lack of deterrence, and other issues related to capital punishment.¹⁰³ There is no

An Assessment of the Moral Bases of the Case for Capital Punishment, 79 MICH. L. REV. 1177, 1182-83 (1981). Professor Lempert states:

Retributivism is also haunted by those executions of the innocent which inevitably occur if the death penalty is allowed. . . . Retributivism, on its own terms, allows life to be taken only when death is deserved; it does not tolerate killing as a means to some greater social good. Retributivists are proud of their Kantian heritage, which demands that life be treated only as an end. Thus, however good a just punishment system and however much such a system demands the death penalty, the philosophy of retributivism apparently forbids the sacrifice of innocent lives as a condition for the maintenance of such a system.

101. As things stand now, we have little or no knowledge about the effect of information about wrongful convictions of capital defendants on the public's support for the death penalty. Here as elsewhere, the Marshall Hypotheses . . . remains untested in recent years. In the decade since our research on miscarriages of justice in capital cases was first published, we have some vivid anecdotal evidence from various conversations and courtroom testimony showing that jurors in capital trials who learn about our work find themselves rethinking their support for the death penalty. However, more systematic research is needed before we can gauge the effect of such knowledge on various constituencies.

Radelet & Bedau, *supra* note 100, at 122.

102. See Radelet & Bedau, *supra* note 100, at 122 and accompanying text. The authors indicate that there were no such studies as of the date of their article in 1998. Informal discussions with other death penalty scholars indicate that there has been no such testing of the Marshall Hypotheses.

103. Bohm et al., *supra* note 12, at 367.

indication as to the order in which the subjects were covered, or to the amount of time and emphasis given to each area, or, more specifically, to the subject of innocence. This lack of clarity makes it difficult to tell what impact providing information on the issue of innocence had on support for the death penalty. The small changes in support for the death penalty observed among some of the students in the course could have been due to the issue of innocence, or could have been due to a factor other than innocence.

Even if the issue of innocence had been covered in depth, most of the critical studies on the issue of innocence were published in the 1990s¹⁰⁴ after the completion of the Bohm, Clark and Aveni study. The widely publicized debacle of the exoneration of thirteen death row inmates in Illinois and the resulting moratorium occurred in 1998. The question of the impact of the innocence issue on support for capital punishment therefore cannot be answered by the Bohm et al. study since, given this new data, innocence may have a much greater impact on attitudes about the death penalty than previously has been supposed. No study to date provides clear and unambiguous data on the impact of the innocence issue on attitudes supporting or opposing the death penalty, leading to the inevitable conclusion that the effect of innocence on support for the death penalty needs to be studied directly.

IV.

THE RESULTS OF AN EXPLORATORY (AND PRELIMINARY) EMPIRICAL STUDY ON THE EFFECT OF INNOCENCE ON SUPPORT FOR THE DEATH PENALTY

A preliminary nonprobability study was conducted to test the effect of innocence on a person's support for or opposition to the death penalty. The purpose of this preliminary study was to determine whether further, more rigorous testing would be worthwhile. The study utilized the purposive sampling method, where test subjects are selected according to their availability and willingness to be part of the study, and according to whether they fit particular criteria discussed below.

A. Sample and Methods

We surveyed criminal justice majors at a regional Midwestern four year teaching university¹⁰⁵ with an enrollment of slightly more than 9000 students.

104. *See supra* Part II.

105. Criminal justice majors were selected for two reasons. First, they were a convenient group to sample. Second, the data used in this study is part of a larger, ongoing research project. Both criminal justice and non criminal justice majors will be surveyed in the larger study. One of the purposes of the larger study is not only to test the Marshall Hypotheses, but also to test what differences, if any, exist between criminal justice and non criminal justice majors regarding knowledge about crime, crime rates, reasons for punishment, and the death penalty. Finally, we intend to do far more rigorous testing of the theory that innocence has a greater impact upon

The university is a four year, regional state institution. It is located in a rural area. The student body is mainly comprised of traditional, young, full time students. The vast majority of the students are from Midwestern urban areas and most are first generation college students. The university was selected because we had access to the students.

A nonprobability (nonrandom) purposive sampling design was utilized.¹⁰⁶ In purposive sampling, a researcher selects subjects that are available and willing to be part of the study and who fit particular criteria. The criteria for selection of students for this study were enrollment in a criminal justice course in the Fall 1999 semester and a declared criminal justice major. In the Fall 1999 semester, there were more than thirty criminal justice courses offered. Approximately half of the criminal justice classes were selected for the administration of the survey. All the criminal justice instructors who were contacted granted us permission to administer the survey in their classes. The class sizes of the courses selected were between fifteen and thirty-five students. Students in the selected courses were given the opportunity to participate in the study by voluntarily completing the survey during class time. We explained the nature of the survey and provided directions to the students. We stressed that the survey was completely voluntary. Additionally, we made it clear that survey responses would be anonymous. Approximately 97% of the students present in each of the selected classes took the survey.

The survey consisted of three sections. The first section consisted of questions designed to measure the respondent's knowledge of crime, attitudes toward punishment, and their degree of support for the death penalty. Respondents were presented with a series of statements in which they selected a response of "strongly agree," "agree," "neutral," "disagree," or "strongly disagree" (a five point Likert-type response scale). The statements discussed crime, crime rates, reasons for punishment, and issues surrounding the death penalty. There were also several questions which inquired about religious views and religious objections to the death penalty, and the degree of support for or opposition to the death penalty. The first section included measures for demographic characteristics, such as age, race, gender, and academic standing (i.e. freshman, sophomore, etc.). A total of forty-eight questions were asked in the first section. Only the variable measuring the degree of support for the death

peoples' attitudes towards the death penalty than other issues, such as lack of deterrence, racism, costs, and incapacitation.

106. Nonprobability means that there was no known mathematical chance of being selected. Purposive sampling is also known as judgmental sampling. See, e.g., W. LAWRENCE NUEMAN, *SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES* 195-202 (4th ed. 2000). Since it was a nonprobability sample, the results cannot be generalized to the larger population. Generalization is not crucial, however, since this study is exploratory. See, e.g., W. LAWRENCE NEWMAN AND BRUCE WIEGAND, *CRIMINAL JUSTICE RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES* 18-21 (2000) (outlining the nature and purpose of exploratory studies in social science research).

penalty is used in this study. Support for the death penalty is measured with seven response categories, ranging from very strongly in favor of the death penalty to very strongly opposed to the death penalty.

