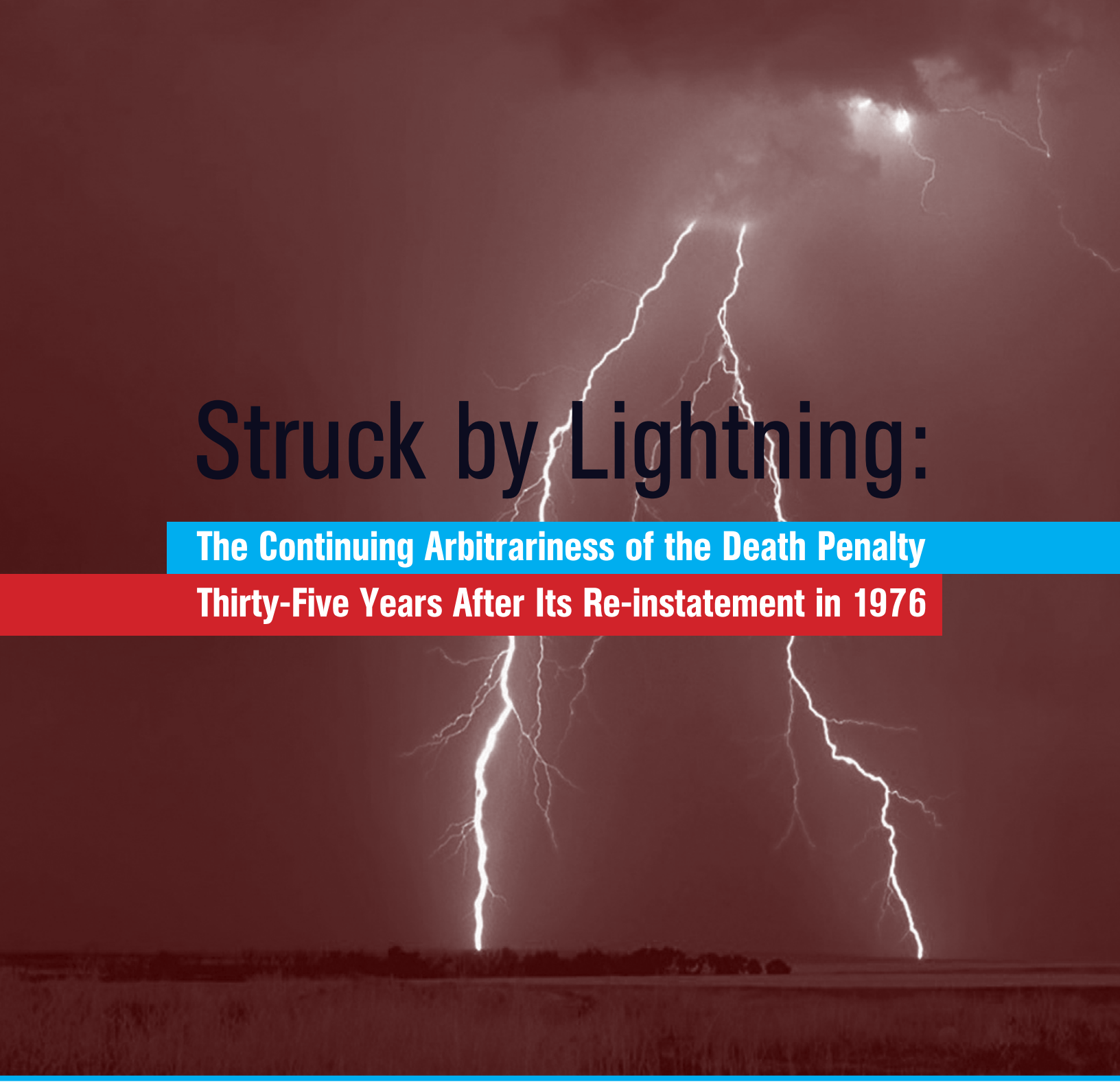

Struck by Lightning:

The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976

A Report of the Death Penalty Information Center

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by Richard C. Dieter, Executive Director

Washington, DC
July 2011

www.deathpenaltyinfo.org

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These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.
-Justice Potter Stewart (1972)

Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated to concede that the death penalty experiment has failed.
-Justice Harry Blackmun (1994)

Two decades after Gregg, *it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed. Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.*
-American Bar Association (1997)

We now have decades of experience with death-penalty systems modeled on [the Model Penal Code]. . . . Unless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.
-American Law Institute (The motion to withdraw this section of the Code was passed in 2009.)

I have concluded that our system of imposing the death penalty is inherently flawed. The evidence presented to me by former prosecutors and judges with decades of experience in the criminal justice system has convinced me that it is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right.
-Gov. Pat Quinn of Illinois (signing bill abolishing the death penalty, 2011)

Executive Summary

The United States Supreme Court approved the re-instatement of the death penalty 35 years ago on July 2, 1976. Although the death penalty had earlier been held unconstitutional because of its arbitrary and unpredictable application, the Court was willing to sanction new systems that states had proposed to make capital punishment less like "being struck by lightning" and more like retribution for only the "worst of the worst" offenders. The Court also deferred to the states' judgment that the death penalty served the goals of retribution and deterrence.

After three and a half decades of experience under these revised statutes, the randomness of the system continues. Many of the country's constitutional experts and prominent legal organizations have concluded that effective reform is impossible and the practice should be halted. In polls, jury verdicts and state legislative action, there is evidence of the American people's growing frustration with the death penalty. A majority of the nine Justices who served on the Supreme Court in 1976 when the death penalty was approved eventually concluded the experiment had failed.

Four states have abolished the death penalty in the past four years, and nationwide executions and death sentences have been cut in half since 2000. A review of state death penalty practices exposes a system in which an unpredictable few cases result in executions from among thousands of eligible cases. Race, geography and the size of a county's budget play a major role in who receives the ultimate punishment. Many cases thought to embody the worst crimes and defendants are overturned on appeal and then assessed very differently the second time around at retrial. Even these reversals depend significantly on the quality of the lawyers assigned and on who appointed the appellate judges reviewing the cases. In such a haphazard process, the rationales of deterrence and retribution make little sense.

In 1976, the newly reformed death penalty was allowed to resume. However, it has proved unworkable in practice. Keeping it in place, or attempting still more reform, would be enormously expensive, with little chance of improvement. The constitution requires fairness not just in lofty words, but also in daily practice. On that score, the death penalty has missed the mark.

I. Introduction: History of the Modern Death Penalty

The only lengthy, nationwide suspension of the death penalty in U.S. history officially began in 1972 when the U.S. Supreme Court held in *Furman v. Georgia*[1] that the death penalty was being administered in an arbitrary and capricious manner that amounted to cruel and unusual punishment. As in Georgia, the statutes of other states and the federal government provided no guidance to the jury empaneled to decide between sentences of life and death. The death penalty ground to a halt as states formulated revised laws they hoped would win the Court's approval.

Executions had stopped in 1967 as lower courts anticipated a High Court ruling on the constitutionality of capital punishment. Insights from the civil rights movement of the 1960s led many to believe the death penalty was so linked to the practice of racial discrimination that it would no longer be constitutionally acceptable. When the Supreme Court reviewed the practice of capital punishment, it focused primarily on arbitrariness in its application rather than on racial discrimination. Nevertheless, as Justice William O. Douglas warned in his concurring opinion in *Furman*, the questions of arbitrariness and discrimination are closely linked.[2]

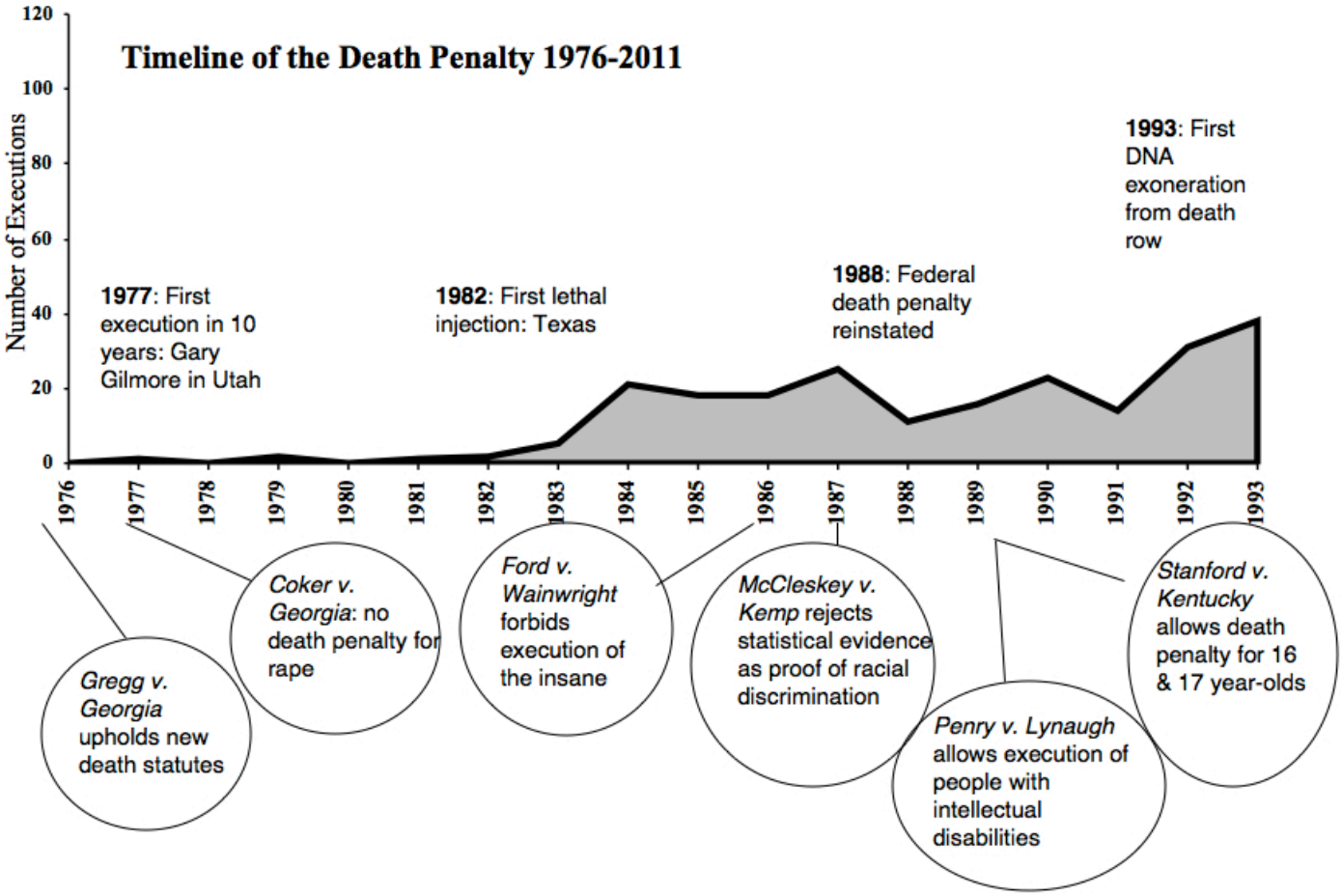
For a pivotal set of Justices, the death penalty was unconstitutional because it was "so wantonly and so freakishly imposed."[3] Justice Potter Stewart said the death penalty was "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[4] Justice Byron White echoed that sentiment when he said he could not uphold a punishment where "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[5]

The Justices left for another day the question of whether the death penalty itself was constitutional, leaving the door open to the enactment of more limited death penalty statutes that provided detailed guidance for juries. After *Furman*, many states re-wrote their death penalty laws and began sentencing people to death—although no executions would be carried out until the Court again addressed the issue.

