This Court charges the United States death penalty with

perverting

THE COURSE OF JUSTICE

JURY BUNDLE

2nd March 2010

6 King's Bench Walk

FRESHFIELDS BRUCKHAUS DERINGER

Amicus

theguardian

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INDICTMENT

IN THE CROWN COURT SITTING AT EMMANUEL CENTRE

THE QUEEN v. THE UNITED STATES DEATH PENALTY

THE UNITED STATES DEATH PENALTY is charged as follows:

STATEMENT OF OFFENCE

DOING ACTS TENDING AND INTENDED TO PERVERT THE COURSE OF JUSTICE

PARTICULARS OF OFFENCE

THE UNITED STATES DEATH PENALTY between 4th July 1776 and 2nd March 2010 did a series of acts tending to pervert the course of justice, namely.

(i) meted out punishment in a discriminatory way resulting in a disproportionate number of black and ethnic minority defendants being put to death

(ii) meted out punishment in a discriminatory way resulting in a disproportionate number of poor people being put to death

(iii) used threats to force defendants to plead to non-capital homicide to escape the penalty of death

(iv) asserted that it was a just and proportionate punishment for murderers

(v) claimed falsely that it was of benefit to society in acting as a deterrent

intending that the course of justice should thereby be perverted.

OFFICER OF THE COURT

a message from the Amicus trustees

Welcome, and thank you for coming.

By hosting this trial, Amicus is seeking to offer participants and attendees the opportunity to be part of a thorough debate on the issues surrounding the US death penalty. We have been fortunate to receive financial support from many sources, in particular Freshfields Bruckhaus Deringer and Baker & McKenzie, for which we are extremely grateful.

Clearly, as many of you know, Amicus' objectives are to assist those awaiting capital trial and punishment in the US, or any other country, and to raise awareness of potential abuses of defendants' rights. We believe that our duty to raise awareness will be well-served by this evening's proceedings. Normally, events focusing on the death penalty are hosted by one or other 'side' of the argument, which often results in an in-built bias (even if this is not the intention). Our intention tonight is that the US death penalty will be subject to a rigorous examination, with forceful opinions being aired by all the witnesses.

We are honoured that Lord Woolf of Barnes agreed to preside over the trial, and that he is to be assisted by Sir Louis Blom-Cooper QC and Geoffrey Robertson QC. And, we are grateful to our patron, Alistair Carmichael MP, for his continued support and for his agreement to be this court's Court Clerk.

Quite simply, tonight's proceedings would not be taking place without the support, hard work and commitment from the team at 6 King's Bench Walk. It was essential that two leading silks led the prosecution and defence teams, and we thank Roy Amlot QC and Dorian Lovell-Pank QC for agreeing to fill these roles. And, although too numerous to list here, we also thank all the junior counsel who have worked on the case.

But, without the witnesses, we would not be here. We are grateful to them for agreeing to participate, in the full knowledge that their evidence will be subject to exacting cross-examination. Rev. Cathy Harrington, Prof. Julian Killingley and Nick Trenticosta will, we believe, provide powerful and astute testimony espousing their reasons for being against the death penalty. Prof. Robert Blecker, Prof. Paul Cassell and Kent Scheidegger will, we are sure, provide strong and insightful justification for why they are pro capital punishment. We hope that, in addition to deliberating on the evidence given in person, you will find the submissions by each of the witnesses to the Jury Bundle of assistance in reaching your verdict.

Lastly, we should like to thank our staff and the many Amicus volunteers, especially Shefali Lamba, who have worked so hard to ensure the success of this evening. Margot Ravenscroft and Marian Cleghorn's dedication to Amicus is critical to our work, but – even with their dedication to their roles – the charity relies heavily on its volunteers to achieve its objectives. We are most grateful for their contribution.

joanne cross **claire jenkins**

tope adeyemi **bill chipperfield** **mark george QC** **erica pomeroy**

a message from the UN

manfred nowak

UN Special Rapporteur on torture

"In my experience, the lack of training and capacity as well as endemic corruption of the law enforcement system often lead to arbitrary arrest and detention, which, in the absence of adequate safeguards, leaves the accused without the possibility to defend fully his or her rights. Without functioning safeguards and effective judicial control, accused persons are rendered completely powerless and left to the mercy of the investigating agency/police, which is often under considerable pressure to "deliver results".

Undoubtedly, criminal justice is a complicated system of needs and norms. A carefully calibrated balance of mechanisms allowing for complaints, controls, monitoring, etc is needed to protect the rights of the accused and ensure the fair and speedy delivery of justice. A large number of actors have stakes in maintaining that balance, including the law-enforcement bodies themselves through regular inspections, prosecutors, judges, medical personnel, penitentiary staff, lawyers, etc. International law provides detailed minimum standards when it comes to fair trial, the presumption of innocence, the prohibition of arbitrary detention, remedies for alleged victims, etc. These guidelines should be taken into account throughout the entire criminal justice process."

judges

the rt hon. lord woolf of barnes

biography

Lord Woolf was Lord Chief Justice of England and Wales from 2000 – 2005. Since then he has been primarily involved in developing Alternative Dispute Resolution ("ADR") and Mediation. His report *Access to Justice, 1996* ('*The Woolf Report*') is generally acknowledged to have been the catalyst for interest in ADR in England. Lord Woolf is a chartered arbitrator and serves on many bodies in this role.

