1 INNOCENCE AND THE DEATH PENALTY DEBATE

On July 25, 1984, nine-year-old Dawn Hamilton went to play in the woods near her aunt's home in the Baltimore suburb of Rosedale, Maryland. When Dawn did not return, her aunt called the police. Several hours later, searchers found Dawn's body in the woods beaten, raped, and strangled. Her underwear was found hanging in a tree, and a bloody rock was found near the little girl's crushed head – a gruesome and horrifying scene.

At the time, former marine Kirk Noble Bloodsworth, twenty-three, was living in Baltimore County. He had no criminal background, but fit the description of the man who two boys, ages seven and ten, said they had seen entering the woods with Dawn that day. Police arrested Bloodsworth. The principal evidence linking him to the crime was testimony by five government witnesses (including the two boys) who identified Bloodsworth as the man they had seen with Dawn soon before she disappeared. This eyewitness testimony contradicted testimony by Bloodsworth's friends that he had been at home at the time of the incident. There was no physical evidence linking Bloodsworth to the crime, but prosecutors suggested that a shoe print left near the girl's body was the same size as a pair of Bloodsworth's shoes. Prosecutors also aggressively questioned the credibility of the defense witnesses. After serving in the marines, Bloodsworth had been unemployed and spent time partying, drinking, and associating with a shifting group of friends who did not make strong character or alibi witnesses. Though they said he could not have been at the scene, many admitted to alcohol or drug use. The jury found Bloodsworth guilty of sexual assault, rape, and first-degree premeditated murder. He was sentenced to death.

Before Bloodsworth's 1986 trial, police had begun to investigate another suspect in the slaying – a local newspaper delivery man who had helped search for the little girl and had been the one to find her underwear. An appeals court ruled that authorities had illegally withheld

this exculpatory evidence from the defense and ordered a retrial. In April 1987, Bloodsworth was tried again, and again found guilty based on eyewitness testimony. This time he was sentenced to two consecutive life terms in prison. Sentences in both trials were imposed by the judge.

After his second trial, Bloodsworth received a new court-appointed attorney, Robert E. Morin. With the help of Centurion Ministries, a nonprofit organization in Princeton, New Jersey, that works to help overturn wrongful convictions of innocent individuals, Morin arranged to have evidence from Bloodsworth's case sent to California for DNA testing – a technology that had not been available in 1984. Even though in 1984 authorities had determined that the evidence from the case – the girl's shorts and underwear and a bloody stick found near the body – contained nothing of criminal value, fortunately for Bloodsworth the items had never been destroyed. Bloodsworth's family had exhausted its life savings in the course of mounting appeals against the two convictions, so Morin paid the $10,000 fee for the DNA testing out of his own pocket. After a long delay, the test results came back showing that semen on the underwear did not belong to Bloodsworth. The prosecutor, still believing Bloodsworth was guilty in spite of this evidence to the contrary, insisted on a second test. Subsequent testing by the Federal Bureau of Investigation (FBI) confirmed the results. Kirk Bloodsworth was innocent.

It would take three months for the paperwork to be processed, but on June 28, 1993, after spending eight years, eleven months, and nineteen days in prison, including two years on death row, Bloodsworth was exonerated. Three months later, in December 1993, Maryland governor William Donald Schaefer issued Bloodsworth a full pardon. The following year in June 1994, the state of Maryland awarded Bloodsworth $300,000 for lost income, based on the calculation that Bloodsworth would have earned approximately $30,000 each year he was imprisoned. There was no payment for injuries, though while in prison as a convicted child rapist and murderer he had been treated harshly by the other inmates.

Bloodsworth and others continued to press prosecutors to find the real criminal by comparing the DNA results to those of possible suspects in the crime, suspects who had gotten away, suspects about whom police had not followed up on leads. On September 5, 2003, nearly two decades after Dawn Hamilton was raped and murdered, a match was found. The murderer was Kimberly Shay Ruffner, a convicted sex offender. In a twist of fate, Bloodsworth and Ruffner had been imprisoned together – Ruffner was there on a different child sexual assault conviction – and the two men had interacted frequently. It was only after conclusive proof that another person had committed the crime that the state prosecutor apologized to Bloodsworth.[1]

Kirk Bloodsworth was the first death row inmate in the history of the United States to be released on the basis of DNA evidence and the forty-ninth individual to be exonerated after serving time on death row since 1973. Ten years later, Ray Krone became the 100th death row inmate to be exonerated. As of 2007, 123 men and women have been exonerated from death row, 14 of them directly as a result of DNA testing (Death Penalty Information Center [DPIC] 2006e).