It did so in 1976, approving the new laws of Georgia, Florida and Texas, while rejecting the approach taken by North Carolina and Louisiana, which required all those convicted of certain murders to be sentenced to death, without regard to individual sentencing considerations.[6] The death penalty itself was declared constitutional under the assumption that it fit the rationales of retribution and deterrence. The Court said that being sentenced to death would no longer be random because the new statutes sufficiently restricted and guided the decision-making of prosecutors, judges, and juries—at least in theory. Whether these new laws would be less arbitrary in practice remained to be seen.

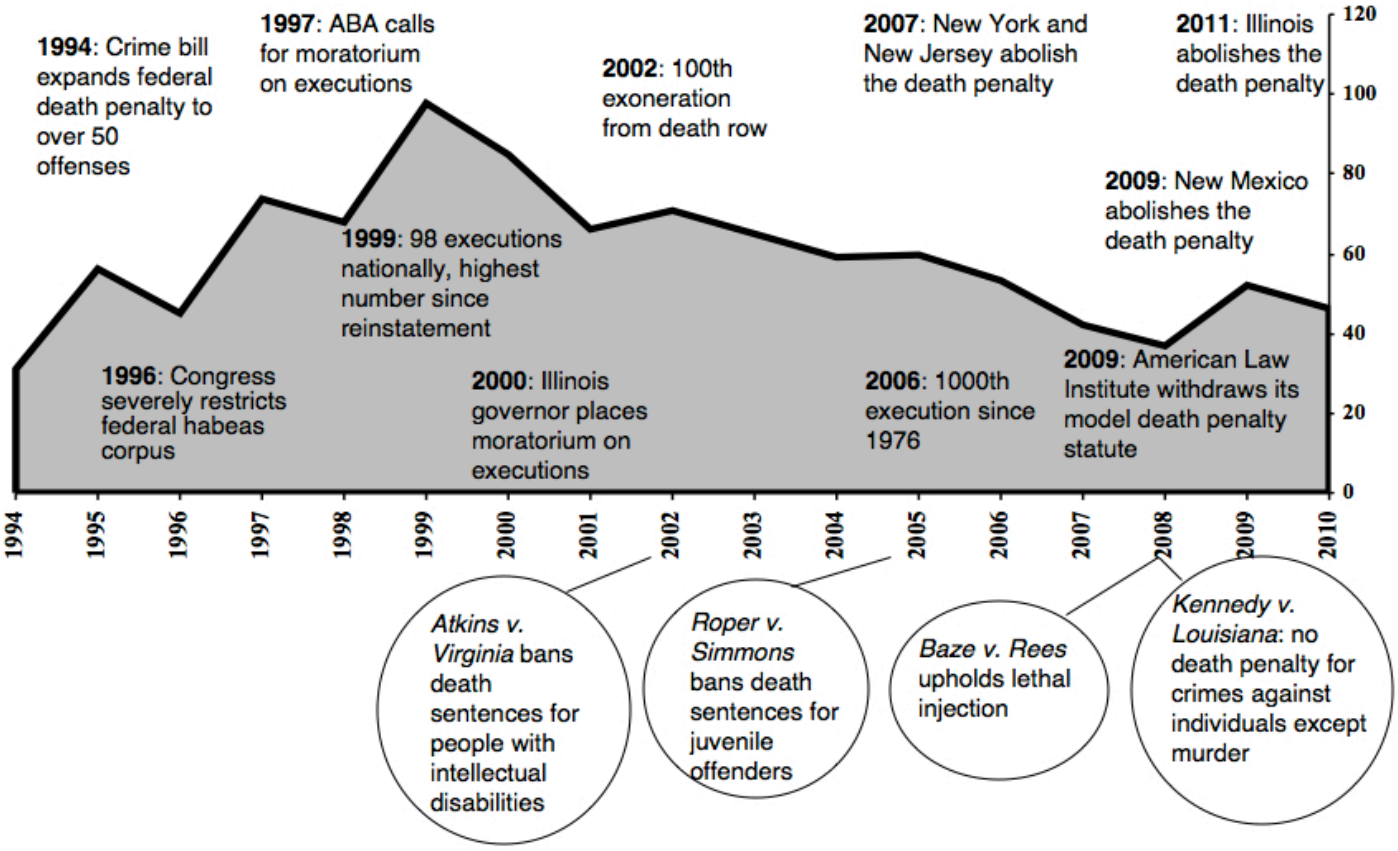
Decades of Experiment

By now thirty-five years have passed, providing ample experience to assess whether this system reliably selects the worst offenders and the most heinous crimes to merit the most severe punishment. This experience also provides an opportunity to judge whether the death penalty's twin rationales—retribution and deterrence—sufficiently justify its continued use, or whether it has devolved into the "pointless and needless extinction of life"[7] forbidden by the Eighth Amendment.



Concerns about the death penalty before the Court's approval of new laws in 1976 stemmed not only from the lack of guidance for jurors making crucial choices between life and death sentences. The death penalty was also rarely carried out, giving rise to doubts about its consistent application. In a country with only a handful of executions each year,[8] it was not at all clear that the few executed were the "worst of the worst." Justice Brennan, concurring with the majority in *Furman*, wrote, "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."[9]

The death penalty is again in decline across the country. The number of death sentences and executions has decreased sharply in the past decade. Since 2007 four states have abandoned the death penalty. Even in the 34 states that retain it, an execution is a rare event in all but a handful of states. Less than one in a hundred murders results in a death sentence, and far fewer defendants are executed. Does the one murderer in a hundred who receives a death sentence clearly merit execution more than all, or even most, of the 99 other offenders who remain in prison for life? Or do arbitrary factors continue to determine who lives and who dies under our death penalty laws?



II. Thirty-five Years Later: The Unfairness of the Death Penalty in Practice

The death penalty system in this country is demonstrably highly selective in meting out sentences and executions, and becoming more so. There are approximately 15,000 murders a year; in 2010, there were 46 executions, a ratio of 1 execution for every 326 murders. The number of murders in the U.S. barely changed from 1999 to 2009,[10] but the number of death sentences declined by 60% during that period. Studies of the death penalty in several states since 1976 reveal a system that sweeps broadly through thousands of eligible cases but ends up condemning to death only a small number, with little rational explanation for the disparity.

- In **New Mexico**, during a 28-year span, 211 capital cases were filed. About half the cases resulted in a plea bargain for a sentence less than death. Another half went to trial, and 15 people were sentenced to death. In the end, only one person was executed (after dropping his appeals), and two people were left on death row when the state abolished the death penalty in 2009.[11]

- In **Maryland**, over a 21-year period from 1978 to 1999, 1,227 homicides were identified as death-eligible cases. Prosecutors filed a death notice in 162 cases. Fifty-six cases resulted in a death judgment, although it has become clear the vast majority of those will never be carried out. As of 2011, five defendants have been executed, and only five remain on death row. There have been no executions since 2005.[12]

- In **Washington,** from 1981 to 2006, 254 cases were identified as death-eligible. Death notices were filed in 79, and death sentences were imposed in 30. Of the cases that completed the appeals process, 83% were reversed. Four executions took place, with three of the four defendants having waived their remaining appeals.[13]

- In **Kentucky**, from 1979 to 2009, there were 92 death sentences. Of the 50 cases that completed their appeals, 42 sentences (84%) were reversed. Three inmates were executed, including 2 who waived their appeals.[14]

Patterns in other states are similar. In Oregon, 795 cases were deemed eligible for the death penalty after its reinstatement in 1984; two people have been executed—both "volunteers."[15] Nationally, only about 15% of those sentenced to death since 1976 have been executed. Under the federal death penalty, from a pool of over 2,500 cases submitted by U.S. Attorneys, the Attorney General has authorized seeking the death penalty in 472 cases; 270 defendants went to trial, resulting in 68 death sentences and 3 executions to date.[16]

The theory behind winnowing from the many defendants who are eligible for the death penalty down to the few who are executed is that the system is selecting the "worst of the worst" for execution. The Supreme Court recently underscored this theory in a 2008 decision restricting the death penalty: "[C]apital punishment must 'be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."'"[17]

However, the notion that tens of thousands of eligible cases are carefully narrowed down to the worst ones does not withstand scrutiny. Many factors determine who is ultimately executed in the U.S.; often the severity of the crime and the culpability of the defendant fade from consideration as other arbitrary factors determine who lives and who dies.

The System of Selection

The system is too fraught with variables to survive. Whether or not one receives the death penalty depends upon the discretion of the prosecutor who initiates the proceeding, the competence of counsel who represents the defendant, the race of the victim, the race of the defendant, the make-up of the jury, the attitude of the judge, and the attitude and make-up of the appellate courts that review the verdict.

-Judge H. Lee Sarokin, U.S. Court of Appeals, Third Circuit (ret.)

Does the framework of guided discretion approved by the Supreme Court in 1976 achieve the goal of making the death penalty predictable and limited to the most heinous cases? On a national level, the answer clearly is "No." The system was never designed to punish the worst offenders across the country. Some states have the death penalty and others do not. Many states that have the death penalty hardly ever use it, even for their worst offenders. Excluding Texas, Virginia and Oklahoma, the rest of the country has averaged far less than one execution per state per year since the death penalty was reinstated, even when only states with a death penalty are counted.