In 2005, Lord Woolf conducted a review of the working methods of the European Court of Human Rights, and was a member of the 'Group of Wise Persons' which developed the strategy to secure the long-term effectiveness of the European Convention on Human Rights.

He was called to the Bar in 1955, and from 1973 held a variety of counsel posts until he was appointed a judge in 1979 and then a Lord Justice of Appeal in 1986. In 2000, he was appointed Lord Chief Justice of England and Wales, a position from which he retired in 2005. Lord Woolf was appointed a non-permanent judge of the Court of Final Appeal of Hong Kong in 2003 and continues in this role, and is president of the Civil and Commercial Court for Qatar.

Lord Woolf regularly contributes to legal journals, lectures and has compiled various reports at the UK government and other bodies' requests.

sir louis blom-cooper QC

Sir Louis (associate tenant, Doughty Street Chambers) has been at the forefront of administrative law throughout its modern development. He is a highly-regarded academic, and he has been a judge in England, and Jersey and Guernsey.

Sir Louis is much in demand as a member (often as the chair/leader) of independent commissions and official enquiries. Most recently, he was appointed as the first Independent Commissioner for the Holding Centres in Northern Ireland. Previous roles include chair of the Mental Health Commission from 1987 – 1994 and chair of the enquiry into the case of Jasmine Beckford. His experience in the field of public enquiries resulted in him giving evidence on this topic in a case at the High Court.

geoffrey robertson QC

Mr Robertson (joint head, Doughty Street Chambers) has been involved in many of Britain's most celebrated trials. He is a recorder and a prolific author, and he works extensively on the international scene, appearing in various high-level courts across the world.

Mr Robertson has conducted a number of missions on behalf of Amnesty International to South Africa and Vietnam, and on behalf of the Bar Council/Law Society Human Rights Mission to Malawi. As a UN Appeal Judge he has delivered important decisions on the illegality of conscripting child soldiers and the invalidity of amnesties for war crimes.

Mr Robertson co-founded Doughty Street Chambers in 1990.

court clerk

alistair carmichael MP

biography

Mr Carmichael was first elected the Member of Parliament for Orkney and Shetland in 2001 and is the Liberal Democrat Party's spokesman on Northern Ireland and Scotland. He chairs the All Party Parliamentary Group for the Abolition of the Death Penalty which attracts cross-party support in the Palace of Westminster with almost 100 members. Mr Carmichael is an Amicus patron.

After he left school, Mr Carmichael worked in the hotel industry for five years before starting his further education. He gained a law degree from the University of Aberdeen in 1992 and then worked as a solicitor in Scotland. He is an elder in the Church of Scotland.

prosecution

roy amlot QC

biography

Mr Amlot has recently retired. He was head of chambers at 6 King's Bench Walk and latterly practised mainly as a defence counsel in serious criminal and commercial fraud cases, having been Treasury Counsel earlier in his career. Over the years, he appeared in many high-profile cases, including defending in *R. v Francis* (Jeffrey Archer trial) and *R. v Railtrack* (Hatfield rail disaster), and prosecuting *R. v Ponting* (official secrets) and *R. v Hindawi* (terrorism).

Mr Amlot has held a series of roles within the legal community, including chairman of the Criminal Bar Association (1997), chairman of the Bar (2001), editor of *Phipson on Evidence* and member of the Queen's Counsel Appointments Panel (2005 – to date).

junior counsel

sarah whitehouse alex chalk paul jarvis

peter ratliff lucy organ

rev. cathy harrington

biography

Rev. Harrington is a board member of the US-based Murder Victims' Families for Reconciliation ("MVFR"). MVFR exists to empower family members of murder victims and execution victims who oppose the death penalty.

In 2004, Rev. Harrington's daughter was murdered. The killer confessed to his crime. Rev. Harrington was already opposed to the death penalty in principle and at the sentencing stood by her views. She was party to the negotiations which resulted in the killer being given a life sentence without the possibility of parole.

Rev. Harrington is an ordained Unitarian Universalist minister and wants to influence the thinking of American society about the role of the state in taking a life. She also travels around the world to talk about her ordeal and her views.

Rev. Harrington has chosen her essay *A Mother's Story*, first published in *No Human Way to Kill* (2009, edited by Robert Priseman), as her submission for inclusion in the Jury Bundle.

A MOTHER'S STORY

Cathy Harrington

"I cannot wipe away your tears…I can only teach you how to make them holy",
Anthony De Mello, *Affirmation*

My life changed forever the night I received the call that my beautiful daughter and her roommate had been brutally murdered on November 1, 2004. A shroud of darkness fell over me in heavy layers, suffocating me with fear and despair. It was inconceivable that the vibrant shining essence, that for twenty-six years had been Leslie Ann Mazzara, the light of my life, my flesh, my blood, my youngest child, could be gone, extinguished forever. Her beautiful and promising life was stolen in the night, in an act of terror, in a gruesome act of selfish anger and rage. I was thrust on a journey through hell seemingly without end, and began a mother's mission to make meaning out of the meaningless.