The second section consisted of an essay for the respondent to read. There were three different essays that a respondent could have read. Each essay was three to four pages in length and took about eight to twelve minutes to read. The first essay was a control essay which discussed the philosophical basis for punishing those who violate the criminal law but did not discuss the death penalty. This essay was basically concerned with why society punishes criminals and consisted of a general, brief discussion of the major ideologies of punishment (i.e. retribution, rehabilitation, etc.). The second essay presented empirical evidence on the deterrent effect of the death penalty on violent crimes, particularly murder, in a simple and concise format. This essay informed the respondent that there is little evidence that the death penalty deters violent crime. The third essay presented the most recent available information and data on the frequency and probability of sentencing innocent individuals to death.

The third section of the survey consisted of questions measuring the degree to which students believed their attitudes on the death penalty, deterrent effect, and chances of executing an innocent person had changed after reading the assigned essay. In addition, the question asked in section one regarding one's degree of support or opposition to the death penalty was asked again. Only that question is used in this study.

Since there are three different essays, there are three different versions of the survey instrument. Based upon the classical experimental design,¹⁰⁷ the surveys were distributed randomly so that a student had an equal chance of receiving a survey containing each one of the three essays; in other words, each student had a known, equal mathematical probability of receiving one of the three essays. Thus, although the sample group was not randomly selected, the assignment to one of the three groups was random. This is illustrated by the fact

107. A classic random experimental design was utilized. The classical random experimental design is considered the most rigorous design for testing the effects of an experimental stimulus. The random experimental design controls for research effects (the effect of the research itself on the subjects) and the effects of extraneous confounding factors (e.g. uncontrolled selection, interfering events, maturational trends, etc.). In the random experimental design, subjects are randomly assigned to experimental and control groups, as was the case in this study. A pretest survey is conducted of the relevant outcome area in order to set a benchmark by which the degree of change following the introduction of the stimulus can be measured. The stimulus is introduced to the experimental group but not to the control group. The stimulus is postulated to cause a change in a given area among those who experience it. The final component of a random experimental design is the posttest. The posttest measures the change in the selected area for both the control and experimental groups. If the stimulus has an effect, there will be a significant change in the before and after measures for the experimental group but not for the control group. For a more in depth discussion of the classical random experimental design and its strengths, see, for example, PETER H. ROSSI ET AL., *EVALUATION: A SYSTEMATIC APPROACH* 261–97 (6th ed. 1999); EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 232–352 (8th ed. 1992).

that of the 324 students surveyed, 106 (33%) received the control essay, 108 (33%) the innocence essay, and 110 (34%) the deterrence essay.

At the Midwestern university where the survey was done, approximately 99% of students enrolled in criminal justice courses are criminal justice majors. Of the 324 students surveyed who were enrolled in the selected criminal justice courses, 320 were criminal justice majors.¹⁰⁸ The 320 surveys from criminal justice majors were selected for analysis in this study. Although there were three essays randomly assigned to the students, only the innocence and control essays are pertinent here. The focus of this study is the impact of innocence on support for capital punishment.¹⁰⁹ The issue of deterrence, although important in the overall death penalty debate, is not the focus here. The 110 students who read the deterrence essay were dropped from the analysis,¹¹⁰ leaving 210 criminal justice students as the source of the analysis. As previously indicated, 103 of the respondents read the control essay and 107 read the innocence essay, or rather, the experimental stimulus. Those who read the innocence essay became the experimental group.

B. Results

Descriptive statistics were run for the 210 criminal justice majors surveyed. The average age was 22.61 years,¹¹¹ with a range from eighteen to forty-three. The majority (87%) of students were twenty-four or younger. The group was racially mixed and ranged from first year students to masters students.¹¹² The

108. There are approximately 600 criminal justice majors at the university, of which 320 returned the survey. Therefore, approximately 50% of the criminal justice majors at the selected Midwestern university were surveyed.

109. Death Penalty Information Center, *CNN/USA Today/Gallup Poll Release 6/30/00*, available at <http://www.deathpenaltyinfo.org/Polls.html#CNN> (finding that 80% of Americans "believe that an innocent person has been executed in the United States in the past five years."). This information suggests that the inquiry into whether the innocence issue is partially responsible for the drop in support for the death penalty is both a relevant and important question.

110. We did examine the effect of the deterrence essay and, consistent with other earlier studies, found a small positive impact. This very small effect on support of capital punishment by providing information on deterrence is not the focus of this study.

111. The arithmetic mean is reported. The arithmetic mean is simply the summing of all the case values and dividing by the total number of cases. It represents the average value for the variable of interest. The standard deviation, a measure of dispersion, for the age of the 210 respondents is 3.05. This standard deviation value indicates that about sixty-eight percent of the respondents range between 19.56 and 25.66 years of age. The median age of respondents in this study was twenty-two years old. For more on the mean, standard deviation, and median, see, for example, FREDERICK GRAVETTER & LARRY WALLNAU, *STATISTICS FOR THE BEHAVIORAL SCIENCES: A FIRST COURSE FOR STUDENTS OF PSYCHOLOGY AND EDUCATION*, 70-128 (4th ed. 1996); JACK LEVIN & JAMES FOX, *ELEMENTARY STATISTICS IN SOCIAL RESEARCH* 73-115 (8th ed. 2000).

112. The 210 criminal justice students were asked their race. Approximately 13% were African-American, 78% were Caucasian, 4% were Hispanic, and 5% were from other racial groups. The racial profile of the 210 students in the study is very similar to the racial profile of the entire criminal justice major student population. Approximately 10% of those surveyed had freshman standing, 13% were sophomores, 31% percent were juniors, 40% were seniors, and 6%

students' gender and program were representative of the overall student body in the criminal justice program.¹¹³

Before reading the assigned essay, all 210 students were asked a question concerning their level of support for or opposition to the death penalty using a seven point Likert-type response scale ranging from "very strongly support" to "very strongly oppose."¹¹⁴ The results are reported in Table 1 below. Approximately 15% of the students were very strongly in favor of the death penalty, 20% were strongly in favor, 25% were somewhat in favor. Twelve percent were "uncertain" or "undecided," 10% were "somewhat opposed" and nearly 9% were "strongly opposed." Another 9% were "very strongly opposed" to the death penalty. When collapsed into those favoring, uncertain, and opposed to the death penalty, 60% of the students supported the death penalty, 12% were uncertain, and 28% opposed the death penalty.¹¹⁵

After reading either the assigned control or innocence essay, the students were asked again about their degree of support for or opposition to the death penalty. The responses to this question are summarized in Table 2 below.

were graduate students. More seniors than freshmen were sampled when compared to the academic standing of all the criminal justice majors. This is probably the result of the criminal justice courses selected. Senior level criminal justice courses were oversampled, while freshman level criminal justice courses were undersampled. This is not a critical issue given that this was an exploratory study.