Local Choices

Although disparities among the states in using the death penalty are allowable under the constitution, the overall justifications of retribution and deterrence become far less credible when the punishment is applied so rarely and so unevenly. However, wide disparities in the use of the death penalty *within* a single state also raise serious questions about equality under law. Jurisdictions like Harris County (Houston), Maricopa County (Phoenix), and Philadelphia have produced hundreds of death sentences, while other counties within the same state have few or no death sentences.[18] In almost all states, the decision to seek the death penalty is not made by a central state entity that evaluates the relative severity of committed homicides; rather, the charging decision is left to the discretion of the district attorney of each county. Prosecutors differ widely on what they consider to be the worst cases, and even on whether the death penalty should be sought at all. A defendant's chances of being sentenced to death may vary greatly depending on which side of the county line he committed a murder.

Jury Discretion and Understanding

Following the decision to seek death by the local prosecutor, the next critical stage for choosing between life and death occurs at the sentencing phase of the trial, where typically a jury decides a convicted defendant's fate. An individual juror, however, has no way of comparing the case under consideration with other cases in the state. For most jurors, this will be the only capital case they will ever decide. Strong emotions can easily take over as they inspect 8-by-10 glossies of the victims at the crime scene or hear heart-breaking testimony from the victim's family. Some defendants will be spared and others condemned, but in the absence of evidence of more egregious cases, most murders can be made to look like one of the worst.

Another difficulty jurors face is that to make their sentencing decision they are given vague instructions with legal terms they do not fully understand. (See, e.g., an excerpt from an Ohio jury instruction in a capital case in the endnote below.[19]) Although the language may be clear to lawyers and judges, numerous studies have documented the misunderstandings that jurors have about their instructions in death penalty cases.[20]

Uneven Appellate Review

At the third key stage of the judicial process—appellate review by the state's highest court—there could be an opportunity, called "proportionality review," to compare a death sentence with sentences given for similar crimes in the state. However, the practice has largely been abandoned, even where it was attempted.

In 1976 the U.S. Supreme Court in *Gregg v. Georgia* approved Georgia's

statute, referring favorably to the provision on proportionality review. However, in 1984, in *Pulley v. Harris,*[21] the U.S. Supreme Court rejected the principle that every state was required to systematically review whether a given death sentence was justified when compared to similar offenses in the state. Proportionality review in almost all states is now, if it occurs at all, a perfunctory process, allowing a death sentence if death sentences were given in one or more similar cases, but ignoring the vast majority of similar cases which resulted in life sentences.[22] Once a death sentence has been upheld for a particular factual scenario, a death sentence in a subsequent similar crime will not be deemed disproportionate. This process results only in a lowest common denominator for a death sentence, not a search for the worst of the worst.

Thus, in our death penalty system thousands of cases go through the initial stages of prosecution and sentencing with the public assuming that the relative few that emerge are the ones most deserving of death. Appellate review, however, in both state and federal courts, then finds that prejudicial mistakes were made in two-thirds of these cases, resulting in the death sentences being overturned.[23] The stated reasons for these reversals often have nothing directly to do with the proportionality of the sentence to the crime. Cases are overturned because defense lawyers failed to perform their professional duties at trial, prosecutors withheld exculpatory evidence, or the jury was improperly selected, among many reasons. When these cases are retried (or reconsidered by the prosecution), the judgment most often changes to a life sentence, or less. No longer are these defendants deemed the worst of the worst, even though the facts of the crimes remain the same.

There are many people who commit heinous crimes, and I'd be the first to stand up with emotion and say they should lose their lives. But when I look at the unfairness of it, the fact that the poor and people of color are most often the victims when it comes to the death penalty, and how many cases we've gotten wrong now that we have DNA evidence to back us up, I mean, it just tells me life imprisonment is penalty enough.

-Sen. Dick Durbin (IL)[24]

These reversals challenge the death-penalty selection process in two ways: first, prosecutors, juries, and judges are often making critical decisions on the basis of incomplete or incorrect information. Some of the errors, but by no means all, are caught. A defendant can have a bad lawyer at trial and another bad lawyer on appeal, so there is no one to remedy the deficiencies of the first lawyer. Evidence withheld at trial by the prosecution is not always uncovered during appeals. So, even when a defendant is near execution, critical facts bearing on the appropriateness of the sentence may remain unrevealed.

The second way in which the appeals process contributes to the arbitrariness of the death penalty is that reversals are very uneven from state to state. Virginia, for example, is the second leading state in terms of executions. Between 1973 and 1995, the Virginia Supreme Court overturned only 10% of the death sentences reviewed, compared to a national reversal rate of 41%.[25] At the next level, Virginia's cases are reviewed by federal courts of the Fourth Circuit, which had the lowest record of reversals in capital cases in the entire country during the same period.[26] As a

result, about 70% of Virginia's death sentences have resulted in executions, compared to 15% nationally. In California from 1997 to 2010, close to 90% of the Supreme Court's capital cases were affirmed, a rate higher than any other state's.[27]

Compare this to Mississippi, where from 1973 to 1995, 61% of the capital cases reviewed were reversed by the state Supreme Court; or North Carolina, where also 61% were reversed; or South Carolina, where 54% were reversed.[28] Such wide disparities in reversal rates raise the specter of uneven application of the law.

Examining what happens to death-sentenced defendants the second time through the system demonstrates the critical importance of a reversal in a death penalty case:

- In **North Carolina**, about 2/3 of the death penalty cases that completed the review process were reversed. About 65% of the defendants in those cases were given life sentences or less as the final disposition of their cases; another 9% died in prison of natural causes.[29]

- As of 2009, **Pennsylvania,** with the fourth largest death row in the country, has had 124 death sentences reversed on appeal. When these cases were retried or otherwise resolved, 95% resulted in a life sentence, or less. The state has had 3 executions in 30 years, all involving defendants who abandoned their appeals.[30]

- In **Washington**, 18 death sentences have been reversed; none resulted in death sentences the second time around.[31]

- In **New York** and **New Jersey**, no case made it through the entire appeals process to execution, and both states have now abandoned the death penalty.

Nationally, the most comprehensive study of death penalty appeals found that two-thirds of death sentences were overturned, and upon reconsideration over 80% received an outcome of less than death.[32] In all of these re-sentencings, the judgment went from "worst of the worst" to something less severe—the difference between life and death.

In sum, this is a broken and unreliable system, compounded by wide disparities between states. In some states most death sentences are overturned and almost no one is executed, but in others, like Texas and Virginia, where reversals are rare, over 575 people have been executed since 1976, almost half of the national total.

III. The Great Divide

I have been a judge on this Court for more than twenty-five years . . . After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.

-Judge Boyce Martin, U.S. Court of Appeals, Sixth Circuit

When Gary Ridgway, the worst mass murderer in this state's history, escapes the death penalty, serious flaws become apparent. The Ridgway case does not 'stand alone,' as characterized by the majority, but instead is symptomatic of a system where all mass murderers have, to date, escaped the death penalty . . . . The death penalty is like lightning, randomly striking some defendants and not others.

-Justice Charles Johnson, Washington Supreme Court[33]

Both our general prison population and death row contain dangerous individuals convicted of serious crimes. But it would be hard to predict whether an inmate ended up on death row or in the general prison population if you were to examine only the facts of the crime. It would be even harder to foresee who would eventually be executed. The fact that a condemned inmate was in Texas or Virginia would be a far better predictor of execution than the facts of the crime.

There are many reasons why a particular defendant does not receive the death penalty. He could be in a state that does not have capital punishment, such as Wisconsin's Jeffrey Dahmer, a serial killer and sex offender who received a life sentence. He may have information to offer the prosecution in exchange for a plea bargain, such as former FBI Agent Robert Hanssen, who was charged with espionage and faced a federal death sentence before cooperating with the government.[34] Those involved in organized-crime killings may also receive leniency because of the information they can offer. Often the most notorious cases receive the best legal defense, making a death sentence less likely, even for horrific crimes.

Who is executed?	Who is spared?
Clarence Carter was executed in Ohio on April 12, 2011, for the murder of another inmate. The former Director of Ohio Prisons, Terry Collins, urged the governor to spare Carter because "It is much more likely that this was an inmate fight that got tragically out hand. Inmate-	**Eric Rudolph** admitted killing two people and injuring 150 others by carrying out a series of bombings at a gay nightclub, abortion clinics, and the 1996 Olympics in Atlanta. He finally was captured in 2003. In separate plea

on-inmate violence in lockups is often pursued to establish oneself as fearsome and to deter others from threatening or attacking the inmate." There was no evidence that Carter planned to kill the inmate during the fight.[35]	agreements with the federal government and Georgia prosecutors, he avoided the death penalty and is serving four consecutive life sentences without the possibility of parole. Prosecutors spared Rudolph from execution in exchange for his guilty pleas and his information about the location of 250 pounds of dynamite he had hidden in the mountains of North Carolina.[36]
Teresa Lewis was executed in Virginia in 2010. Requests for a commutation of her death sentence had come from mental health groups, the European Union, and novelist John Grisham. Many pointed to the fact that while Lewis was a conspirator in the crime, the two co-defendants who actually carried out the killings received life sentences. Information that became available after Lewis's trial showed she had an IQ of 72, one of the key components of intellectual disability that could have rendered her death sentence unconstitutional. A letter from one of the co-defendants in prison indicated he had manipulated Lewis into going along with the murder of her husband. While on death row, she reportedly was a great help to other prisoners.[37]	**James Sullivan,** a millionaire and former fugitive on the FBI's most-wanted list, was captured in Thailand in 2002, four years after he was indicted on murder charges and 15 years after he paid a truck driver $25,000 to kill his wife in Georgia. A jury sentenced him to life without parole.[38]
Michael Richard needed the help of his sisters to dress himself until age 14. He cut his meat with a spoon because he could not use a knife. He was diagnosed as mentally retarded by Dr. George Denkowski, but Denkowski reversed himself after the District Attorney's Office intervened.[39] (Dr. Denkowski has since been barred from rendering further diagnoses of intellectual disabilities in Texas.) Richard was the last person executed in the U.S. in 2007. After the U.S. Supreme Court agreed to hear a challenge to lethal injection, every other defendant was granted a stay of execution. However, Richard's attempt to file a similar appeal was blocked because a Texas appellate judge refused to keep the courthouse open after 5 pm so his lawyers could file legal papers due that day.[40]	In Washington in 2003, **Gary Ridgway** pleaded guilty to killing 48 people and received a life-without-parole sentence. He was called the "Green River Killer" because of the area in which his victims were found. He was spared the death penalty in exchange for a detailed confession about all of the young women he had murdered.[41]