The next eleven months were an unspeakable nightmare as the police investigation following false assumptions that Leslie was the murderer's target failed to find the killer. I fumbled through each day in a broken-hearted daze, confused and unconvinced that anyone would want to hurt Leslie. When Eric Copple, a friend of her roommate, Adrienne, turned himself in after the police revealed that the killer smoked a rare blend of Camel cigarettes, we were all stunned. I hadn't realized that I had been holding my breath all that time and that every muscle in my body had been braced for that moment until I received that long-awaited call in the middle of the night. I gasped for air like a victim of a near-drowning accident. We had been held in trauma space for almost a year, while this man, this murderer, married Adrienne's best friend, and had gone about his life as if nothing had happened. Stunned by the news, I braced myself for the next steps of the journey.

The many months that followed were filled with speculation about Eric Copple and about whether the prosecution would seek the death penalty. The District Attorney assured us that it would be his decision ultimately and after they did a full review of the case and a psychological profile on Eric, they would ask the families for their views before making that decision. We were told to be patient, to wait.

Meanwhile the media rushed in to exploit and sensationalize our tragedy. The American entertainment industry has developed an unsavory taste for violence and vulgarity. When murder is turned into entertainment, the sacred gift of life is diminished and our minds and hearts become calcified, our humanity suffers.

I sought counsel with anyone who might help me preserve Leslie's dignity and save us from the potential pain and suffering of a lengthy and very public trial. Sister Helen Prejean generously offered to speak with me, and her words of wisdom nourished me with hope. Sister Helen told me heart-wrenching stories about mothers of murderers that opened my mind and my heart to compassion. She pierced my darkness when she said, "Jesus asks us to stretch, Cathy. There are two arms of the cross; one side is for the victims and their loved ones and the other side of the cross holds in the same light of love and hope, the

murderer and his family." For the first time I felt a measure of compassion for Eric's mother, and I could feel my heart open, suddenly aware that it had been clenched tightly like a fist. Looking back I must have been thinking that a broken heart had to be bound tightly like a tourniquet.

There has been a gradual adjustment since then as my eyes have slowly adapted to the dark. My Universalist faith teaches that ultimately all will be reconciled with God and that everyone is saved, even murderers. When I think of Eric as a child wounded by abuse, I feel sadness, a too common history shared by those who grow up to commit violent acts against each others. Remarkably, Jesus was capable of forgiving his murderers as he suffered on the cross. As a Unitarian Universalist Christian minister, I seek to follow the teachings and the exemplar of Jesus, but forgiving the murderer of my daughter and for the loss of my never-to-be-born grandchildren; babies that my arms ache to hold, still seems inconceivable to me.

But, even in the worst that life has to offer I've discovered that grace is present. Grace is everywhere. Georges Bernanos' country priest said on his death bed, borrowing his dying words from St. Therese of Liseaux, "It must be true, because I found that when I reached towards the heavens from the hollow emptiness of my sorrow, I found grace. Grace was there waiting for me, quenching my sorrow, a trusted companion on the lonely journey."

Will, a homeless friend that I met along the way, gave me his grandmother's Benedictine cross to remind me of God's love when I told him about Leslie's murder. Moved by his compassion and selfless generosity, the theology of the cross took on new meaning for me, and at Sister Helen's suggestion, I developed a relationship with Mary as a peer. After all, her son was murdered, and Mary spent the rest of her life making meaning. I carried that cross in my pocket for over two years and often found my fingers tracing the lines of the two arms as if praying in Braille. My life became a living prayer; *there are two arms to the cross. Jesus asks us to stretch....*

"Have you ever heard of a pinhole camera?" retired astronomer, Dr. Ed Dennison asked when I mentioned to him that Sister Helen had poked a tiny hole in my darkness. He demonstrated it to me by covering the window in his laundry room with foil and poking a tiny hole in the foil. We huddled in the darkness and waited. Impatiently, I squirmed in the dark stuffy, room as my eyes slowly adjusted. I thought five minutes was surely enough, but Ed told us that it takes a full thirty minutes for our eyes to adjust to the dark. After ten minutes, he held up a white paper to the beam of light coming in through the tiny hole and we were astounded to see the trees from outside outlined on the paper. Gradually, we could see the details of the leaves and as we waited they became more intricate and clear. I was amazed at how I was sure that I could see clearly in a few minutes and how much more clarity there was in fifteen, and even more in twenty and twenty-five minutes. The trees were upside down, and though I haven't found a metaphor to properly explain that phenomenon, I had no problem understanding the metaphor of the pinhole camera and my journey toward forgiveness, parting my sea of despair and hopelessness one step at a time. I may never arrive, but it is the goal of forgiveness that I have set my compass. I believe it is our true north as Jesus demonstrated on the cross, the destiny of human potential that some have called becoming fully human, and perhaps this is the kingdom of

God that Jesus understood so clearly. Forgiveness is not a destination, it is a journey I have come to understand.