113. Of the 210 students, approximately 61% are male and 39% are female. The Criminal Justice Program at the Midwestern university has three undergraduate academic tracks and a graduate program. (A track is a concentration of courses within the field.) The three undergraduate tracks are Corrections, Generalist, and Law Enforcement. The graduate program is a Masters of Science in Criminal Justice Administration. Forty-four percent of the surveyed students were in the Law Enforcement track, 35% were in the Generalist track, 15% were in the Corrections track, and 6% were in the graduate criminal justice program. This breakdown reflects the distribution in the overall program.

114. The criminal justice students were asked to check one of seven response categories that best reflected their attitude toward the death penalty. The seven response categories were: 1 = I am very strongly in favor of the death penalty; 2 = I am strongly in favor of the death penalty; 3 = I am somewhat in favor of the death penalty; 4 = I am uncertain about the death penalty; 5 = I am somewhat opposed to the death penalty; 6 = I am strongly opposed to the death penalty; and 7 = I am very strongly opposed to the death penalty.

115. These findings are slightly lower than the current national figures. Generalized support for the death penalty in the abstract has fallen from 77% in 1993. See, e.g., Lisa Holland, *Demographic and Attitudinal Correlates of Support for Life Without Parole as an Alternative to the Death Penalty*, (2000) (unpublished manuscript) (on file with author) (citing Death Penalty Information Center, *Gallup Poll Release 3/2/01*, available at <http://www.deathpenaltyinfo.org/Polls.html#Gallup201>). A 2001 Gallup Poll indicates that support has fallen to 67%. Holland argues that this general support is misleading and that it is more accurate to use polls that provide alternatives to the death penalty, such as life without parole. Nonetheless, it is useful to know that the student attitudes reflected in this survey were similar to national norms. This slightly lower generalized support for the death penalty is best explained by the fact that the subjects were college aged students in Michigan. Michigan's abolition of capital punishment may account for part of the difference. In addition, young college educated people are somewhat less likely than the national norms to support the death penalty. See, e.g., *id.* Finally, one might speculate that, given Illinois' closeness to Michigan, some of these students may have been disproportionately affected by Illinois' recent problems in administering the death penalty.

Table 1 - Degree of Support for the Death Penalty among Criminal Justice Students Before Reading the Control and Innocence Essays

Pretest Support For the Death Penalty	Total Group (N = 210)	Control Essay (N = 103)	Innocence Essay (N = 107)
Very Strongly Favor	14.8%	16.5%	13.1%
Strongly Favor	20.0%	22.3%	17.8%
Somewhat Favor	25.2%	26.2%	24.3%
Uncertain	12.4%	7.8%	16.8%
Somewhat Opposed	10.0%	8.7%	11.2%
Strongly Opposed	8.6%	7.8%	9.3%
Very Strongly Opposed	9.0%	10.7%	7.5%

Roughly 11% were very strongly in favor of the death penalty, 18% were strongly in favor of the death penalty, and 26% were somewhat in favor. This contrasts with 13% "uncertain," 10% "somewhat opposed," and 7% who were "strongly opposed" after reading the essay. Fifteen percent ended up "very strongly opposed" to the death penalty. When collapsed into favoring, uncertain, and opposed categories, 55% still favored the death penalty after reading the essay, 13% were uncertain, and 32% had come to oppose the death penalty.

After reading either the assigned control or innocence essay, the students were asked again about their degree of support for or opposition to the death penalty. The responses to this question are summarized in Table 2 below. Roughly 11% were very strongly in favor of the death penalty, 18% were strongly in favor of the death penalty, and 26% were somewhat in favor. This contrasts with 13% "uncertain," 10% "somewhat opposed," and 7% who were "strongly opposed" after reading the essay. Fifteen percent ended up "very strongly opposed" to the death penalty. When collapsed into favoring, uncertain, and opposed categories, 55% still favored the death penalty after reading the essay, 13% were uncertain, and 32% had come to oppose the death penalty.

Overall there was a slight decrease for support of the death penalty traceable to the innocence essay. If this was all that was found, the results would mean little. A deeper interpretation, however, yields a more interesting analysis. As we demonstrate below, the fact that this very small stimulus created a significant change across the board suggests that the innocence issue may be far more potent politically than any of the other systemic problems with capital punishment.

*Table 2 - Degree of Support for the Death Penalty
among Criminal Justice Students After Reading
the Control and Innocence Essays*

Posttest Support For the Death Penalty	Total Group (N = 210)	Control Essay (N = 103)	Innocence Essay (N = 107)
Very Strongly Favor	11.0%	14.6%	7.5%
Strongly Favor	18.1%	23.3%	13.1%
Somewhat Favor	26.2%	27.2%	25.2%
Uncertain	12.4%	7.8%	16.8%
Somewhat Opposed	10.0%	7.8%	12.1%
Strongly Opposed	7.1%	6.8%	7.5%
Very Strongly Opposed	15.2%	12.6%	17.8%

In order to test the effect of the information presented in each of the two essays and to see if, as predicted, the innocence essay had a significant effect on reducing support for the death penalty, paired t-tests were done. The paired t-tests measure whether the difference between the “before” and “after” measures for the same group of individuals is statistically significant.¹¹⁶ For this study, the differences in measures of support for or opposition to the death penalty before and after the reading of the assigned essay were tested for in both the control and experimental groups.

For the 103 students who read the control essay, there was no statistically significant change in the level of support for the death penalty from before and after reading the assigned essay.¹¹⁷ Reading the control essay on some of the

116. Statistical significance refers to whether the observed changes are due to the experimental stimulus or to random chance. If the resulting paired t-test value exceeds a set value (which is conventionally set at 1.96), then the observed difference is attributed to the experimental stimulus (the experimental stimulus is said to have a significant effect on the outcome area). If the paired t-test value does not meet or exceed the set value, the observed change is attributed to random chance, and it is concluded that the experimental stimulus has no real effect on the outcome area. For more on paired t-test and other tests of statistical significance, see, for example, RONET BACHMAN & RAYMOND PATERNOSTER, *STATISTICAL METHODS FOR CRIMINOLOGY AND CRIMINAL JUSTICE* 342–79 (1997); JEROME MCKEAN & BRYAN BYERS, *DATA ANALYSIS FOR CRIMINAL JUSTICE AND CRIMINOLOGY: PRACTICE AND APPLICATIONS* 153–78 (2000); FERRIS J. RITCHEY, *THE STATISTICAL IMAGINATION: ELEMENTARY STATISTICS FOR THE SOCIAL SCIENCES* 334–68 (2000).