In fact, exonerations are nothing new in this country. In spite of many safeguards, mistakes have always occurred. For example, in 1819 two Vermont brothers were scheduled to be executed for the murder of Russell Colvin when Colvin himself showed up to witness the hanging (Banner 2002, 122). In 1835 Charles Boyington was executed in Alabama for a murder in a tavern; several years later the owner of the tavern, on his deathbed, confessed to the murder himself (ibid.). Examples from throughout history can be found of people either convicted or executed for the murders of people who later turned up alive or whose real murderer was subsequently identified (see Radelet et al. 1992). Mistakes happen.

One response to these examples is utilitarian – perhaps the value of the death penalty outweighs the cost of a few errors. In a 1985 congressional hearing, Senator Jeremiah Denton of Alabama expressed this view: "I do not want to be overly simplistic, but saying that we should not have the death penalty because we may accidentally execute an innocent man is like saying we should not have automobiles because some innocent people might accidentally be killed in them" (quoted in Banner 2002, 304). This argument does indeed have a parallel with the death penalty. The logic is to compare the benefit with the cost.

Although people recognize that cars do indeed crash (and more than 40,000 people regularly die on the highways each year), the difference in purpose between automobiles and the death penalty makes the analogy hollow. The purpose of cars is not to kill people with the hope that they are all deserving. The purpose of the death penalty, however, *is* to kill individuals – those individuals judged to be guilty. Most Americans find abhorrent the idea that executions would be performed without complete confidence that the people being executed actually deserve the punishment. This idea of executing someone who may be innocent is objectionable even to people who support the death penalty in theory and in those cases in which there is no doubt about guilt.

THE DISCOVERY OF INNOCENCE

This book is about Americans' discovery of the concept of innocence. Although it is obvious on one level that any human-designed institution

is imperfect, until recently most Americans did not think much about the possibility that some percentage of people sentenced to death might actually be innocent. The occasional exoneration of someone from death row was often seen more as proof that the system works (because they were not executed) rather than as a sign of imperfections perhaps pervading the system. All this has begun to change, and in fact has changed dramatically, over the past twenty years or so. Today, the concept of innocence pervades public and official discussion of the death penalty in a way unlike that of any period in previous history. State legislatures are establishing "innocence commissions," putting the death penalty on hold as they review the vulnerability of their state justice systems to potentially fatal errors, and reviewing the possible mechanisms to establish a "foolproof" death penalty. In December 2006, the number one best-seller on the *New York Times* hardcover nonfiction list was John Grisham's *The Innocent Man*, the story of Ron Williamson, a former major league baseball prospect who was wrongly convicted of murder and spent eleven years on Oklahoma's death row for a 1982 crime he did not commit (Grisham 2006). These developments come after hundreds of years of experience with the death penalty and more than 1,000 executions in the modern era (since 1976) alone. Why now? And what effect is this new debate having on the death penalty in the public eye and in practice? Can there be such a thing as a foolproof bureaucratic institution of the scope of the U.S. criminal justice system?

The answers to these questions lie in the process of "framing," defining an issue along a particular dimension (e.g., fairness and innocence) at the exclusion of alternate dimensions (e.g., morality, constitutionality, or cost).[2] Framing is a natural part of the political process, but rarely does framing result in a near-complete overhaul of an issue debate, as in the case of the death penalty over the last decade.

The strength and even the occurrence of the "innocence frame" is somewhat surprising because, once one pauses a moment to think about it, it seems obvious that mistakes will occur, and probably have occurred, throughout the history of the death penalty, as in other criminal proceedings. How could *every single* judicial proceeding in all of American history have been perfect? What if a clinically depressed, suicidal, drug-addicted, or mentally handicapped defendant actually wanted to be executed and confessed to a crime, refused to cooperate in his own defense, and was connected to the crime through eyewitness testimony, association with known criminals, or some other evidence, or simply bore a resemblance to the real murderer? Could the system make such errors? Logically, it seems quite possible. And yet, except for one notable instance of Supreme Court intervention, a majority of American states have kept the death penalty on the books throughout our nation's history. So why all the fuss about wrongful convictions, and why now?