Which brings me to my understanding of the death penalty and what I believe to be the multi-layered hidden tragedy beneath the conviction that the death penalty is "just" punishment, I don't have time to build a case for the multitude of reasons that the death penalty is impractical economically, unjust, racist, and so on. I can best speak to my own experience and to the insights that I have gained over the past four and one half years of finding my way in the dark. I likened it to four and one half minutes in the pinhole camera experiment. I am *just beginning* to see. If we had been forced to endure a trial and remain defended and held in trauma, there would have been no beam of light to penetrate and relieve the oppressive darkness - nothing to illumine the path. The death penalty not only serves to keep us in a dark stagnating hope; it serves to compound the violence, and escalates the conflict, limiting our human potential to find our true north. I don't yet have a glimpse of what forgiving the murderer of my precious child would be like, but I know that if I don't walk towards that hope, I will be doomed to dwell in despair and pain forever. It is about choosing life, again and again, day after day.

The German poet, Rainer Maria Rilke suggests that we think of *God as a direction.* I hold that in my heart as I put one step in front of the other, and as I slowly move toward clarity, I begin to think about the possibility of meeting Eric Copple face to face; a stipulation written into the plea agreement for a facilitated victim/offender dialogue. If Sister Helen is right about the two arms of the cross, and I believe she is, then Eric can also find his way towards wholeness. But, it is Eric's responsibility to take fully into his heart the reality of what he has done and let the guilt tear and rip apart his heart from the inside out, as his senseless and violent act resulting in the murders of Leslie and Adrienne have done to all who loved them and whose lives they touched. It is only then that healing will be possible for Eric. I pray it will be so.

I would say that what might be the most insidious tragedy of the death penalty is that if we wilfully *murder* murderers, how can we ever hope to become fully human, to complete the journey? Honestly, I'm terrified of facing the murderer of my child one day, and I don't know if I will have the courage and the grace to ever forgive but it is my hope and prayer. All I can do is keep on walking in that direction and leave the rest up to the grace that I have come to know and trust.

Cathy Harrington is a parish minister in the Unitarian Universalist faith.
Her daughter Leslie Ann Mazzara was murdered on November 1, 2004 at her home in Napa, California. Cathy negotiated a life sentence for her daughter's murderer, who until that point, had been potentially facing the death penalty.

julian killingley

biography

Mr Killingley is a solicitor and Professor of American Public Law at Birmingham City University School of Law (UK), and the director of the Law School's LL.B Law with American Legal Studies programme. Formerly, he was a partner in private practice for 15 years specialising in criminal and family law. He is a former trustee of Amicus and continues to contribute significantly to the charity's training programme.

He has written for or organised a number of *amicus curiae* briefs to the US Supreme Court on behalf of the Bar and Law Society's Human Rights Committees in capital cases such as *Penry v Johnson* and *Atkins v Virginia* (mental retardation), *In re Stanford* and *Roper v Simmons* (juvenile executions) and *Deck v Missouri* (shackled sentencing) and the juvenile life without parole sentencings in *Sullivan v Florida* and *Graham v Florida*.

Mr Killingley has chosen an extract from *Lethal Indifference: The fatal combination of incompetent attorneys and unaccountable courts in Texas death penalty appeals* (c) Texas Defender Service 2002 as his submission for inclusion in the Jury Bundle. The full report (and others) available free from Texas Defender Service at www.texasdefender.org in Library>Publications section.

Lethal Indifference: An Executive Summary

Texas Defender Service is a private, non-profit organization specializing in death penalty cases through direct representation, consulting, training and case-tracking projects. This report is a comprehensive study of the quality of representation afforded to death row inmates in the state post-conviction process. Amid heightened awareness of the mistakes and failures permeating the application of the death penalty in Texas, we studied the quality and consistency of attorney performance in the latter stages of the appellate process, especially the critical state habeas corpus proceeding.

The findings of this report reveal that a high number of people are being propelled through the state habeas process with unqualified attorneys and an indifferent Court of Criminal Appeals (CCA). The current capital habeas process in Texas—resulting from new legislation in 1995 and intended as a vital safety net to catch the innocent and those undeserving of the death penalty—is, instead, a failed experiment with unreliable results.

CHAPTER I **State Habeas Corpus: A Vital Safety Net**

No concern surrounding the death penalty is more pervasive and troubling than the system's history for and continued potential to convict the innocent. A recent poll reports that 94% of Americans believe innocent people are wrongly convicted of murder. Nowhere is this issue more critical than in Texas. A July 2002 Scripps Howard poll of Texans found that 66% polled believe that Texas has executed an innocent person. This number has increased by nine percentage points from two years ago.

Texas is responsible for one-third of all executions in the U.S. since 1976 and more than half of all executions in the U.S. in 2002 (through October). Between 1976 and October 2002, 102 death row prisoners nationwide, including seven in Texas, have been cleared of charges and freed from imprisonment.

The writ of habeas corpus, also known as the Great Writ, is usually all that stands between the innocent or undeserving and his or her execution. Most of the 102 exonerations have come during habeas corpus proceedings, when lawyers

uncovered and presented new evidence of innocence, prosecutorial misconduct, ineffective representation, mistaken identifications, perjured testimony by state witnesses or unreliable scientific evidence.