117. The pretest mean for the control group on the question of support for the death penalty was 3.36. The question responses were coded with “very strongly favor the death penalty” assigned a value of 1, “strongly favor” a value of 2, and so forth, until the last category of “very strongly opposed,” which was coded with a value of 7. The lower the value of the mean, the

reasons for punishing those who break the criminal law had no effect on the degree of support for capital punishment. In contrast, there was a significant change in the level of support for the death penalty among the 107 criminal justice students who read the essay on the chances and frequency of sentencing innocent persons to death.¹¹⁸ Overall, there was a small but statistically significant reduction in support of capital punishment for this group.

Next, independent t-tests were conducted to see if the experimental and control groups were equal in the level of support for the death penalty before reading the assigned essays and if they were statistically different after reading the assigned essays. The independent t-test examines the difference between the means of two independent groups to determine if the difference is statistically significant.¹¹⁹ For this study, we tested for the differences in the level of support for the death penalty, both before and after reading the assigned essay, and in both the experimental and control groups. Pretest figures generated no statistical difference between the experimental group and the control group.¹²⁰ Both

stronger the support for the death penalty among the students in the control group. After reading the control essay, the mean value of support for the death penalty was 3.42. In other words, there was only a minute decline in support for the death penalty in the control group. The t-test value is -1.283, and, with 102 degrees of freedom, this t-value has a probability value of 0.202. Since the probability level far exceeds the normal cut off probability level of 0.05, we concluded that the minute change observed in the control group is due to random chance. In other words, there was no real change in support for capital punishment from before to after reading the control essay for the control group. This is the outcome that was predicted.

118. The pretest mean for the experimental group on the question of support for the death penalty was 3.53. Again, the question responses were coded such that the lower the value of the mean, the stronger the support for the death penalty. After reading the innocence essay, the mean value of support for the death penalty was 4.07. In other words, there was a decline in support for the death penalty for the experimental group. The t-test value is -6.095, and, with 106 degrees of freedom, this t-value has a probability value of less than 0.001. Less than one time out of thousand would such a large difference be observed in the before and after means due to random chance alone. We concluded that after reading the innocence essay, there was a statistically significant reduction in support for the death penalty among the students in the experimental group. The issue of innocence therefore has a statistically significant effect on support for the death penalty. This is the outcome that was predicted.

119. Statistical significance here refers to whether the observed differences between two groups in a given outcome area really exist or are the result of random chance. If the resulting independent t-test value exceeds a set value (which is conventionally set at 1.96), then it is concluded that there is a statistically significant difference between the two groups. If the independent t-test value does not meet or exceed the set value, it is concluded that the observed difference between the experimental and control groups is due to random chance and, as such, there is no real difference between the two groups in the outcome area. For more on paired t-test and other tests of statistical significance, see, for example, MCKEAN & BYERS, *supra* note 116; NEIL SALKIND, *STATISTICS FOR PEOPLE WHO (THINK THEY) HATE STATISTICS* 191-205 (2000); JEFFERY WALKER, *STATISTICS IN CRIMINAL JUSTICE: ANALYSIS AND INTERPRETATION* 299-301 (1999).

120. The pretest mean for the control group on the question of support for the death penalty was 3.36. The pretest mean for the experimental group was 3.53. The question is whether the small difference observed between the control and experimental groups is significant or due to random chance. The independent t-test value is -0.69, and, with 208 degrees of freedom, this t-value has a probability value of 0.494. Since the probability level far exceeds the normal cut off

groups supported capital punishment at about the same level. The posttest data differs. There the difference in attitudes was statistically significant.¹²¹ The innocence essay lowered support for the death penalty.

Next we collapsed the pretest and posttest measures of support for and opposition to the death penalty from a seven point response category to a three point response category. Those who indicated that they “very strongly favor,” “strongly favor,” and “somewhat favor” the death penalty were collapsed into a single support category. Those who originally marked “uncertain” were coded as “uncertain” on the new collapsed measure. Those who stated that they were “very strongly opposed,” “strongly opposed,” and “somewhat opposed” capital punishment were collapsed into a single opposition category. Both independent and paired t-tests were conducted using the collapsed measures. Using the collapsed measure for the 103 students who read the control essay, there was no statistically significant change in the level of support for the death penalty before and after reading the control essay.¹²² Reading the control essay on general reasons for punishing those who break the criminal law had no effect on the degree of support for capital punishment. Conversely, among the 107 students who read the innocence essay, there was a significant reduction in the level of support for the death penalty using the collapsed measure.¹²³

Using the independent t-test, there is no statistical difference between the experimental group and the control group in the level of support for capital

probability level of 0.05, we concluded that the minute difference observed between the control and experimental groups in terms of support for the death penalty is due to random chance. There was no real difference in the level of support for capital punishment between the control and experimental groups before the reading of the assigned essay. This is the desired outcome, since before the introduction of the stimulus (the innocence essay), there should be no difference between the experimental and control groups.

121. The posttest mean for the control group on the question of support for the death penalty was 3.42. The posttest mean for the experimental group was 4.06. The question is whether the difference observed between the control and experimental groups after the reading of the assigned essays is significant or due to random chance. The independent t-test value is -2.48, and, with 208 degrees of freedom, this t-value has a probability value of 0.014. Since the probability level is far lower than the cut off probability level of 0.05, it is concluded that there is a statistically significant difference in the level of support for the death penalty between the experimental and control groups. The level of support is lower in the experimental group than it is in the control group. Therefore, as predicted, the innocence essay had a statistically significant impact on reducing the level of support for capital punishment among criminal justice students in this study.

122. The pretest mean for the control group with the collapsed measure for support of the death penalty was 1.6214, and the posttest mean was also 1.6214. Since there was no change in mean values, the control essay had no impact.

123. The pretest mean for the experimental group with the collapsed measure of support for the death penalty was 1.7290. Thus, there was a decline in support for the death penalty for the experimental group. The t-test value is -3.50, and, with 106 degrees of freedom, this t-value has a probability value of less than 0.001. In less than one time out of thousand would such a large difference in the before and after means for the collapsed measure be observed due to random chance alone. Thus, there was a statistically significant reduction in support for the death penalty among the students in the experimental group using the collapsed measure. As predicted, the innocence issue has a statistically significant effect on support for the death penalty.

punishment using the pretest collapsed measure.¹²⁴ Both groups had the same level of support for capital punishment before reading the assigned essay. After reading the assigned essay, there was a statistically significant difference in the level of support for the death penalty using the collapsed measure between the experimental and control groups.¹²⁵ The experimental group was statistically lower in its level of support for capital punishment than was the control group. The innocence essay had a negative impact on the level of support for the death penalty even when the collapsed measure was utilized.

V.