There are, of course, many reasons for the recent consideration of innocence. Some have to do with new scientific technologies such as DNA testing, which provides overwhelming evidence of innocence in particular criminal cases. But what more convincing evidence is there than seeing the supposed victim of a murder amble up to the execution site, as occurred back in 1819? Convincing demonstrations of the innocence of some proportion of those convicted of capital crimes have always been around us, and the numbers in recent years have not been startling by any historical standards. In this book, we argue that the rise of what we call "the innocence movement" has stemmed from a process of collective attention-shifting. As legal scholars, judges, journalists, and others have focused new attention on this old problem of innocence, the debate has been transformed. Once the process started, it was reinforced by further findings of innocence. Particular facts, which once might have been treated as one-of-a-kind historical flukes or lucky breaks for the wrongly condemned, were transformed into evidence of the entire system being flawed, framing the debate along a new dimension. More attention led to more efforts to find more cases. "Innocence projects" were established in journalism and law schools throughout the country, offering pro bono research and legal assistance to the wrongfully convicted. Scientific and cultural trends also reinforced these developments. DNA evidence and TV dramas (some factual, some fictionalized) that focused on problems in police crime labs added further credibility to the idea that concerns about mistakes are not just the product of self-interested statements by convicts attempting to save their skin but perhaps are indicative of serious and systematic problems that public officials should take seriously. The result of these self-reinforcing developments has been the redefinition of American public discourse about the death penalty. Although Americans remain supportive of capital punishment *in theory*, they are increasingly concerned that the system might not work as intended *in practice*. According to the Gallup Organization, public support for the death penalty has declined by ten percentage points in the last decade – a significant drop in aggregate public opinion.[3] And as public concern about the death penalty has grown, the system itself has changed; the average number of death sentences per year since 2000 (150) is just more than half the yearly average during the previous decade (288) (calculated from Snell 2005). The results have been dramatic.

A NEW ARGUMENT IN AN OLD DEBATE

The death penalty is an American tradition, but in recent decades a highly contested one. Whereas capital punishment for serious crimes was once common across the bulk of Western countries, since 1945 it has been

increasingly rare in democratic nations and more geographically concentrated within the United States. Because the death penalty has such a long history in America and elsewhere, the arguments for and against it are quite familiar. Most familiar of course are moral and religious arguments – on both sides. Pro–death penalty moral arguments center around the biblical "an eye for an eye" code, emphasizing the need for harsh punishment for terrible crimes. Anti–death penalty moral arguments, often also couched in religious terms, stress forgiveness and redemption, question whether justice is served by what opponents call "state violence" or "state killing," or rely on the more homespun logic that "two wrongs do not make a right." In any case, morality is the main argument on both sides: Some oppose and some support the death penalty based on their own sense of what is right and wrong. This national ambivalence, of course, augurs extremely poorly for anyone who would hope to change attitudes or behaviors on the topic. People do not change their moral views on a whim.

Morality is not the only argument familiar to those who have followed the death penalty debate. Among experts, the bulk of the discussion in fact is on constitutionality and legal procedures. After all, death cases are always criminal trials, so they involve all the complicated questions of federal review over state procedures, due process, jury selection, use of evidence, right to effective counsel, and other issues that are the stuff of detailed analyses of constitutional law and criminal procedure as these relate to particular cases. This legal complexity is clearly not the set of terms on which ordinary Americans draw when thinking about or discussing the issue, but because of its nature the death penalty cannot be dissociated from issues of criminal procedure. Deterrence has been extensively debated, on both sides, with statistics, anecdotes, examples, and forceful arguments aplenty. Race, class, geography, and fairness issues have long been a part of the discussion. International comparisons have entered the debate. As most Western countries have abandoned the practice, the United States has become increasingly isolated. Internal geographic disparities have become important. States in the South have always been more prone to use the death penalty (though as Stuart Banner [2002] shows, in colonial times states of the North were also quite frequent users of capital punishment, though they imposed it more for moral crimes than the economic ones – including slavery – at focus in the South). But the modern death penalty has become even more geographically distinct. More than 80 percent of all the executions since 1976 have taken place in the South, and the bulk in only a handful of states. Even the method of execution, the functioning of the physical machinery of death, has become a periodic item of discussion. Malfunctioning electric chairs produced horrific scenes in a few instances in the 1980s, and faulty administrations of lethal injections, with gruesome consequences, recently

became the source of controversy in the early 2000s, finally leading to the suspension of executions in many states, including Florida, in 2006 and 2007. The financial cost of the death penalty has become the focus of some discussion, with a shift over time from a sense that it was cheaper than the alternative of life in prison to the realization that court costs associated with capital trials – with substantial safeguards for the defense, including DNA testing – are tremendously high. Considering the low percentage of convicted murderers who are actually executed, the total cost per execution of most state capital punishment systems is staggering (more than $10 million per case in many states); many have begun to argue that the money could better be spent on alternative crime-related spending priorities while promoting life without parole as an alternative punishment.