Kelsey Patterson was executed in Texas in 2004 despite a highly unusual 5-1 recommendation for clemency from the Board of Pardons and Paroles. He had spent much of his life in and out of state mental hospitals, suffered from paranoid schizophrenia, and rambled unintelligibly at his execution. He had killed 2 people without warning or apparent motive.[42]	**Charles Cullen** received 11 consecutive life sentences for killing as many as 29 intensive-care patients with fatal injections. In 2004 Cullen made a plea agreement with New Jersey and Pennsylvania prosecutors in which he offered to provide information about his crimes and the names of his victims in exchange for the states' agreement not to seek the death penalty.[43]
Wanda Jean Allen was executed in Oklahoma in 2001. She was sentenced to death for killing her lover, Gloria Leathers, in Oklahoma City in 1988. The two women, who met in prison, had a turbulent relationship. Leathers' death followed a protracted argument between the couple that began at a local shop, continued at their home, and culminated outside a police station. Allen maintained she acted in self-defense. In 1995, a psychologist conducted a comprehensive evaluation of Allen and found "clear and convincing evidence of cognitive and sensori-motor deficits and brain dysfunction," possibly linked to an adolescent head injury.[44]	**Thomas Capano**, a former state prosecutor and prominent Delaware lawyer, was convicted of murdering his mistress and dumping her body in the ocean. He was sentenced to death, but a state court overturned his sentence. In 2006, the state decided not to pursue the death penalty at retrial, with the original prosecutor stating, "The death penalty was always a secondary issue."[45]
Manny Babbitt lived with his brother in California after being released from a mental institution. He had been suffering from post-traumatic symptoms ever since he returned from Vietnam in 1969. During the 77-day siege at Khe Sanh, Manny picked up pieces of the bodies of his fellow G.I.s. When he was wounded, he was evacuated in a helicopter on a pile of dead bodies. He later broke into the home of an elderly woman and beat her. She died of a heart attack. His brother turned him over to authorities, expecting his war-hero brother would receive the medical attention he needed. However, Babbitt was tried, sentenced to death and executed in 1999, shortly after receiving the Purple Heart in prison.[46]	In 2003, **Stephen "The Rifleman" Flemmi** was allowed to plead guilty to 10 murders, drug trafficking, racketeering and extortion, as federal prosecutors agreed not to seek the death penalty against him in exchange for his cooperation with ongoing crime investigations. Under the terms of the agreement, Flemmi--who also admitted to murders in Florida and Oklahoma--will serve a life-without-parole sentence in a secure unit reserved for cooperating inmates. Among the murders committed by Flemmi were the murder of one girlfriend and the daughter of another.[47]

Dwayne Allen Wright was executed in Virginia in 1998. Wright was 17 at the time of his crime, the product of a failed system of juvenile care in the District of Columbia. Wright had been admitted to St. Elizabeth's mental hospital and sent to two of the city's most notorious juvenile centers. He suffered from a number of mental problems and grew up with an incarcerated father, a mentally ill mother, and an older brother serving as his father until he was murdered when Wright was ten. At trial his lawyers played down these issues. Two jurors later said they would not have voted for death if they had known of his mental illness and intellectual shortcomings. Although Wright's case captured the attention of noted civil rights, religious and political leaders, he was shown no mercy. Wright was one of three juvenile offenders executed in Virginia after the death penalty was reinstated. The Supreme Court did not bar such executions of juvenile offenders until 2005.[48]	**Brian Nichols** was in custody in a crowded Atlanta courthouse on a rape charge when he grabbed the gun of a deputy and shot and killed the judge and court reporter. While escaping from the courthouse, he killed a police deputy and U.S. Customs agent and took a woman hostage. He later agreed to turn himself in. His guilt was never in question, but after the state spent over $3 million trying to sentence him to death, the jury could not agree on sentence and hence Nichols was sentenced to life without parole.[49]
Harold McQueen was the first person executed in Kentucky in 35 years. McQueen was tried with his half-brother, Keith Burnell, for a robbery and murder. While Burnell's father paid for a private attorney, McQueen had a court-appointed lawyer who, at the time of trial, could be paid a maximum of only $1,000 for handling the case. McQueen was electrocuted in 1997; Burnell was sentenced to prison and paroled shortly thereafter.[50]	**Oscar Veal** was a contract killer for a large drug and murder-for-hire operation. Convicted of seven counts of murder and eight counts of racketeering conspiracy, in 2011 federal prosecutors agreed not to seek the death penalty against him in exchange for his testimony about a drug organization in Washington, D.C. Although prosecutors said, “[Veal] willingly and purposely killed seven men, motivated by both greed and the desire to please the other members of this violent gang,” they called his cooperation "extraordinary by any measure" and recommended a prison sentence of 25 years.[51]
Jesse Dewayne Jacobs was executed in 1995 in Texas. After Jacobs's trial, at which he was accused of firing the murder weapon, the prosecution, in an unsuccessful attempt to get another death sentence against the co-defendant, reversed itself and claimed Jacobs did not do the shooting and did not even know that his co-defendant had a gun. Despite this	**Juan Quintero**, a Mexican immigrant with no identification papers, killed a Houston police officer after being stopped for speeding in Texas in 2006. Unlike many other foreign nationals, the Mexican government learned of his case and was able to provide assistance, bringing in a mitigation specialist and an

blatant inconsistency about who committed the murder, Jacobs's death sentence was upheld. The Vatican, the European Parliament, and some members of the U.S. Supreme Court objected to the state's misconduct. Justice Stevens wrote: "I find this course of events deeply troubling."[52]	expert capital defender from Colorado. In 2008, a jury convicted Quintero of the murder, but at least 10 of the 12 jurors voted for a life-without-parole sentence instead of the death penalty. Houston is in Harris County, which has been called the "capital of capital punishment."[53]
John Spenkelink was a 24-year-old former convict and drifter. He picked up a hitchhiker, another ex-convict, in the Midwest, and together they drove to Florida. Along the way the hitchhiker, who was larger and stronger, forced Spenkelink to have sexual relations with him and bullied him into playing Russian roulette. When they reached Tallahassee, Spenkelink discovered his abuser had also stolen his money. They fought, and Spenkelink shot the man to death. He was executed in 1979, the first person put to death in Florida after the death penalty was reinstated.[54]	In a recent New York trial in in which the federal government sought the death penalty for Vincent Basciano, who was already serving life without parole, the chief witness against him was **Joseph Massino,** another organized-crime figure. Massino was guilty of at least seven murders but escaped the death penalty because of his cooperation with the government.[55] He is serving numerous life sentences, but his testimony may win him further relief. In the end, Basciano was also given a life sentence by the jury, despite his conviction for murder, racketeering, and conspiracy.
Cameron Willingham was convicted of capital murder of his three children in Texas after arson investigators concluded an accelerant had been used to set three separate fires inside his home. The only other evidence presented by prosecutors during the trial included testimony from a jailhouse snitch and reports that Willingham was acting inappropriately after the fire. Before his execution in 2004, Willingham's attorneys presented the state's highest court and the governor with new testimony from a prominent fire expert questioning the conviction, but no stay was granted. Subsequently, four national arson experts concluded the original arson investigation was flawed and there was no evidence of a crime.[56]	**Ernest Ray Willis** was sentenced to death in Texas for the 1986 deaths of two women who died in a house fire that was ruled arson. Investigators originally believed they had found an accelerant in the carpet. When officers at the scene of the blaze said Willis acted strangely, prosecutors arrested him. They used his dazed mental state at trial - the result of state-administered medication - to characterize Willis as "coldhearted" and a "satanic demon." Seventeen years later, the Pecos County District Attorney revisited the case after a federal judge overturned Willis' conviction. To review the original evidence, he hired an arson specialist, who concluded there was no evidence of arson. Willis was freed in 2004.[57]

Aside from the issue of mistakes, these cases show that society has priorities that supersede the demands for the death penalty, regardless of the severity of the offense. They indicate that executions of the worst offenders are not necessary for the safety of the public; if they were, the most notorious killers almost certainly would be executed. In the modern death penalty era, many of the country's most infamous offenders are serving life sentences in secure state and federal prisons, while those who have fewer resources, or no valuable information to barter, or who committed their crime in the "wrong" state or county, are executed.

Even in cases evoking national fear, a death sentence is not a predictable result. From 1978 to 1995, Theodore Kaczynski, the "Unabomber," sent 16 bombs to people at universities and airlines, killing 3 and injuring 23, resulting in a national manhunt and widespread public anxiety. Although the death penalty was originally sought, the case resulted in a plea bargain and a life-without-parole sentence in federal prison.[58] Skilled representation and Kaczynski's mental illness played a role in avoiding the death penalty, but as the cases above show, many mentally ill defendants meet a different fate.

Zacharias Moussaoui admitted his involvement in the 9/11 terrorist attacks in New York and Washington, D.C. that led to the deaths of over 3,000 people. He tried to represent himself in the sentencing phase of his federal trial in Virginia, but his abuse of the process led the judge to require experienced counsel to represent him. In 2006, a jury sentenced him to life without parole.[59]

Even When Notorious Killers Are Executed, Arbitrariness Remains

Of course, some notorious offenders are executed. Timothy McVeigh was the first person executed under the reinstated federal death penalty for the 1995 bombing of the Oklahoma City building, in which 167 people died. However, his co-defendant, Terry Nichols, was given life sentences following convictions in both federal and Oklahoma courts, despite being found guilty of conspiracy in the same crime. Although Nichols was probably less culpable of the bombing than McVeigh, his crime was monumental compared to those of others who were executed.