DISCUSSION

The results provide qualified support for the proposition that information on sentencing innocent persons to death has a negative impact on support for the death penalty. In addition, the innocence issue appears to have a stronger effect on death penalty attitudes than does deterrence.¹²⁶

124. The pretest mean for the control group with the collapsed measure indicating support for the death penalty was 1.6214. The pretest mean for the experimental group was 1.7290. The question is whether the small difference observed between the control and experimental groups is significant or due to random chance. The independent t-test value is -0.89, and, with 208 degrees of freedom, this t-value has a probability value of 0.377. Since the probability level far exceeds the normal cut off probability level of 0.05, the minute difference observed in support for the death penalty between the control and experimental groups using the collapsed measure is due to random chance. There was no real difference in the level of support for capital punishment between the control and experimental groups with the collapsed measure before the reading of the assigned essay.

125. The posttest mean for the control group with the collapsed measure of support for the death penalty was 1.6214. The posttest mean for the experimental group was 1.9159. Is the difference observed with the collapsed measure between the control and experimental groups after reading the assigned essays significant or due to random chance? The independent t-test value is -2.37, and, with 208 degrees of freedom, this t-value has a probability value of 0.019. Since the probability level is far lower than the cut off probability level of 0.05, there is a statistically significant difference in the level of support for the death penalty between the experimental and control groups. The level of support is lower in the experimental group than it is in the control group. Therefore, as predicted, the innocence essay had a statistically significant impact on reducing the level of support for capital punishment among criminal justice students in this study.

126. We conducted a preliminary test of the criminal justice students who read a deterrence essay similar in structure to the innocence essay previously described. The deterrence essay provided a summary of the empirical research on the death penalty. We found that the death penalty has little or no impact on violent crime, including murder. A total of 110 students completed and returned a survey that contained the deterrence essay. First, the group who read the deterrence essay was compared with the control group to measure the level of support for the death penalty on the pretest mean using the independent t-test. The pretest mean for the control group was 3.36, while the pretest mean for the deterrence group was 3.16. The resulting t-value was 0.82 with 213 degrees of freedom, and has a probability level of 0.413. Therefore, there is no statistically significant difference between the control and deterrence groups in their support for or opposition to the death penalty in the pretest. As expected, the two groups are equivalent to one another in this area. Next, an independent t-test was done for the posttest measure of support for or opposition to the death penalty. For the control group, the posttest mean was 3.42. For the deterrence group, it was 3.54. The resulting t-value was -0.50 with 213 degrees of freedom, and has a probability of 0.619. There is no statistically significant difference between the deterrence

Although there was a reduction in support for the death penalty, the change did not reflect a fundamental shift from supporting to opposing the death penalty for most of the students. The level of support for the death penalty before and after reading the innocence essay exposed a small, but statistically significant, reduction in support for the death penalty across the board. Most students dropped only a response category in their support for capital punishment. For every other student who read the innocence essay there was, on average, a one response category reduction in support for the death penalty. For example, a student who “somewhat favored” the death penalty before reading the innocence essay was likely to change his or her support for capital punishment to “uncertain” after reading the essay; likewise, a student who “strongly favored” the death penalty before reading the innocence essay would change his or her support to “somewhat favoring” the death penalty. In contrast to the unchanged opinions of the control group, the drop in support for the death penalty in students reading the innocence essay spanned the entire range of students tested.

This may be the most important aspect of these findings. A simple essay, read in ten minutes, changed attitudes along the entirety of the scale. This suggests that with more time to assimilate the information, and more intensive coverage of that information, much larger changes could be affected among all groups, including strong retributivists with powerfully held views. If this is true, then this is the kind of understanding about attitudes concerning the death

group and the control group in level of support for capital punishment on the posttest. This was not the case for the innocence essay group. There was a statistically significant difference between the control and innocence group using the independent t-test on the posttest measure for level of support for the death penalty.

Second, the differences between the three essay groups (control, deterrence, and innocence) on the posttest level of support for or opposition to the death penalty were tested using the One Way Analysis of Variance (ANOVA) procedure. ANOVA is an extension of the t-test. The t-test is appropriate for when there are two groups (e.g. a control and an experimental group). ANOVA is used when you have three or more groups. Here there are three groups—the control essay group, the deterrence essay group, and the innocence essay group. The ANOVA procedure tests to see if the means for different groups are the same or different when looking at a single dependent measure. The dependent variable here is the level of support for or opposition to the death penalty on the posttest after reading the assigned essay. The ANOVA procedure finds that there is a statistically significant difference in the three groups in their level of support for the death penalty on the posttest ($F = 3.653$, degrees of freedom = 2, and probability level = 0.027).

In order to tell which groups are different from one another, post hoc tests using Tukey and Scheffe statistics were done. A post hoc test under the ANOVA procedure tests to see which groups significantly differ from one another. The Tukey and Scheffe post hoc tests are commonly utilized in the social sciences when using the ANOVA procedure. Both the Tukey post hoc test and the Scheffe post hoc test indicate that only the innocence essay group is statistically different from the control group. The deterrence essay group is not statistically significant from the control essay group in level of support for the death penalty on the posttest. Therefore, it appears that the issue of innocence has an impact on changing people's support for capital punishment, while presenting evidence that the lack of deterrence has no effect. For more on the ANOVA test, see, for example, JOSEPH HEALEY, *STATISTICS: A TOOL FOR SOCIAL RESEARCH* 274–92 (4th ed. 1996); ROBERT PAGANO, *UNDERSTANDING STATISTICS IN THE BEHAVIORAL SCIENCES* 371–415 (4th ed. 1994); BARBARA TABACHNICK & LINDA FIDELL, *USING MULTIVARIATE STATISTICS* 37–52 (3d. ed. 1996).

penalty that could make a meaningful difference in the modern capital punishment debate.

This small across the board attitudinal change also demonstrates the incremental nature of using social facts to change strongly held views. This is particularly true when the issues are highly charged politically, as is the case with the death penalty. Facts do matter, even to a retributivist. Even the retributivist might pay attention to a factual argument when the facts undercut the basic assumptions of her retributivist theory. Our preliminary research suggests that the fact of innocence may play this role. We hope that further research will be done to test Marshall's Hypotheses in this area.

VI.

IMPLICATIONS OF MARSHALL'S CLAIM

The reduction in support for the death penalty, even using the innocence essay, was not the major reduction originally postulated by Justice Marshall when he wrote in *Furman* that persons who "were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."¹²⁷ As suggested above, there are several reasons for this. First, Justice Marshall posited that a *fully informed* individual would oppose capital punishment. Reading a short essay falls far short of providing all the information necessary to fully inform a person about the issues surrounding the death penalty. Even a single issue, such as innocence, cannot be adequately addressed in so short a time. But, as this exploratory study illustrates, one short essay can have an effect, indicating that a more rigorous study should find a much larger effect. The shift revealed in this study was large enough, given the wide spectrum of students affected, to indicate a clear need for further study.