In sum, the death penalty is certainly a complex issue. In fact, the paragraph above refers to nineteen distinct arguments, though our list is by no means comprehensive. For most of recent history, however, the death penalty in America has been characterized by entrenched feelings, stable policies, and little movement. Most states rarely use the death penalty, a few use it quite extensively, and most Americans support its use. Considering the multiple dimensions of evaluation that relate to the death penalty, and the multiplicity of concerns that Americans have, the death penalty is a good area in which to explore the process by which attention shifts from one dimension of evaluation to another, and with what consequence. Although the debate is complex, this complexity is not unusual; in fact this complexity – the multiple dimensions of evaluation – is typical of many debates in public policy. Consider global warming, homelessness, poverty, and educational opportunity; which of these issues is simple?

A POLICY REVERSAL

What *is* rare about the death penalty among other major U.S. policy areas is that it is in historic decline. From the beginning of the modern era of capital punishment in 1976 through the mid-1990s, the death penalty grew more common and was increasingly accepted as a "normal" part of American political life. In 1994, 314 death sentences were imposed and nearly 3,000 inmates were on the various death rows across the United States. Public opinion hovered around 80 percent in favor of capital punishment for persons convicted of murder, with less than 20 percent of Americans opposed, reflecting a steady increase in public support over a thirty-five-year period. Media coverage of the death penalty was increasingly positive as well, reflecting its wide use, constitutional acceptability, and public support. These trends reversed, however, in the mid-1990s,

and by 2004 the number of death sentences for the year had dropped to 125. Since 1973, more than 120 Americans have been released from death row as a result of exonerations, and a few highly publicized cases have focused public attention on the possibility of errors in the system. The "discovery of innocence" refers to the shift in public attention away from the traditional morality-based discussion of the issue toward a new topic: The possibility that the justice system, dealing as it does with thousands of cases every year, could potentially make mistakes, sending the wrong person from time to time to death row or even, tragically, to the gallows.

In this book, we offer an explanation of one of the most dramatic and unlikely policy reversals in modern times. After all, even today a solid majority of Americans support the death penalty, and few politicians are anxious to appear "soft on crime." Further, those who stand to benefit most directly from an abolition of capital punishment are often notorious killers, brutally insensitive to the lives of others. As convicted felons, they do not have the right to vote. The collection of activists who have campaigned for changes in death penalty laws is made up largely of public defenders, criminal defense attorneys, and a few student-dominated organizations in law and journalism schools at a small number of universities. A majority of Americans continually report support for the concept of a sentence of death for those convicted of murder, even though many states never impose the death penalty and the vast majority of murderers never face a death sentence in spite of their crimes. Further, the constellation of forces traditionally cool to the idea of death penalty reform includes many politically powerful actors, including prosecuting attorneys and attorneys general as well as the U.S. Department of Justice and a majority of the members of the U.S. Supreme Court. Nothing of what we report in this book should be taken to imply that politicians are willing to appear soft on crime or that Americans have suddenly changed their moral views away from the belief that the biblical eye-for-an-eye attitude toward heinous crime is entirely appropriate. Most Americans have such moral views. And yet, things have changed.

Social and political trends are not particularly favorable to the innocence movement: Different religious traditions have differing views on capital punishment, with many abolitionists basing their views on the moral teachings of their church, be they Catholics, traditional Protestants, Jews, or members of other faith communities. But many members of other faiths strongly support an eye-for-an-eye biblical interpretation, including members of many of the fastest-growing religious communities in America. The number of Americans affiliated with evangelical Protestant denominations has sharply increased over the past thirty years, while affiliations with traditional liberal denominations have declined. The post-9/11 war on terror has justified many restrictions on civil liberties and the rights of those accused of crimes, and the federal government has sought

the death penalty in several high-profile cases, including that of al-Qaeda sympathizer Zacarias Moussaoui (unsuccessfully) and Washington-area sniper John Muhammad (successfully). Finally, for much of this period, the president has been a former governor of Texas who during his time as governor commuted only one death sentence while presiding over the nation's most active death chamber; more than 150 inmates were put to death in Texas during the years that George W. Bush was governor, more than any other governor in U.S. history (Gross et al. 2005).