The risk of wrongly convicting and executing an innocent person is increased when the process lacks basic fundamental protections, such as competent lawyers and meaningful judicial review.

CHAPTER 2 **The Study: A Dismal State of Justice**

Because of anecdotal information of lawyers mishandling state habeas proceedings, we undertook a thorough review of all the state habeas petitions filed since 1995 when the Texas Legislature created and codified the current habeas process in Article 11.071. Of the 263 initial habeas applications filed during the six-year period of the study, 251 were available for review. The results of the study reveal a systemic problem: Death row inmates today face a one-in-three chance of being executed without having the case properly investigated by a competent attorney and without having any claims of innocence or unfairness presented or heard.

The barometer of the quality of representation is whether or not appropriate claims are filed in the habeas petition. Claims based on evidence already presented at trial are reserved for the first appellate stage, known as the direct appeal. Claims based on new, unlitigated facts and evidence found outside of the trial record are appropriate in state habeas corpus proceedings. Consequently, the statute governing the habeas process requires appointed counsel to conduct a thorough investigation of the case.

Despite the critical importance of a comprehensive investigation, 71 of the habeas applications reviewed in our study (28%) raised claims based solely on the trial record. In 97 cases (39%), no extra-record materials were filed to support the claims.

The result of these inadequate applications is that, in over one-third of the cases, the inmates' right to post-conviction review effectively ended when the petition was filed. In those cases, there was absolutely nothing presented that was appropriate for the court to consider in habeas proceedings.

In Chapter Two, numerous cases are cited illustrating the frequency with which appointed lawyers are either filing the wrong kind of claims, failing to support the claims, copying verbatim claims that had been previously raised and rejected or otherwise neglecting to competently represent their clients.

For example, in the case of Leonard Rojas, who is scheduled for execution on December 4, 2002, the state habeas lawyer appointed by the CCA had been disciplined twice and given two probated suspensions from the practice of law by the State Bar. His discipline problems included neglecting a legal matter,

failing to completely carry out the obligations owed to his clients and having a mental or psychological impairment materially impairing his fitness to represent his client. He was disciplined a third time just two weeks after being appointed by the CCA to represent Rojas. The lawyer was still serving his two probated suspensions at the time he received this third probated suspension from the practice of law in Texas. Despite these violations, the CCA deemed the lawyer "qualified." The lawyer filed a 15-page petition raising 13 inappropriate record-based claims and Rojas was denied relief.

The study reveals that many state habeas lawyers are unqualified, irresponsible, or overburdened and do little if any meaningful work for the client. Often, new lawyers appointed by federal courts after the filing of the state habeas petition discovered evidence of innocence or of serious and substantial mistakes in the trial process. However, contrary to the misconception that the capital process is one with multiple opportunities for innocent or undeserving inmates to obtain relief, they only get "one bite at the apple." Barring unique circumstances, the federal courts cannot consider claims that were not litigated at the state habeas corpus level.

Our findings show that competent representation arrives too late in the process. Slipping through the cracks are those who may be innocent or have been unfairly sentenced to death.

CHAPTER 3 **Turning a Blind Eye on Incompetent Representation: The CCA's Abdication of Responsibility**

With the 1995 enactment of Article 11.071, the Texas Legislature statutorily promised indigent death row inmates that they would receive "competent" counsel who would expeditiously investigate the case. Article 11.071 is failing to live up to that promise. The CCA is often confronted with persuasive evidence of inadequately investigated and poorly prepared state habeas petitions.

Despite the Legislature's guarantee of "competent" counsel, the CCA recently decided that Article 11.071 provides no remedy or second chance for death row inmates who do not *actually receive* competent counsel. At odds with the fundamental purpose of the legislation, the CCA reasoned that it will not measure the competence of an attorney according to what the attorney *actually does* during the period of habeas representation; but, rather, simply on whether the attorney has been placed on the list of those eligible for appointment. The CCA's interpretation is at odds with the clear intent of the 1995 legislation to provide inmates with one full and fair opportunity for meaningful judicial review of their claims.

Chapter Three reviews cases illustrating the ramifications of the CCA's interpretation of Article 11.071. In these cases and many others, a state habeas

lawyer was appointed who, although on the appointment list, failed to perform at the competent level envisioned by Article 11.071.

For example, in the case of Anthony Graves, the CCA appointed a lawyer who had only been out of law school three years. This lawyer failed to conduct an adequate investigation and missed compelling evidence of Graves's innocence, including the statement of a witness who admitted he lied when he implicated Graves at the trial. Graves was convicted largely based on the testimony of this witness, Robert Carter, who had participated in the murders and was also sentenced to death. The other evidence against Graves was weak: No physical evidence linked him to the crime, and prosecutors could never ascribe to him a clear motive.

Strapped to the gurney in the execution chamber, Carter admitted: "Anthony Graves had nothing to do with it." Because of the lawyer's failure to investigate the case and present the evidence of innocence, no court has ever considered these facts. The CCA's decision in that case to effectively eliminate the Legislature's promise of meaningful appellate review prompted a dissenting judge to note: *"'Competent counsel' ought to require more than a human being with a law license and a pulse."* Anthony Graves remains on death row.