The second reason the innocence essay did not have a greater impact on support for the death penalty may have been the delivery. The information on the chances and frequency of sentencing innocent individuals to death was delivered in a short essay. Deeper coverage of the subject undoubtedly would have a greater impact. We assumed that the reader would read carefully. Some students may not have taken the time and effort to critically read, absorb, and comprehend the information presented in the innocence essay. Similarly, some students may have been poor readers, thus hampering comprehension.

Finally, and most importantly, the stimulus was too small to have a large effect. The incremental effect seen across the board suggests that a longer, more detailed and in depth presentation of information on innocence, frequently given over a long period of time, could have a far greater effect than was found in this study. If one short essay can produce statistically significant results across the scale, it is likely that more intensive and prolonged dissemination of factual information would have an even more dramatic effect along the same wide

127. *Furman v. Georgia*, 408 U.S. 238, 361-63 (1972) (Marshall, J., concurring).

spectrum. Reducing the intensity of support may be more important than eliminating support for the death penalty altogether in the long run. If attitudes about the death penalty are changed only incrementally, but in people with varying levels of support, the impact of such a subtle change might be greater because it might be a more pervasive and more feasible way of effectuating change. Changing the opinions of the general public incrementally inevitably will change the terms of the debate as well.

VII. CONCLUSION

Preliminary evidence supports our theory that dissemination of information on the innocence issue reduces support for the death penalty. This reduction in support appears larger and more profound than dissemination of information concerning the death penalty's failure to deter crime.¹²⁸ Our study showed a significantly larger effect over a wide range of attitudes, despite the small stimulus.

This accords with the theory advanced herein. If we assume that retributivism plays a large role in attitudes favoring the death penalty, and if we assume that deterrence, like other consequentialist arguments, has little or no effect on the retributivist position, it stands to reason that innocence would show a larger and broader effect. Even the most staunch adherent of "an eye for an eye" will want to get the right person's eye. The innocence problem is so intuitively obvious, even to the most committed death penalty adherent, that researchers simply may have failed to properly assess its merits. Deterrence, or the lack thereof, may seem like the most crucial argument to the committed abolitionist. Yet the death penalty supporter who follows a more retributivist logic may find the problem of innocence more compelling. The effects seen in this small convenience sample are strong enough to warrant further research using larger, random samples designed around much greater exposure to the relevant information.

The political climate surrounding the death penalty suggests the fruitfulness of this line of inquiry. The fact that a conservative governor suspended executions in Illinois when confronted with a spate of wrongfully convicted death row inmates may be a bellwether.¹²⁹ Shortly after the Illinois moratorium, and plainly affected by the revelations there,¹³⁰ the Nebraska legislature approved a

128. See *supra* note 126.

129. See, e.g., William Claiborne, *Illinois Order on Executions Lauded: Governor Ryan Backs Moratorium After 13 Death Row Inmates Are Exonerated*, WASH. POST, Feb. 1, 2000, at A2.

130. Henry Weinstein, *Death Penalty Moratorium Attracting Unlikely Adherents*, L.A. TIMES, Oct. 17, 2000, at A5 ("Ryan acted after 13 men were freed from death row in Illinois because judges had concluded that they were wrongfully convicted. Anthony Porter, the 13th, was just hours from execution when a group of Northwestern University journalism students produced evidence that another man had committed the murder.").

moratorium only to have it vetoed by the governor. The New Hampshire legislature also voted to abolish the death penalty, and their moratorium also was vetoed by the governor.¹³¹ Even the stodgy American Bar Association, citing concerns about innocent people convicted of capital crimes, now calls for a halt to executions until the states and the federal government “can ensure that all capital cases are handled fairly in accordance with due process.”¹³²

A Lexis-Nexis search of major newspapers over the last year disclosed twenty-three articles reporting calls for a moratorium on the death penalty. Many cited innocence as the most important issue. The topic of innocence appears to be trickling down to small, conservative communities as well. For example, the Los Angeles Times¹³³ reports:

One night recently, in the conservative textile town of Greensboro, N.C., the City Council, by an 8-1 vote, passed a resolution urging a moratorium on executions in the state, whose death row is the fifth largest in the nation. The move was the latest in a series of similar declarations in places as widespread as Atlanta, Baltimore, Philadelphia and San Francisco—31 cities in all—that are harbingers of a growing movement for reexamining capital punishment in the United States.

The article reported that recent revelations of wrongful convictions in capital cases have contributed strongly to this trend. Senator Pat Leahy even responded to the Illinois moratorium with a sarcastic, “Whoops, sorry. Don’t pull the switch. We have the wrong person.”¹³⁴

The anecdotal evidence continues to build. Although such evidence is hardly conclusive, it plainly adds support to the need for further and better research on this issue. Innocence just may be the death penalty’s Achilles’ heel.

131. Sara Rimer, *Support for a Moratorium In Executions Gets Stronger*, N.Y. TIMES, Oct. 31, 2000, at A18.

132. Rhonda McMillion, *Pulling the Plug on Executions: ABA’s Call for Death Penalty Moratorium Sparks Debate in Congress*, 86 A.B.A. J. 99 (2000).

133. Weinstein, *supra* note 130, at A5.

134. E.J. Dionne, Jr., *Second Thought on Executions*, PITT. POST-GAZETTE, Feb. 8, 2000, at A11.

APPENDIX A

Control Essay: The Purposes of Punishment

The criminal justice system imposes punishment on law-breakers for a variety of reasons. Generally these are:

1. **Intimidation** seeks to coerce or terrorize the criminal. The goal is to induce such fear of the consequences of repeating the illegal activity that he or she will refrain from committing the act in the future. Under this theory punishment should be as unpleasant as possible so that the individual will be afraid of the consequences of repeating her crime.

2. **Incapacitation** simply puts the criminal “out of action” for a time. Imprisonment (quite apart from whether the convicted person is actually intimidated) renders the convict unable to commit crime during the period of incarceration.

3. **Rehabilitation** aims, through therapy or education, to correct or “cure” the individual. The goal is to transform or “heal” the person so that he or she can return to society reformed.

4. **Deterrence** seeks to educate and intimidate others. The idea is that other people, seeing the offender’s punishment, will be deterred from following their example.

5. **Retribution** seeks to insure that a particular wrongdoer receives his or her just deserts. Under this theory, a person who has been convicted of committing a criminal act is punished, not because that punishment contributes to any social good, but rather because it is morally right to redress the balance caused by the wrongdoers criminal act. In short, we punish because punishment is merited; because the wrongdoer deserves to be made to pay for his or her crime.