And yet, despite many reasons why this trend may be surprising, the death penalty debate has been completely transformed over the past ten years. The new innocence frame diverts attention away from theoretical and philosophical issues of morality to focus simply on the possibility of errors in the criminal justice system. No matter what one thinks about the death penalty in the abstract, this new argument goes, evidence suggests that hundreds of errors have occurred in spite of safeguards designed to guarantee that no innocent people are executed. As attention has shifted from the long-dominant morality argument to the innocence argument, other concerns have risen as well: Is the death penalty effective? Is it racist? Is it worth its high financial cost? Is life without parole a more appropriate sentence? Could we design a set of judicial procedures that would guarantee no errors?

FRAMING, THE STATUS QUO, AND POLICY CHANGE

We aim to understand and demonstrate why the new innocence argument has been so effective in changing U.S. public opinion and public policy. In doing so, we tether our discussion to a theoretical understanding of the politics of attention more broadly. And we will develop new methodologies for studying issue-definition along the way. The death penalty, like abortion, is a moral issue on which most Americans' views are solidly fixed. What is more, a consistent majority of Americans are in favor of the death penalty when queried about it in the abstract. But the death penalty, like any other issue of public policy, is multifaceted. It includes questions of morality, efficacy, constitutionality, fairness and equity of its use, and so on. We trace media coverage of the issue back to 1960 and show dramatic shifts over time in which of these arguments has been most prominent. We chronicle the unprecedented rise in attention to the innocence frame beginning in the mid-1990s and show, statistically, how this shift in the nature of public discourse has driven changes in public opinion and in policy outcomes. Further, by understanding how the death penalty has been reframed, we illustrate the importance of framing and attention-shifting in American politics more generally and show how these factors affect not only public opinion, but the direction of public policy as

well. American constitutional law concerning the death penalty is being transformed by a shift in attention. Public opinion is shifting because of the rise of a new frame. Public policy, measured by the number of death sentences imposed, has already been transformed.

We demonstrate how the structure of political conflict surrounding the death penalty has been transformed by a self-reinforcing process that is likely to continue in the future. A "tipping point" has been reached where changes in public understanding have begun to induce further changes in policy, which in turn reinforce those same changes in public understanding. Studies of tipping points and social cascades are fundamental to many areas of social science, ranging from models of residential segregation to cultural fads to momentum associated with candidates for office during a political campaign (see Gladwell 2002 for a popular overview of work on these topics and Schelling 1971 and 1978 or Granovetter 1978 for classic citations from economics and sociology). The death penalty illustrates these ideas well. Beginning in the mid-1970s, a self-reinforcing process generated greater and greater acceptability of the death penalty for almost thirty years as Americans became more and more accustomed to capital punishment. Then a new cascade began in the 1990s, following a similar process but with opposite results: The new focus on innocence has generated public doubt, official caution, powerful individual stories of exoneration, and fewer death sentences, all in a self-perpetuating cycle.

Tipping points and social cascades are by their nature unpredictable, but the continued operation of a system of self-reinforcement allows us to conclude with some predictions about future developments. Increased attention to "innocence" may well be questioned by some, but it will continue to dominate the discussion, with the effect of lowering, for the foreseeable future, the number of death sentences nationwide. Powerful forces of momentum ensure that the current decline in death sentences will continue. The impact of these changes on public opinion has been more difficult to observe, because public opinion at the aggregate level is highly inertial. Most Americans do not think that much about the death penalty, and when they do think of it, they tend to do so in abstract, theoretical terms. (Juries, by contrast, are faced with anything but a theoretical question; this helps explain why juries – expressed through the death sentences they deliver – have changed their behavior in response to the innocence argument much more quickly than public opinion in the abstract – as evidenced in national polls.)

Beyond offering a critical analysis of the evolution of the death penalty debate over time, ours is the first book-length treatment of the dynamics of attention-shifting, following on the work of Bryan Jones and Frank Baumgartner in *The Politics of Attention* (2005). They argued that when dealing with multidimensional and highly complex issues of public policy,