Serial killer Ted Bundy was executed in Florida in 1990. Everyone knew of his crimes and smug demeanor. What many did not know was that Bundy was offered a plea bargain similar to that given other serial killers described above. His attorneys urged him to take the deal, which would have covered all of his offenses in Florida, but at the last minute he balked, perhaps attracted by the attention an execution could bring him. Bundy's crimes fit the profile of cases for which people believe the death penalty was designed, but in the end, he controlled the process. His unpredictable decision to seize the role of anti-hero, rather than a careful process of official decision-making, determined his fate.[60]

Our criminal justice system is frequently confronted with dangerous individuals guilty of heinous crimes--yet almost all of them will remain in prison and never be executed. The few who are executed generally are not the most dangerous offenders. They may not have had information to offer the prosecution, or they may have adamantly refused a plea bargain. They are put to death many years, and sometimes decades,

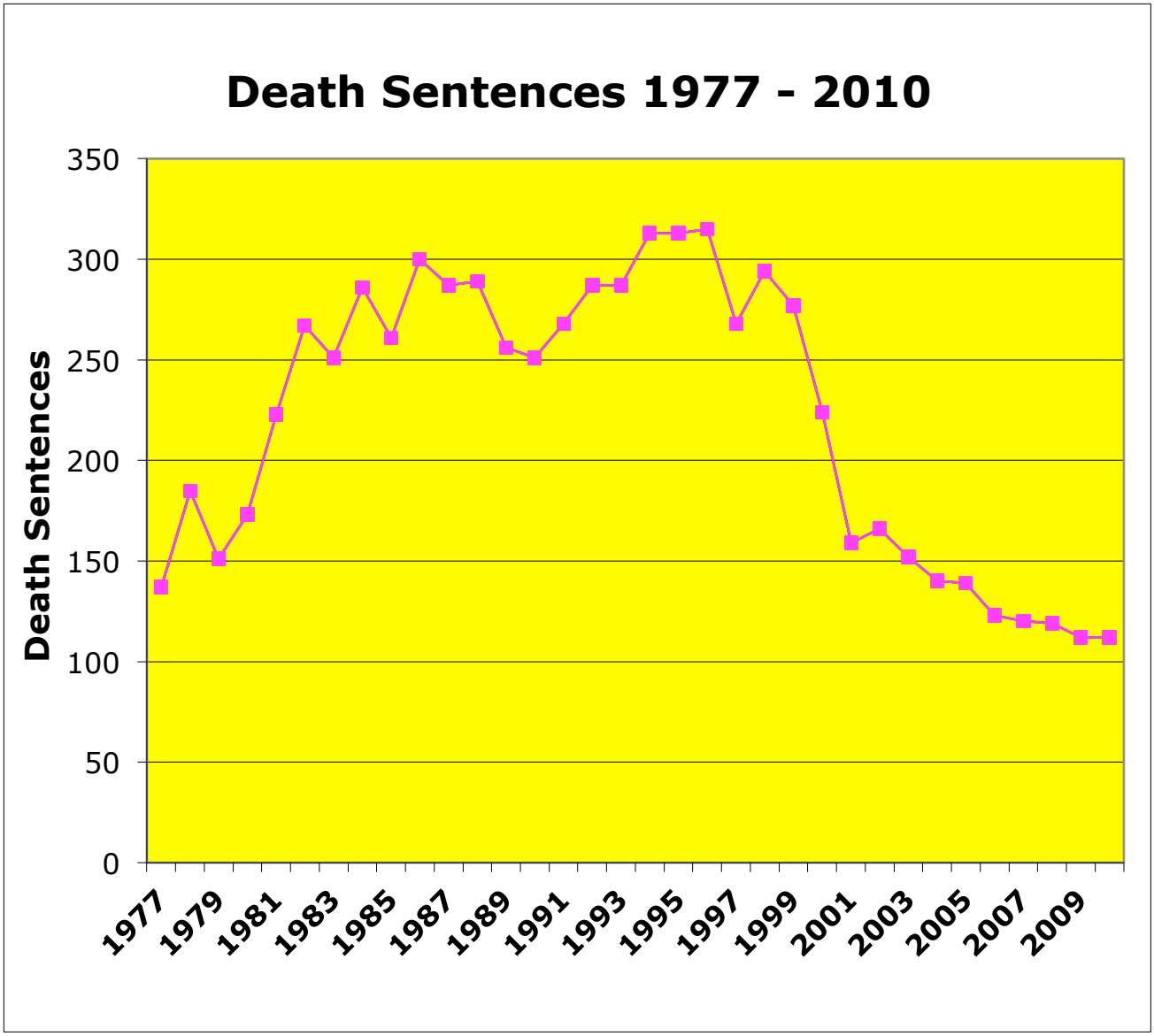
after their crime, and have often changed substantially from who they once were.

IV. The Judgment of Experts

Even before states tried to formulate a system that would satisfy the Supreme Court's concerns about the arbitrariness of the death penalty, experts warned it was a futile endeavor. In 1953, the British Royal Commission studied the death penalty and concluded, "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder."[61] Ultimately, the Commission recommended that the death penalty in Great Britain be ended, and in 1973 it was.

The American Law Institute, authors of the Model Penal Code, agreed the death penalty could not easily be put into a set of rules for jurors to follow: "[T]he factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . ."[62]

Nevertheless, in 1976 the Court approved a list of aggravating and mitigating factors when it allowed the death penalty to



resume. By a vote of 7 to 2, the Court approved Georgia's framework of guided-discretion in *Gregg v. Georgia*.[63] Justices Thurgood Marshall and William Brennan, believing the death penalty could not be saved by merely amending the old statutes, dissented.

A Majority of the 1976 Justices

It now appears that at least three of the Justices in the *Gregg* majority would belatedly have joined Justices Marshall and Brennan if they had had the opportunity. One of those Justices was Harry Blackmun, who famously announced his reconsideration of the death penalty in 1994, shortly before he left the bench. He concluded the theory he had upheld in 1976 had not worked in practice:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated to concede that the death penalty experiment has failed.[64]

Justice Lewis Powell came to a similar conclusion after retiring from the Court. He told his biographer, James Jeffries, that his approval of the death penalty while on the Court was the one area he had come to regret: "I have come to think that capital punishment should be abolished."[65]

Finally, Justice John Paul Stevens, who remained on the Court for almost the entire 35 years of the post-*Gregg* era, gradually became convinced the death penalty is unconstitutional:

> [T]he imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[66]

Thus if the composition of the Court at the time of *Gregg* in 1976 were in place today, the vote on the constitutionality of the death penalty would be at least 5-4 in favor of banning capital punishment.

Prominent Legal Organizations

The conclusion of the Justices that the death penalty should be reconsidered in light of its record since 1976 was echoed by the prestigious **American Law Institute** (ALI), an organization comprising the country's leading jurists and legal scholars. Although the ALI had been skeptical about providing adequate guidance to juries on death sentencing, it nevertheless had offered as part of the Model Penal Code a framework of aggravating and mitigating factors, which many states followed. Recently, however, the ALI decided that the entire framework should be withdrawn. In 2009, while not taking a stand on the death penalty itself, the ALI voted to rescind the parts of their Model Penal Code dealing with the death penalty because the attempt to channel the death penalty toward only the worst offenders had failed. The report submitted by the ALI Council to its members stated:

> Unless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.[67]

The ALI based its withdrawal from the death penalty arena on a research report it commissioned from law professors Carol and Jordan Steiker. Their thorough analysis of the modern death penalty concluded:

> The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, *these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.*[68]

Other leading organizations have come to similar conclusions about the state of the death penalty since the *Gregg* decision in 1976. The **American Bar Association**, after years of advocating reforms to the death penalty system, agreed in 1997 to call for a moratorium on all executions. That resolution remains in force today. The report supporting this historic step stated:

> Two decades after *Gregg*, it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed. Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.[69]

The Constitution Project, a non-profit organization of legal experts focused on reforming the justice system, similarly reviewed the status of the death penalty, issuing a report in 2001 entitled "Mandatory Justice: Eighteen Reforms to the Death Penalty." It called for a series of legislative steps to bring the death penalty into compliance with minimal constitutional requirements. On the problem of arbitrariness identified by the Supreme Court in 1972, it concluded little had changed:

> We are now faced with state systems that vary vastly from one another, but most of which pose almost as great a risk of arbitrary, capricious, and discriminatory application as three decades ago, when the Court called for reform in *Furman v. Georgia*.[70]

Few of its recommendations have been adopted.

Other Jurists

Other prominent individuals have also weighed in on the continuing problem of arbitrariness in the death penalty. Retired Federal Appeals Court Judge H. Lee Sarokin recently offered a harsh critique of

the system. Citing the arbitrariness at every level, Judge Sarokin concluded the death penalty should not be permitted to continue:

> *The system is too fraught with variables to survive.* Whether or not one receives the death penalty depends upon the discretion of the prosecutor who initiates the proceeding, the competence of counsel who represents the defendant, the race of the victim, the race of the defendant, the make-up of the jury, the attitude of the judge, and the attitude and make-up of the appellate courts that review the verdict.[71]

Judge Boyce F. Martin, Jr. of the U.S. Court of Appeals for the Sixth Circuit reached a similar conclusion:

> I have been a judge on this Court for more than twenty-five years. In that time I have seen many death penalty cases and I have applied the law as instructed by the Supreme Court and I will continue to do so for as long as I remain on this Court. This my oath requires. After all these years, however, only one conclusion is possible: *the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair*.[72]

Finally, former Chief Justice Deborah Poritz of the New Jersey Supreme Court, reflecting on her years of trying to make the state's death penalty fair, said, "We really can find no way to do this that will take the arbitrariness out of the system."[73]

Public Opinion

Legal experts are not the only ones concerned about the arbitrary nature of the death penalty. Whatever their views about the death penalty in theory, the public is very concerned about the manifest unfairness in its application. In a 2010 national survey of registered voters by Lake Research Partners,[74] respondents rated the problem of unfairness as one of the top reasons to replace the death penalty with a sentence of life in prison, ranking it high, along with their concerns about innocence and the frustration the death penalty causes victims' families. Sixty-nine percent (69%) found the following statement convincing:

> Our criminal justice system should treat all people equally, regardless of how much money they make, where they live, or the color of their skin. In reality, the death penalty is applied unevenly and unfairly, even for similar crimes. Some people are sentenced to die because they couldn't afford a better lawyer, or because they live in a county that seeks the death penalty a lot. A system that is so arbitrary should not be allowed to choose who lives and who dies.[75]

Men and women, young and old, black and white, all rated unfairness as the concern they found most convincing among the problems with the death penalty. The perception that the death penalty is not fairly administered has led many people to support repeal of capital punishment. In the same survey, when asked what the proper punishment for murder should be, 61% opted for various forms of a life sentence, and only 33% said the punishment should be the death penalty.[76]

These doubts about the death penalty have contributed to the dramatic 60% decline in new death sentences in the past decade, even in states like Texas.[77] These doubts also make it difficult to select a jury in a capital case. Prospective jurors are quizzed about their views on the death penalty, and those who express serious concerns about applying it can be dismissed

by the judge or prosecution. In a separate survey, almost 40% of Americans said they believe they would be eliminated from serving on a death penalty jury because of their views on capital punishment. The percentage among some minorities was even higher.[78]

V. Influences on the Decision for Death

I never saw a way that you could make the death penalty consistent across jurisdictions, juries, counties, and prosecutors.