This last theory—retribution—is thus different from all of the other theories of punishment. Every other theory—intimidation, incapacitation, deterrence, and rehabilitation—are concerned with consequences. Each theory makes a prediction about lowering crime, or the effects of crime, by treating convicted criminals in a certain way. Only retribution focuses solely on the moral basis for punishment. Thus, retribution, alone of the theories of punishment, is wholly disconnected from consequences of the sanction. Under this theory the rightness of the punishment does not depend upon whether the world is made a better or safer place or even if it is made worse. This implies inconsistencies between the various theories of punishment. This essay will discuss some of the tensions among these goals of punishment and some of the problems that can come about when one theory is pursued to the exclusion of the others.

The most obvious example is the inconsistency between intimidation and rehabilitation. To truly intimidate a person, one must make the penitentiary experience a miserable as possible. Under this theory the worse the experience, the more likely it is that the person will be intimidated. However, research

demonstrates that a truly harsh experience can leave a prisoner brutalized and alienated, thus removing moral constraints and making the prisoner more likely to commit crime upon release.

Rehabilitation, on the other hand, emphasizes helping the prisoner to reform. Under this model, the emphasis is away from making the prisoner suffer and in favor of a treatment regime. But rehabilitation also has its problems. Chief among them is the suspicion that rehabilitative programs do not work very well. Recidivism rates seem to be unaffected by whether we intimidate or rehabilitate. However, one criticism of this charge has been that rehabilitation programs rarely have been tried and then only sporadically and ineptly. Many criminal justice theorists believe that rehabilitation has never been given a fair chance to work and that studies showing that "nothing works" are based upon incomplete data and poorly designed research. Moreover, recent research indicates that well-designed treatment interventions are effective at reducing recidivism. Whatever the truth may be, incapacitation is fundamentally inconsistent with rehabilitation.

As stated earlier, retribution is at odds with other forms of punishment in that it does not focus on any social good. Retributive theory, focusing as it does on the moral deserts of the offender, is not concerned with the consequences of the punishment. We punish because it is just, not because it reduces crime. Because of this lack of a real world connection, retribution has had a bad name in some circles where it is equated with vengeance or retaliation.

However, this criticism is misguided. When pushed, most people will admit a place for retribution as a reason to punish. For example, consider the tension among rehabilitation, deterrence and retribution. When we seek to rehabilitate the criminal, or to deter others from crime, we attempt to lower the crime rate. If successful, this makes society safer, thus increasing the social good. But would we imprison a minor offender for long periods or even life if it took that to reform her or if it could be shown that the lengthy sentence would effectively deter others? For example, could we imprison a scofflaw litterbug for life if she refused to reform? Would we impose such draconian punishment if studies proved that such life sentences would effectively end litter on our highways? Even the most ardent utilitarian would likely find this unjust. But why? A utilitarian, if consistent, and with no concern other than increasing the greater good, should be able to justify this. Under this theory, if a harsh punishment advances the greater good, so be it. One's discontent with this outcome can only come from a sense that it would be morally unjust to imprison someone for life for mere littering—that somehow the crime does not merit or deserve that harsh treatment. Thus, even the most committed utilitarian will inevitably recognize that retributive theory has a place in at least mitigating the harsher edges of the other theories.

It is not the purpose of this essay to canvass all of the theories of punishment or to cover all of the problems inherent in these theories. Our

purpose has been to demonstrate that one cannot consistently pursue any one theory to the absolute exclusion of the others. It may be that there are intrinsic inconsistencies between them, but we must struggle to accommodate competing visions despite the apparent incoherency of doing so.

APPENDIX B

Deterrence Essay: Deterrence and the Death Penalty— Common Assumptions and Reality

People commonly assume that the death penalty deters murder, that use of capital punishment reduces the homicide rate. Surprisingly, the near universal findings of social scientists are contrary—the death penalty does not make us safer; life imprisonment is an equally effective deterrent. Many people are surprised at the evidence:

1. Homicide rates are higher in states as a group that impose the death penalty than those that do not. For example, in the 1997 death penalty states averaged 6.6 homicides per 100,000; states without the death penalty averaged only 3.5.

2. Comparisons of adjacent states where one state has capital punishment, and the other does not, show the same trend. Non-death penalty states generally have lower homicide rates than adjacent states with the death penalty. For example, Wisconsin and Iowa do not execute people and in 1997 had less than half the homicide rate of Illinois, which does execute. During the same period Iowa had less than one-fourth the homicide rate as neighboring Missouri, which has capital punishment.

3. Canada abolished the death penalty in 1976. The homicide rate in Canada fell from 3.09 in 1975 per 100,000 to 2.74 in 1983.

4. The South accounts for 80% of all executions, yet has by far the highest homicide rate of any region. The Northeast, which accounts for less than 1% of the nation's executions, has the lowest homicide rate in the nation. Texas has the highest execution rate in the country. It also has one of the highest homicide rates. If executions deterred, one would expect to find that states with the death penalty would have lower homicide rates than states that have abolished the death penalty. That the reverse is true undercuts any argument that the death penalty deters murders.

5. Some studies show that death penalty may actually *increase* homicide rates. Moreover, studies have shown that homicide rates go up *after* executions. Other studies have shown that homicide rates generally either drop or remain stationary in states that abolish capital punishment. This may be because of the brutalizing effect of capital punishment. For example, one prosecutor asked a fourteen year old boy why he had committed a particularly brutal murder. The boy responded that he wanted to “be just like the Briley brothers” (two particularly notorious death row inmates). Another death row inmate expressed

pleasure at the publicity he had received as a result of a double capital homicide. In both cases, capital punishment appears to have been an encouragement rather than a deterrent. Thus, it may be that capital punishment, rather than discouraging murder, encourages some people to kill.

6. Expert criminologists do not believe that the death penalty is a proven deterrent to homicide. In one survey of the members of the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association, more than 80% of those surveyed felt that existing research does not support the deterrence argument. Similarly, U.S. police chiefs consistently rank the death penalty as the *least* effective method of crime control.

7. The few studies that have purported to find that the death penalty has a deterrent effect have not survived peer review. They have been so strongly criticized that the National Academy of Sciences concluded: "It seems unthinkable to us to base decisions on the use of the death penalty" on these flawed studies.

8. Most capital crimes are committed in the heat of passion or while the perpetrator is under great emotional stress or under the influence of drugs and alcohol. These people are not thinking logically. The rationality necessary for deterrence to work is not present in these people. Moreover, even with rational people who commit murder, the death penalty is not a plausible deterrent. The infrequency and arbitrariness of the present death penalty undercuts that rationale. There are approximately twenty thousand homicides each year. Only a few dozen persons are executed each year. No one contemplating murder can reasonably calculate that he or she will actually suffer the ultimate penalty. Since no one reasonably argues that we could or should have thousands of executions each year, the death penalty can never plausibly be an effective deterrent.