Similarly, in the case of Johnny Joe Martinez, the CCA appointed a lawyer who had never previously handled any capital post-conviction matters. Having never spoken with his client and after spending less than 50 hours in preparation, the lawyer filed a five-page petition that raised four inappropriate claims. Because of his incompetence, the lawyer failed to uncover evidence rendering the process unreliable, including compelling mitigating evidence that was not presented at trial.

Despite having actual knowledge of the ineptitude of the lawyer, the CCA would not remedy the problem and refused to consider the compelling new claims. The lawyer's performance in Martinez's case was so inadequate it prompted the federal judge to note: *"I don't know what's holding up the State of Texas giving competent counsel to persons who have been sentenced to die."* Martinez suffered the consequences of his lawyer's incompetence and was executed on May 22, 2002, without any court ever addressing the merits of these claims.

Our study indicates that the lawyers in these cases are all too typical of the lawyers authorized for appointment by the CCA. As a consequence, death row inmates, including those innocent of the crime or undeserving of death, whose trials have been rife with egregious constitutional violations, are being denied fundamental protections necessary to ensure reliable results—competent lawyers and meaningful judicial review.

CHAPTER 4 The Fox Guarding the Hen House: The CCA Controls the Process

The CCA's analysis of Article 11.071 is based on the incorrect assumption that all the lawyers on the list of approved counsel are *actually qualified* to represent death row inmates in habeas corpus proceedings. The CCA has not promulgated standards for appointed counsel, made public the qualifications of the attorneys currently on the list or reviewed the quality of attorneys already on the list.

While one CCA judge has made the facile accusation that all it takes to make it on the CCA's list of attorneys approved for appointment in Article 11.071 cases is a *"law license and a pulse,"* the fact remains that a dead person is currently on the list of approved attorneys. Also on the list are at least five other lawyers who are ineligible for appointment in these cases, including three prosecutors, and an employee of the Texas Department of Criminal Justice.

There are currently 142 attorneys on the approved list. Of those, 106 (75%) attorneys filed petitions during the period of our study. Forty-two (39%) of the attorneys who filed habeas applications failed to raise any extra-record claims. Counting petitions that purport to raise extra-record claims but do not include the extra-record material crucial to review of those claims, there are 60 (57%) attorneys on the list who filed such petitions.

The CCA has overlooked repeated poor performance, disciplinary problems and admissions of incompetence from the attorneys themselves. One attorney sent a letter to his client saying: *"I am trying to get off your case and get you someone who is familiar with death penalty post-conviction habeas corpus."* After receiving two death penalty cases, another lawyer confessed: *"At the time I was appointed, I was not familiar with how to litigate a capital habeas corpus case and was not aware of the need to investigate facts outside of the trial record."* Yet another admitted: *"I acknowledge that the investigation of [the inmate's] case was inadequate to discover all of the potentially important issues affecting the legality of his conviction and death sentence."*

State Bar grievance procedures have proven ineffective in protecting inmates from poor representation. Lawyers who have been publicly disciplined by the State Bar represented at least 13 death row inmates during the period of the study. In 11 of those 13 known cases, the petitions failed to raise or support appropriate state habeas claims. However, most of the disciplined lawyers have received multiple cases and remain eligible for additional appointments.

The CCA demonstrates further indifference to the state habeas process by failing to properly fund the appeals, generating boilerplate, two-page opinions in most state habeas cases, and almost universally adopting trial court findings of fact generated by prosecutors in 90% of the cases. These practices instill little confidence that the CCA is as concerned with meaningful appellate

review—designed to weed the innocent from the guilty and those deserving death from those who do not—as it is with speed and finality of conviction.

Though two out of three capital cases nationwide are overturned for error; the reversal rate in Texas since 1995 approaches zero. The CCA reversed only eight of the 270 death sentences it reviewed on direct appeal between 1995 and 2000—the lowest reversal rate of any state. Prior to 1995, Texas reversed about one-third of all death punishments.

CHAPTER 5 **Conclusion: A Breakdown in the System**

Cases highlighted in this report reflect a systemic problem. Over the six-year period of the study and even today, lawyers known to be inexperienced and untrained or known for their poor work in past cases continue to receive appointments, file perfunctory habeas petitions and turn over cases without proper investigation. It is not an exaggeration to say that by turning its back on this level of performance, the CCA is punishing the inmates, *including those who may be innocent*, and robbing them of the chance to have their cases reviewed. One judge noted that the CCA, in holding inmates accountable for their lawyer's shortcomings, *"gives a new meaning to the lady with a blindfold holding the scales of justice, as it dispatches [some] death row inmates toward the execution chamber without meaningful review of their habeas claims."*

Post-conviction review is crucial: It is the method of ensuring that capital trials are fair and that death sentences are appropriate. It is a proceeding intended to prevent wrongful executions, to find any new evidence proving innocence and to root out cases of prosecutorial misconduct, shoddy police work, mistaken eye-witnesses, false confessions and sleeping trial lawyers. But when inadequate lawyers and unaccountable courts sacrifice meaningful post-conviction review for speed and finality, death sentences are unreliable because mistakes are not caught and corrected.