- Dee Joyce Hayes, 20-year veteran prosecutor and former St. Louis Circuit Attorney

Although the application of the death penalty remains arbitrary, the choice of who is executed and who is spared is not random. Today's death penalty is not only determined by factors having little to do with the severity of the crime or the culpability of the criminal, but it also is unfairly applied, in that the determinative factors often are the same ones that repeatedly have marred our commitment to equal justice.

Influence of Race

One of the strongest determinants of who gets the death penalty is the race of the victim in the underlying murder. If one kills a white person, one is far more likely to get the death penalty than if one kills a member of a minority. This has been demonstrated for at least 25 years, and reinforced by careful statistical studies in almost all death penalty states and by several review commissions.

As far back as 1990, the U.S. General Accounting Office reviewed studies on race and the death penalty and concluded:

> In 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.[79]

One of the most comprehensive studies of race and the death penalty was conducted by Professor David Baldus in preparation for a case eventually reviewed by the U.S. Supreme Court. Professor Baldus and statisticians at the University of Iowa reviewed over 2,000 potential death penalty cases in Georgia and matched them with 230 variables that might influence whether a defendant would receive a death sentence. After extensive review, they concluded that the odds of receiving the death penalty in Georgia were 4.3 times greater if the defendant killed a white person than if he killed a black person.[80]

Ultimately, the Supreme Court upheld Georgia's death penalty system by a vote of 5-4.[81] The Court assumed the validity of the Baldus study and recognized that inequities existed in the criminal justice system. However, the Court was unwilling to reverse McCleskey's death sentence on the basis of this statistical study. Doing so would have, in the Court's view, threatened the entire criminal justice system.

In his dissent in *McCleskey,* Justice Brennan eloquently summarized the impact of Baldus's findings on individual defendants:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence . . . . Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: *there was a significant chance that race would play a prominent role in determining if he lived or died.*[82]

Subsequent studies in states around the country have revealed how pervasive this problem is. In a report prepared for the American Bar Association, Professors Baldus and Woodworth expanded on the GAO's review of studies on race discrimination in capital cases. They found relevant data in three-quarters of the states with prisoners on death row. In 27 of those states (93% of the studies), there was evidence of race-of-victim disparities, i.e., the race of the person murdered correlated with whether a death sentence would be given in a particular case. In nearly half of those states, the race of the defendant also served as a predictor of who received a death sentence.[83]

In Florida, for example, a defendant's odds of receiving a death sentence is 4.8 times higher if the victim is white than if the victim is black in similar cases. In Oklahoma the multiplier is 4.3, in North Carolina it is 4.4, and in Mississippi it is 5.5.[84]

Since that review new studies have reached similar results. A study conducted by Professors Glenn Pierce and Michael Radelet and published in the 2011 *Louisiana Law Review* showed that in parts of Louisiana the odds of a death sentence were 2.6 times higher for those charged with killing a white victim than for those charged with killing a black victim.[85]

A study of the death penalty in Arkansas published in 2008 showed similar racial patterns in sentencing. Professor Baldus examined 124 murder cases filed in one district from 1990 to 2005. After adjusting for factors such as the defendant's criminal history and the circumstances of the crime, black people who killed white people were significantly more likely than others to be charged with capital murder and sentenced to death.[86]

A sophisticated statistical study of homicide cases in South Carolina by Professor Isaac Unah of the University of North Carolina at Chapel Hill and attorney Michael Songer found that prosecutors were more likely to seek the death penalty when the victim in the underlying murder was white or female:

> South Carolina prosecutors processed 865 murder cases with white victims and sought the death penalty in 7.6% of them. By contrast, prosecutors sought the death

> penalty in only 1.3% of the 1614 murder cases involving black victims. . . .The data further suggest that non-Whites are far more likely than Whites to be homicide victims in the state. About 62% of homicide victims in the study were non-Whites; virtually all of these victims were African American. . . . South Carolina prosecutors were 5.8 times as likely to seek the death penalty against suspected killers of Whites as against suspected killers of Blacks.[87]

In a comprehensive study in 2005 covering 20 years and almost two thousand capital cases in Ohio, the Associated Press found the death penalty had been applied in an uneven and arbitrary fashion. The study analyzed 1,936 indictments reported to the Ohio Supreme Court by counties with capital cases from October 1981 through 2002 and concluded that offenders facing capital charges were twice as likely to be sentenced to death if they killed a white person than if they killed a black person. Death sentences were handed down in 18% of cases where the victims were white, compared with 8.5% of cases where victims were black.[88]

Interaction With Geography

The reasons for racial disparities in death sentencing are not hard to find. For prosecutors and juries, choosing which cases are the worst and the most deserving of death is largely a subjective judgment. If the prosecutor is white, if the media highlights the death of a prominent white victim or if the jury is predominantly or entirely white, the perception that white-victim cases are more heinous, and thus more deserving of death, is predictable.

This is not necessarily the result of racial prejudice; it also can correlate with geography. Murders are affronts to the community, but prosecutors in communities with largely black populations may believe their constituents are not as supportive of the death penalty, or that jurors in that community would be less likely to vote for the death penalty. Opinion polls appear to bear this out.

When selecting a jury, prosecutors with no racial agenda may still prefer an all-white jury because they believe such a jury would be more likely to convict the defendant and sentence him to death than a mixed-race jury. The system becomes self-reinforcing. For example, a prosecutor who knows the jury will be mainly black may choose not to seek the death penalty. The net result is a preference for white victims killed in predominantly white communities.

These race-correlated disparities in outcome may be explicable, but it does not follow that racial differences in death sentencing should be sanctioned in a criminal justice system committed to even-handed, non-arbitrary outcomes.

There's indifference to excluding people on the basis of race, and prosecutors are doing it with impunity. Unless you're in the courtroom, unless you're a lawyer working on these issues, you're not going to know whether your local prosecutor consistently bars people of color.

-Bryan Stevenson, Equal Justice Initiative

A recent study of the Equal Justice Initiative (EJI), a human rights and legal services organization in Alabama, found the practice of excluding blacks and other racial minorities from juries remains widespread

and largely unchecked, especially in the South. "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy" revealed that Alabama courts have found racially discriminatory jury selection in 25 death penalty cases since 1987, and in some counties 75% of black jury pool members in capital cases were excluded.[89]

The same study revealed that in Jefferson Parish, Louisiana, the Louisiana Capital Assistance Center found blacks were struck from juries more than three times as often as whites between 1999 and 2007. In North Carolina, at least 26 current death row inmates were sentenced by all-white juries. According to Bryan Stevenson, Executive Director of EJI, "There's indifference to excluding people on the basis of race, and prosecutors are doing it with impunity. Unless you're in the courtroom, unless you're a lawyer working on these issues, you're not going to know whether your local prosecutor consistently bars people of color."[90]

Cases Cluster Within a State

Clearly the death penalty is applied unevenly around the country. Eighty-two percent (82%) of the country's executions occur in the South.

However, even within states death sentences and capital prosecutions typically cluster in a few areas.[91] An investigation by seven Indiana newspapers in 2001 found that seeking the death penalty depended on factors such as the views of individual prosecutors and the financial resources of the county in which the crime was committed. Two Indiana counties have produced almost as many death sentences as all of the other Indiana counties combined.[92]

When New York had the death penalty, upstate counties experienced 19% of the state's homicides but accounted for 61% of all capital prosecutions. Three counties (out of 62 in the state) were responsible for over one-third of all of the cases in which a death notice was filed.[93]

A report by the ACLU of Northern California revealed that in 2009 three counties–Los Angeles, Orange, and Riverside–accounted for 83% of the state's death sentences.[94]

A recent article in *Second Class Justice*, a blog dedicated to addressing unfairness and discrimination in the criminal justice system, cited figures from the American Judicature Society revealing that only 10% of U.S. counties accounted for all of the death sentences imposed between 2004 and 2009, and only *5%* of the counties accounted for all of the death sentences imposed between 2007 and 2009. Even in states that frequently impose death sentences (such as Texas, Alabama, Florida, California, and Oklahoma), only a few counties produce virtually all of the state's death sentences. According to the study:

> The murders committed in those counties are no more heinous than murders committed in other counties, nor are the offenders in those counties more incorrigible than those who commit crimes in other counties. Examination of prosecutorial practices demonstrate that some prosecutors seek death in cases in their jurisdictions while other prosecutors in the rest of the state do not seek death for the same–or even more aggravated–murders.[95]

In Maryland for many years almost all of the death cases came from predominantly white Baltimore County, and almost none

from predominantly black Baltimore City. In 2002, Baltimore City had only one person on Maryland's death row, but suburban Baltimore County, with one tenth as many murders as Baltimore, had nine times as many on death row.[96]

In Ohio's Cuyahoga County (Cleveland), a Democratic stronghold, just 8% of offenders charged with a capital crime received a death sentence. In conservative Hamilton County (Cincinnati), 43% of capital offenders ended up on death row.[97]

Death penalty prosecutions in Missouri also illustrate the county-by-county arbitrariness across the country. St. Louis Circuit Attorney Jennifer Joyce, whose jurisdiction covers the city, has never taken a capital case to trial since her election in 2001, but Prosecuting Attorney Robert McCulloch, whose jurisdiction is the neighboring suburban county, has won death sentences against 10 people since 2000, although the county has only one-fourth as many murders as the city.[98] The two longtime Democrats have adjacent jurisdictions, one urban and one more rural.

The St. Louis Circuit Attorney's predecessor, Dee Joyce Hayes, after 20 years working as a prosecutor and circuit attorney, acknowledged she found death sentences arbitrary: "I never saw a way that you could make the death penalty consistent across jurisdictions, juries, counties, and prosecutors."[99]

Political considerations

It's a roll of the dice. When I look at a lineup of a panel in this kind of case, you can almost go to the bank on what the result is going to be.

-Judge Nathaniel Jones, U.S. Court of Appeals, Sixth Circuit (ret.)