Conclusion

As a United Nations study published in the 1980s concluded: "Despite much more advance research efforts mounted to determine the deterrent value of the death penalty, no conclusive evidence has been obtained on its efficacy." Thus, despite all of the studies, there is no good evidence that the death penalty deters crime. Moreover, the majority of studies suggest the opposite—that the death penalty provides no marginal deterrent effect over life imprisonment and may even increase the homicide rate.

APPENDIX C

*Innocence Essay: The Risk of Executing Innocent Persons
In Death Penalty Jurisdictions*

We rarely think about innocent people wrongly convicted of crime. We think about the execution of innocent human beings even less. Many people undoubtedly think both occurrences rare. As with many commonly held assumptions, reality differs from the customary view. Even when the findings of researchers are understood, many people find it difficult to abandon long-held, but erroneous, feelings about the death penalty. This essay explores the findings of modern social science investigations that have considered the problem of executing innocent people.

A Brief History

Michigan abolished the death penalty in 1846, in part as a result of widespread revulsion at the execution of an innocent man in neighboring Windsor, Ontario. As described by Eugene Wanger in the *Cooley Law Review*:

In 1838, Fitzpatrick was hanged in Canada, across the river from Detroit in what is present-day Windsor, for carnal knowledge of a nine-year-old girl. There were at least two possible suspects, but Fitzpatrick was an Irishman and he was elected. . . . Later on his death bed, the actual rapist confessed to the crime.

People on both sides of the border protested the execution. The Detroit newspapers used the incident to oppose capital punishment. The Fitzpatrick case was widely perceived by Michiganders of the day to be a travesty of justice. It argued against capital punishment precisely because it demonstrated the inevitability of executing innocent persons.

Careful investigation by Professors Hugo Bedau and Michael Radelet demonstrated that from 1900 to 1985, there were at least 416 wrongful capital convictions,¹³⁵ including 139 incorrect death sentences and twenty-nine executions of innocent persons. These researchers investigated only a small fraction of capital convictions for this period. Because not all cases were (or could be) reviewed, the actual frequency of mistaken capital convictions and executions was significantly higher. Plainly, these numbers are conservative. We can never know the actual numbers of innocent people put to death by government; what we do know is that innocent people have been put to death.

135. These are people who were convicted of a capital crime but were not necessarily sentenced to death. They are included because conviction of a capital crime necessarily risks the death sentence. Thus, errors in these cases help to demonstrate the risk of ultimately executing the innocent.

The Present Record of Sentencing the Innocent to Death

In 1993, the Staff Report for the House Judiciary Committee concluded:

Judging by past experience, a substantial number of death row inmates are indeed innocent and there is a high risk that some of them will be executed. The danger is inherent in the punishment itself and the fallibility of human nature.

Experience supports this. The probability of executing innocent people remains significant; it is not a peculiarity of bygone justice.

Since the reinstatement of capital punishment in 1976, Illinois has executed twelve people and exonerated thirteen who were wholly innocent. Florida leads the nation in erroneous capital convictions with twenty men sentenced to death who were later proved to have been innocent of any crime. Nationwide, since the reinstatement of the death penalty, seventy-nine men and women have been released from death row because of innocence—one exoneration for every seven executed. Bruce Shapiro, writing for *The Nation*, calls this a “staggering indicator of the unreliability of the criminal justice system.”

Another study, by Hugo Bedau and Michael Radelet, using conservative criteria, has found an even higher error rate in capital murder executions to sentencing—one in five. Whatever the true error rate is for sentencing the innocent to death, the number appears to be exceptionally high.

These numbers significantly *understate* the problem. The Bedau and Radelet study omitted cases of innocent people who were actually executed or who remained in prison. This means that the study inevitably left out additional people who were innocent.

More fundamentally, the system itself prevents the discovery of innocence in many cases. The death penalty is imposed in thirty-eight of the fifty states. Some states, like Virginia, almost never overturn a death sentence. Virginia's reversal rate in death cases is the nation's lowest—six percent—compared with the national average of about thirty-three percent. This is because Virginia enforces the most rigid procedural default rules in the nation which prevents meritorious cases, including cases of innocence, from being heard on the merits. Ironically, except possibly in extraordinary cases of truly persuasive demonstrations of “actual innocence” there appears to be no constitutional impediment against execution of innocent people. Thus, Virginia commits no legal error, even though its rules decrease the likelihood of discovering mistaken capital convictions. Because it is nearly impossible to establish innocence in some jurisdictions, any attempt to establish the actual numbers of innocent people sentenced to death will always understate the magnitude of the problem.

Ironically, the fact that seventy-nine people have been freed from death sentences does not prove that the justice system works, that it ultimately frees the innocent. Many of the people freed from death row obtained their freedom despite the active resistance of prosecutors and law enforcement to admit the

error. Outside persons have often intervened and prevailed over vigorous resistance to prove the condemned person's innocence. For example, in Illinois the proof of the innocence of several men came about as a result of investigations conducted by a journalism class at Northwestern University. In case after case, the discovery of the mistake that put a person on death row appears to have been fortuitous. A system cannot be said to work well that relies on sheer chance to correct its most grievous errors.

There are many reasons for this high error rate in convicting and sentencing innocent people to death row:

1. These are high profile crimes that attract enormous media attention. The police are under tremendous pressure to find a culprit. This encourages short cuts and even police frame-ups—as occurred in Walter MacMillan's case.

2. There is enormous pressure on the system to use accomplice and snitch testimony. In capital cases the pressure on these people to lie is at its greatest. Perjury by the real killers remains a persistent problem and is the second leading cause of error in capital prosecutions.

3. False confessions are the third leading cause for erroneous capital convictions. The pressure to use coercive and manipulative techniques to obtain a confession is at its highest in capital cases. Even innocent people will sometimes confess to escape the pressures of the interrogation room.

4. The publicity that surrounds a capital trial combined with procedural rules that allow the prosecution to exclude jurors that oppose the death penalty (and who are thus more likely to convict) makes a capital trial harder to defend and renders a claim of innocence harder to make.

Thus, the problem of a high error rate in capital murder cases appears to be systemic. The present criminal justice system continues to sentence innocent people to death and as the Staff Report for the House Judiciary Committee states: "there is a high risk that some of them will be executed."

Death is final; death is irrevocable. Peter Fitzpatrick was executed. Maurice Sellars was later found to have been the perpetrator. Had Fitzpatrick been given a life sentence, the error could have been rectified, in part. Although his lost years could not be returned, had he been alive his vindication could yet have occurred. Death prevents errors from ever being righted.