Because there is no punishment for appallingly insufficient performance by defense lawyers, the problems will only worsen. Supreme Court Justice Ruth Bader Ginsburg, criticizing the quality of representation provided to indigent capital defendants, has voiced support for a moratorium on the death penalty. Her more conservative colleague, Justice Sandra Day O'Connor, acknowledged: *"Serious questions are being raised about whether the death penalty is being fairly applied in this country. . . . If statistics are any indication, the system may well be allowing some innocent defendants to be executed."*

By providing substandard review, we are running full tilt at the edge of a cliff—the execution of the innocent. Except, because there is no meaningful review, we do not know whether we are still on the precipice, peering over the brink, or already in free fall down into the abyss.

nicholas trenticosta

biography

Mr Trenticosta is the Director of the New Orleans-based Center for Equal Justice, a not-for-profit law firm representing mainly defendants facing the death penalty in post-conviction proceedings, and is an Adjunct Professor at the Loyola University School of Law. He and his wife, Susana Herrero, staff the El Salvador Capital Assistance Project (a programme of the Embassy of El Salvadore).

Mr Trenticosta has represented two clients in the US Supreme Court, including death row exonoree Curtis Kyles. He offers Amicus internships at the Center, and also helps to place law students and interested others with capital defense lawyers across the US.

He has degrees in social work, sociology and law, and has worked actively to abolish the death penalty since 1980.

Mr Trenticosta has chosen the Death Penalty Information Center's *Facts about the Death Penalty* (as at 17th February 2010) as his submission for inclusion in the Jury Bundle.

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DEATH PENALTY INFORMATION CENTER

Facts about the Death Penalty

Updated February 17, 2010 following execution in Florida

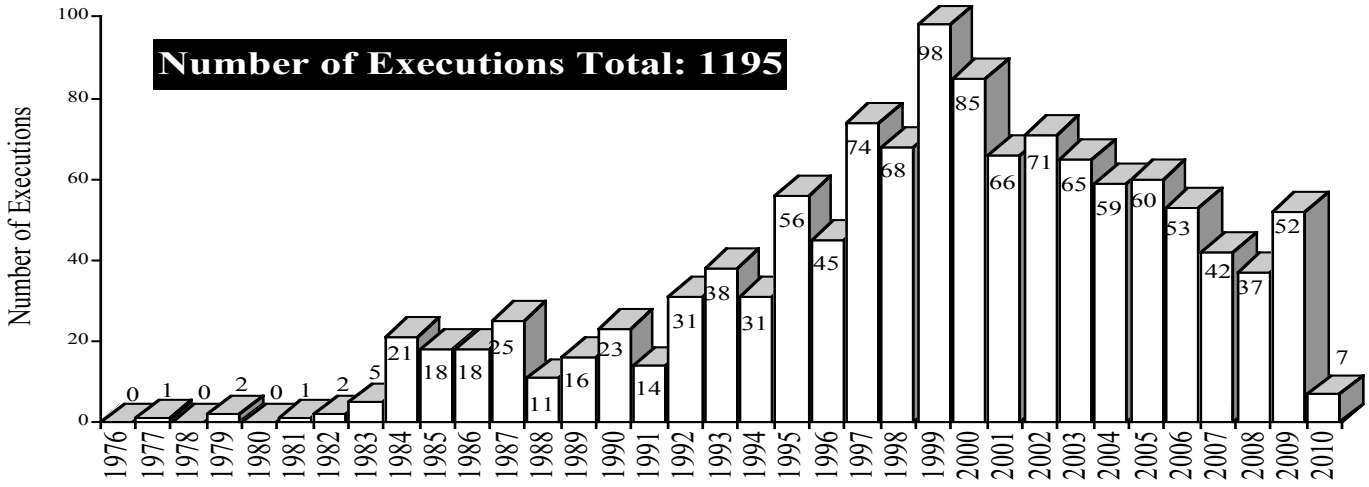
STATES WITH THE DEATH PENALTY (35)

Alabama	Florida	Louisiana	New Hampshire	South Dakota	
Arizona	Georgia	Maryland	North Carolina	Tennessee	
Arkansas	Idaho	Mississippi	Ohio	Texas	
California	Illinois	Missouri	Oklahoma	Utah	- plus
Colorado	Indiana	Montana	Oregon	Virginia	U.S. Gov't
Connecticut	Kansas	Nebraska	Pennsylvania	Washington	U.S. Military
Delaware	Kentucky	Nevada	South Carolina	Wyoming	

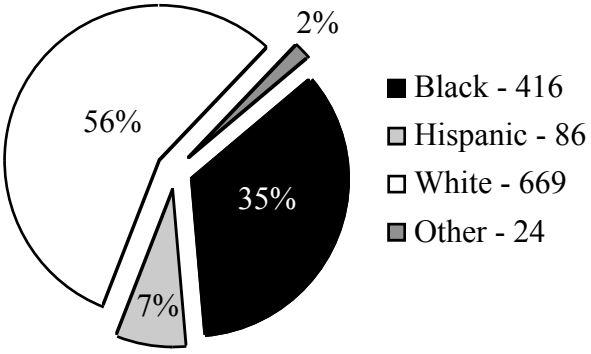
STATES WITHOUT THE DEATH PENALTY (15)