The death penalty has always been plagued with political influence. Elected prosecutors and judges know the power of seeking and supporting the death penalty when a murder shocks the community. More surprising is that even federal judges with lifetime appointments can be affected by politics in the death penalty decisions.

A *Cincinnati Enquirer* examination of death penalty decisions of the U.S. Court of Appeals for the Sixth Circuit, which considers cases from Ohio, Kentucky and Tennessee, revealed federal judges appear to vote consistently along party lines, thereby injecting arbitrariness into their death penalty rulings. The judges work mostly on randomly selected three-judge panels. Sixteen judges are eligible to sit on those panels, including nine Republican and seven Democratic appointees. Life-and-death decisions often hinge on the defendant's luck of the draw. A defendant who gets a panel with 2 liberals has a far greater chance of avoiding execution than one with 2 conservatives.

"It's a roll of the dice. When I look at a lineup of a panel in this kind of case, you can almost go to the bank on what the result is going to be," said Nathaniel Jones, a retired Sixth Circuit judge appointed by President Jimmy Carter.[100] Arthur Hellman, a University of Pittsburgh law professor added, "It looks very much like a lottery.

Literally, if someone lives or dies depends on the panel they get."[101]

According to the *Cincinnati Enquirer* investigation, appointees of President George H. W. Bush posted the most lopsided track record, voting 50-4 against granting inmates' capital appeals. President George W. Bush's appointees voted 34-5 against granting such appeals. By contrast, President Carter's appointees voted 31-4 in favor of the inmates' appeals. Appointees of Presidents Clinton and Reagan were slightly less skewed. President Clinton's voted 75-32 in favor of inmates' appeals, and President Reagan's voted 39-13 against them. Ten of the 16 judges who currently hear Sixth Circuit death penalty appeals vote the same way (for or against the defendant) at least 80% of the time.

ARBITRARINESS IN THE COURTS: Votes in Capital Appeals by judges of the U.S. Court of Appeals for the Sixth Circuit

President Making Appointments	% of Votes by Judges Against Defendant	% of Votes by Judges for Defendant
Jimmy Carter	11%	89%
Ronald Reagan	75%	25%
George H.W. Bush	93%	7%
Bill Clinton	30%	70%
George W. Bush	87%	13%

Source: Cincinnati *Enquirer,* April 15, 2007.

Regardless of one's position on which set of judges was "correct," the influence of politics on what should be apolitical legal judgments is disturbing. Statistics like these do not prove that judges' decisions are influenced by their political leanings, but the stark contrast in outcomes strongly suggests that judgments in death penalty cases are subjective and influenced by other factors that interject a high degree of arbitrariness into the process.

Costs

Part of the reason why geography plays such a prominent role in determining the use of the death penalty is the disparate resources available to counties responsible for paying for capital prosecutions. Death penalty cases are exorbitantly expensive, often putting them out of reach for smaller counties. For a poorer rural county, paying for one death penalty case has been compared to coping with the effects of a natural disaster, and may require an increase in taxes.[102]

Texas prosecutors acknowledge that many smaller counties never send anyone to death row, partly because of a lack of funding. Wharton County District Attorney Josh McCown noted:

> This is one of those things a district attorney doesn't like to talk about. You don't want to think that you're letting money come into play. You ought to consider the facts of a case and make your decisions in a vacuum. In a perfect world, that's the

> way you do it. But in a county this size, you have to consider the level of expertise, the financial resources. If you don't, you're stupid. This is not a perfect system or a perfect world.[103]

Michael Rushford, president of the Criminal Justice League Foundation, a California pro-death penalty advocacy group, said, "I've got to believe in some places that money becomes a problem. If it's going to clean out the budget, there may be some pressure not to go for the death sentence."[104]

In Florida, a budget crisis has led to a cut in funds for state prosecutors. As a result, some prosecutors are cutting back on their use of the death penalty, and perhaps on other prosecutions. Florida State Attorney Harry Shorstein explained how available funds affect the administration of justice: "There will be cases that can't be tried. . . . We are strained to the breaking point. . . . Instead of seeking the death penalty, maybe we'll seek something else."[105]

Other Factors

Several other factors that have nothing to do with the severity of the crime or the culpability of the criminal can affect the ultimate outcome of a capital case. States differ vastly in the quality of representation afforded indigent defendants. The number of attorneys assigned, their experience in death penalty matters, their rate of pay, and the funding made available for defense investigators and experts all affect a defendant's chances of avoiding a death sentence.[106]

The same is true on appeal. There are no binding national standards for appellate representation, and states are not constitutionally required to provide attorneys for death row inmates throughout the entire appeals process.[107] While some states have public defender offices completely dedicated just to comprehensive capital defense, others leave defendants with no representation for parts of their appeal. Although a few fortunate defendants have their appeals voluntarily taken on by large law firms that work for free and provide a high quality defense, many cases slip through the cracks—poorly defended at trial and even more poorly defended on appeal.

On rare occasions, the U.S. Supreme Court will review the quality of representation provided capital defendants, but the standard of review it and lower courts apply is highly deferential to the strategic decisions made by defense attorneys and to the state court that conducted or reviewed the trial. Even where inadequate representation is apparent, such as when a lawyer has slept through part of the trial or failed to investigate critical facts, a court may still affirm the death judgment on the rationale that in its view better representation would not have made a difference in the outcome.

Victim Impact Evidence

Since 1991 prosecutors have been allowed to interject another influential variable into death penalty sentencing trials: in-person statements from members of the victim's family about how they were affected by the murder. Although this may be accepted as a way to counterbalance evidence about the redeeming qualities or disabilities of the accused, it can introduce arbitrariness into the proceedings. Jurors are likely to be heavily influenced by emotional stories from distraught and angry family members about how the death of a loved one impacted them.[108] In contrast, some victims' families may oppose the death penalty; other victims may have no family at all.[109] Whether the defendant

receives a death sentence may be more heavily influenced by statements of the victim's family than by the crime he committed.

In a recent California case, the family of a murdered young woman was allowed to put on a lengthy video about their daughter's childhood, friends, and important life milestones. The video was carefully edited, accompanied by moving, professionally produced music; it concluded with beautiful pictures of people—unrelated to the victim—riding horses in Canada as the music reached an emotional climax.[110] This compelling video may have been the deciding factor in the jury's death sentence, even though it made the crime no worse than a similar one in which the victim had a tough life that was not amenable to a moving portfolio of a photogenic family.

VI. Conclusion

When the death penalty was permitted to go forward in 1976, many distinguished legal scholars warned that the task of creating an objectively fair system for deciding which criminals deserved to die and which should be allowed to live was impossible. A majority of those on the Supreme Court that approved the experiment ultimately concluded the attempt to fix the death penalty had failed.

Thirty-five years later a strong body of empirical evidence confirms that race, geography, money, politics, and other arbitrary factors exert a powerful influence on determining who is sentenced to death. This is the conclusion not only of experts, but increasingly that of the general public as well. Unfairness ranks near the top of the American public's concerns about the death penalty.

As the use of the death penalty has declined, the rationale for its continuation has disappeared. With defendants already facing life without parole, no one is likely to be deterred by an added punishment that is rarely imposed and even more rarely carried out many years later, and that is dependent on so many unpredictable factors. Nor does the wish for retribution justify a death penalty that is applied so sporadically. The reality is that those in society generally, and those families of murder victims in particular, who look to an execution to counter a terrible homicide will very likely be disappointed. Very few of those cases result in execution, and those that do are often not the most heinous, but merely the most unlucky, recalling Justice Stewart's comparison in 1972 that receiving the death penalty is like being struck by lightning.

No longer looking only to the Supreme Court to review these issues, some states are choosing to act on their own. Four states in the past four years have abolished the death penalty, bringing the total of states without capital punishment to sixteen. As growing costs and stark unfairness become harder to justify, more states are likely to follow that path.

The post-*Gregg* death penalty in the United States has proven to be a failed experiment. The theory that with proper guidance to juries the death penalty could be administered fairly has not worked in practice. Thirty-five years of experience have taught the futility of trying to fix this

system. Many of those who favored the death penalty in the abstract have come to view its practice very differently. They have reached the conclusion that if society's ultimate punishment cannot be applied fairly, it should not be applied at all.

The Death Penalty Information Center (DPIC) is a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment. The Center provides in-depth reports, issues press releases, conducts briefings for journalists, and serves as a resource to those working on this issue. The Center is funded through the generosity of individual donors and foundations, including the Roderick MacArthur Foundation, the Open Society Institute, and the European Union. The contents of this document are the sole responsibility of DPIC and can under no circumstances be regarded as reflecting the position of the European Union or other donors.

Endnotes

[1] . Furman v. Georgia, 408 U.S. 238 (1972).

[2] . "Arbitrariness is pregnant with discrimination." *Furman*, 408 U.S. at 257 (Douglas, J., concurring).

[3] . *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

[4] . *Id*. at 309.

[5] . *Furman*, 408 U.S. at 313 (White, J., concurring).

[6] . Gregg v. Georgia, 428 U.S. 153 (1976) and companion cases decided the same day.

[7] . *Furman*, 408 U.S. at 312.

[8] . From 1965 to 1972, there were a total of 10 executions in the country. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics (2000), at Table 6.92.

[9] . *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

[10] . The number of murders in 1999 was 15,552; in 2009, it was 15,241. FBI Uniform Crime Reports, U.S. Dept. of Justice (2010).

[11] . M. Wilson, "The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis," 38 New Mexico Law Review 255 (2008).

[12] . Urban Institute, "The Cost of the Death Penalty in Maryland," March 2008.

[13] . "Final Report Of The Death Penalty Subcommittee Of The Committee On Public Defense," Washington State Bar Association, December 2006 <http://www.wsba.org/lawyers/groups/committeeonpublicdefense.htm>. Many of those who "volunteer" for execution are suffering from mental illness. See J. Blume, "Killing the Willing: 'Volunteers,' Suicide and Competency," 103 Michigan Law Review 939 (2005).

[14] . Department of Public Advocacy Press Release, November 23, 2009.

[15] . The Oregonian, May 6, 2011.

[16] . Federal Death Penalty Resource Counsel, March 24, 2010, available at <http://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094>.

[17] . Kennedy v. Louisiana, No. 07-343 (U.S. 2008), slip op. at 9, citing Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)) (death penalty too extreme for crime of child-rape).

[18] . See, e.g., F. Baumgartner, "The Geography of the Death Penalty," (2010), available at <http://www.unc.edu/%7Efbaum/Innocence/NC/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf>.

[19] . One paragraph from a lengthy Ohio jury instruction in the mitigation phase of a capital trial reads:

> 27. Any one mitigating factor standing alone is sufficient to support a sentence of life imprisonment if the aggravating circumstance is not sufficient to outweigh that mitigating factor beyond a reasonable doubt. Also, the cumulative effect of the mitigating factors will support a sentence of life imprisonment if the aggravating circumstance is not sufficient to outweigh the mitigating factors beyond a reasonable doubt.

Hamilton County, Ohio, Public Defender memo < http://www.hamilton-co.org/pub_def/orders_and_entries.htm> (visited May 20, 2011).

[20] . See, e.g., W. Bowers, et al., "Foreclosed Impartiality in Capital Sentencing. Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making," 83 Cornell L. Rev. 1476 (1998) (multi-state data).

[21] . 465 U.S. 37 (1984).

[22] . See, e.g., "Mandatory Justice: Eighteen Reforms to the Death Penalty," Constitution Project (2001), at 27.

[23] . J. Liebman, et al., A Broken System: Error Rates in Capital Cases, 1973-95 (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/ [hereafter *A Broken System*].

[24] . B. Schoenburg, "Durbin changes stance on death penalty," State Journal-Register, January 17, 2011.

[25] . *A Broken System*, note 23 above, at State Comparisons.

[26] . *Id.* at Circuit Comparisons.

[27] G. Uelmen, "The End of an Era," Californina Lawyer (Sept. 2010).

[28] . *A Broken System*, note 23 above, at State Comparisons.

[29] . F. Baumgartner & R. Richardson, "Rates of Reversals in the North Carolina Death Penalty," Univ. of North Carolina at Chapel Hill (Feb. 28, 2010), discussed in F. Baumgartner, "In NC, only 20 percent of condemned are executed," Charlotte Observer, March 5, 2010.

[30] . "Facts about Pennsylvania's Death Penalty," Associated Press, July 24, 2009.

[31] . Walla Walla Union-Bulletin, Nov. 10, 2009.

[32] . *A Broken System*, note 23 above.

[33] . State of Washington v. Dayva M. Cross (March 30, 2006) (Johnson, J., dissenting); see also, P. Whitley, "Death sentence upheld in triple murder," Seattle Post-Intelligencer, March 31, 2006.

[34] . "Robert Philip Hanssen Espionage Case Press Release," FBI, Louis J. Freeh, February 20, 2001 < http://www.fbi.gov/about-us/history/famous-cases/robert-hanssen>.

[35] . A. Johnson, "Jailhouse Killer Clarence Carter Executed," Columbus Dispatch, April 12, 2011.

[36] . See S. Dewan, "Bomber Offers Guilty Pleas, and Defiance," New York Times, April 14, 2005; also Washington Post, April 6, 2005.

[37] . M. James and A. de Vogue, "Teresa Lewis becomes 12th Woman to be Executed since 1976," ABC News, September 23, 2010.

[38] . Associated Press, March 14, 2006.

[39] **.** R. Feltz, "Despite a U.S. Supreme Court ban, Texas has continued to send mentally retarded criminals to death row," Texas Observer, Jan. 8, 2010.

[40] . K. Johnson, "In hours before execution, a frenzied legal fight," USA Today, November 15, 2007.

[41] . See P. Whitley, "Death sentence upheld in triple murder," Seattle Post-Intelligencer, March 31, 2006 (describing Ridgway's case in light of a proportionality challenge to a death sentence for another defendant).

[42] . Associated Press, "Schizophrenic Killer to be Executed Tuesday," Houston Chronicle, May 17, 2004.

[43] . New York Times, March 3, 2006; Press Release from the New Jersey Office of the Attorney General, May 19, 2004.

[44] . Associated Press, "Wanda Jean Allen put to death," USA Today, January 12, 2001.

[45] . Philadelphia Inquirer, March 3, 2006.

[46] . "Should Manny Babbitt Die?" SF Gate, April 5, 1999.

[47] . Boston Globe, October 15, 2003.

[48] . C. Timberg, "Virginia Executes Inmate Who Killed Woman at 17," Washington Post, Oct. 15, 1998, at B1. See Roper v. Simmons, 543 U.S. 551 (2005) (barring execution of juvenile offenders).

[49] . S. Visser, J. Scott, "Nichols gets life without parole," Atlanta Journal-Constitution, December 13, 2008.

[50] . Associated Press. "McQueen Witness Contradicted Self," Kentucky Post, August 6, 1997.

[51] . J. McElhatton, "A killer deal: Be a star witness, escape execution," Washington Times, January 14, 2011. Other examples in which sentences were reduced in exchange for valuable information include Phillip Leonetti, a member of the Philadelphia mob, who

despite a criminal record that included 10 murders served just 5 years in prison because he cooperated with officials, and Salvatore Gravano, a well-known criminal who cooperated with the government and was sentenced to only 5 years, despite his involvement in 19 murders and other crimes. *Id.* Gravano was later imprisoned on unrelated drug charges.

[52] . A. Sachs, "Guilty, Innocent, Guilty," Time Magazine, January 16, 1995.

[53] . J. Toobin, "The Mitigator," The New Yorker, May 9, 2011.

[54] . J. Prugh, "Florida Executes Killer Spenkelink," L.A. Times, May 26, 1979.

[55] . J. Dwyer, "A High Cost, to Little Effect, for a Window Into the Mob," New York Times, April 12, 2011.

[56] . S. Mills & M. Possley, "Texas Man Executed on Disproved Forensics," Chicago Tribune, December 9, 2004.

[57] . M. Balleza, "After 17 Years on Death Row, Texas Inmate Walks Free," N.Y. Times, Oct. 7, 2004.

[58] . W. Glaberson, "Kaczynski Avoids a Death Sentence with a Guilty Plea," N.Y. Times, Jan. 23, 1998.

[59] . CNN & Associated Press, May 3, 2006.

[60] . See P. Nelson, "Defending the Devil: My Story as Ted Bundy's Last Lawyer," p.327 (William Morrow & Co., New York, 1994).

[61] . Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, at 595, quoted in McGautha v. California, 402 U.S. 183, 205 (1971).

[62] . Model Penal Code, 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959), quoted in McGautha v. California, 402 U.S. 183, 205 (1971) (quoting the Royal Commission Report).

[63] . 428 U.S. 153 (1972).

[64] . Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari review).

[65] . J. Jeffries, "Justice Lewis F. Powell, Jr.," p.451 (1994) (quoting Justice Powell).

[66] . Baze v. Rees, No. 07-5439 (U.S. 2008), slip op. at 17 (Stevens, J., concurring) (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

[67] . Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty, at p.4 (April 15, 2009) (hereafter, *ALI Report*).

[68] . *Id*. at Annex B, p.49 (emphasis added).

[69] . American Bar Association, Death Penalty Moratorium Resolution Report, at 2 (1997).

[70] . "Mandatory Justice: Eighteen Reforms to the Death Penalty," Constitution Project (2001), at 27. The reform of proportionality review still has not been adopted.

[71] . H. Lee Sarokin, "Does a Botched Execution Constitute Double Jeopardy?" Huffington Post, Oct. 5, 2009 (emphasis added).

[72] . Moore v. Parker, No. 03-6105 (U.S. Court of Appeals for the Sixth Circuit, October 4, 2005) (Martin, J., dissenting) (emphasis added).

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[74] . Available at www.deathpenaltyinfo.org/pollresults. The survey of 1,500 registered voters was conducted for DPIC in 2010. The margin of error is 2.5%.

[75] . *Id.* at question 57.

[76] . *Id.* at question 8.

[77] . See DPIC's 2010 Year End Report at <http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf>.

[78] . See R. Dieter, "A Crisis of Confidence: Americans' Doubts About the Death Penalty," (Death Penalty Information Center 2007).

[79] . United States General Accounting Office, Death Penalty Sentencing, February 1990.

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[81] . *McCleskey*, 481 U.S. at 279.

[82] . *Id.* at 321 (1987) (Brennan, J., dissenting) (emphasis added).

[83] . D. Baldus & G. Woodworth, "Race Discrimination in America's Capital Punishment System Since *Furman v. Georgia* (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing This Issue" (1997) (report prepared for the American Bar Association). The disparities in nine states (CA, CO, GA, KY, MS, NJ, NC, PA and SC) were particularly notable because of their reliance on well-controlled studies.

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[86] . A. Davis, "Study indicates pattern in sentences," Arkansas Democrat-Gazette, September 8, 2008.

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[90] . *Id*.

[91] . See, e.g., F. Baumgartner, "The Geography of the Death Penalty" (2010).

[92] . South Bend Tribune, Oct. 21, 2001.

[93] . *Capital Punishment in New York State: Statistics from Six Years of Representation*, Report from the Capital Defender Office, Sept. 2001 (data through June 30, 2001).

[94] . N. Minsker, et al., "Death in Decline '09," ACLU of Northern California, March 29, 2010.

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[96] . See L. Montgomery, "Md. Questioning Local Extremes on Death Penalty," Wash. Post, May 12, 2002.

[97] . See Welsh-Huggins, note 88 above.

[98] . H. Ratcliffe, "Prosecutors use discretion differently in death sentencing," St. Louis Post-Dispatch, July 6, 2008.

[99] . *Id*.

[100] . D. Horn, "The politics of life and death," Cincinnati Enquirer, April 15, 2007.

[101] . *Id*.

[102] . K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

[103] . "Can Austin County afford 4 capital cases?," Houston Chronicle, Oct. 5, 2009.

[104] . H. Ratcliffe, "Prosecutors use discretion differently in death sentencing," St. Louis Post-Dispatch, July 6, 2008.

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[106] . "Slamming the Courthouse Doors: Denial of Access to Justice and Remedy in America," American Civil Liberties Union, December 2010.

[107] . See Murray v. Giarratano, 492 U.S. 1 (1986).

[108] . See R. Paternoster & J. Deise, "A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making," 21 Criminology 129 (2011).

[109] . See T. Mowen & R. Schroeder, "Not In My Name: An Investigation of Victims' Family Clemency Movements and Court Appointed Closure," 12 Western Criminology Review 65 (2011).

[110] . See Kelly v. California, No. 07-11073 (U.S. Nov. 10, 2008) (Breyer, J., dissenting from denial of certiorari review) ("the film's personal, emotional, and artistic attributes themselves create the legal problem").