Alaska	Massachusetts	New Mexico*	Vermont	- plus
Hawaii	Michigan	New York	West Virginia	District of Columbia
Iowa	Minnesota	North Dakota	Wisconsin	
Maine	New Jersey	Rhode Island		

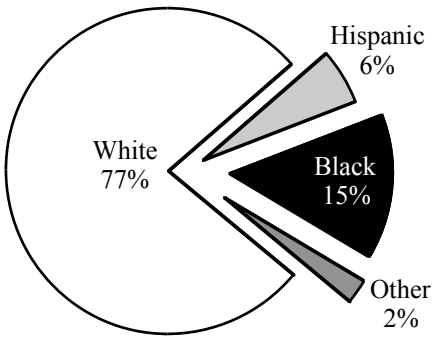
*Two inmates remain on death row in NM.



Race of Defendants Executed



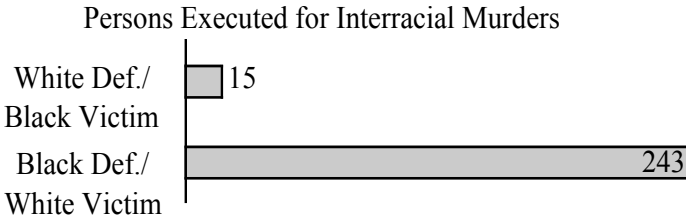
Race of Victim in Death Penalty Cases



Over 75% of the murder victims in cases resulting in an execution were white, even though nationally only 50% of murder victims generally are white.

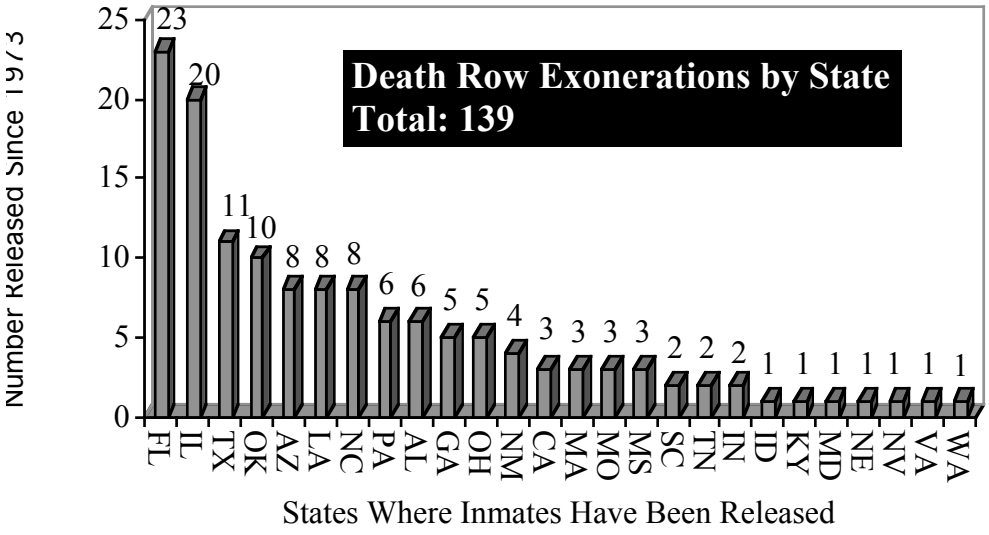
Recent Studies on Race

- In 96% of the states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both. (Prof. David Baldus report to the ABA, 1998).
- 98% of the chief district attorneys in death penalty states are white; only 1% are black. (Prof. Jeffrey Pokorak, Cornell Law Review, 1998).



- A comprehensive study of the death penalty in North Carolina found that the odds of receiving a death sentence rose by 3.5 times among those defendants whose victims were white. (Prof. Jack Boger and Dr. Isaac Unah, University of North Carolina, 2001).
- A study in California found that those who killed whites were over 3 times more likely to be sentenced to death than those who killed blacks and over 4 times more likely than those who killed Latinos. (Pierce & Radelet, Santa Clara Law Review 2005).

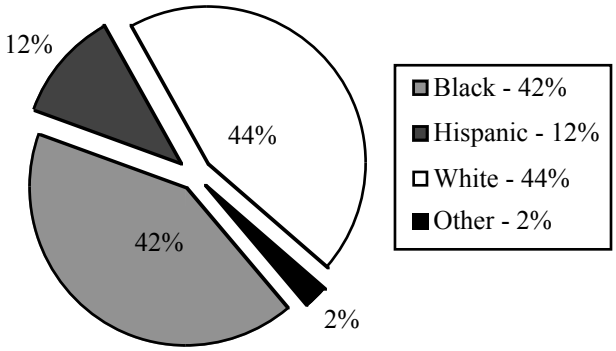
Innocence



Since 1973, over 130 people have been released from death row with evidence of their innocence. (Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, Oct. 1993, with updates from DPIC).

From 1973-1999, there was an average of 3.1 exonerations per year. From 2000-2007, there has been an average of 5 exonerations per year.

Race of Death Row Inmates



EATH ROW INMATES BY STATE: July 1, 2009

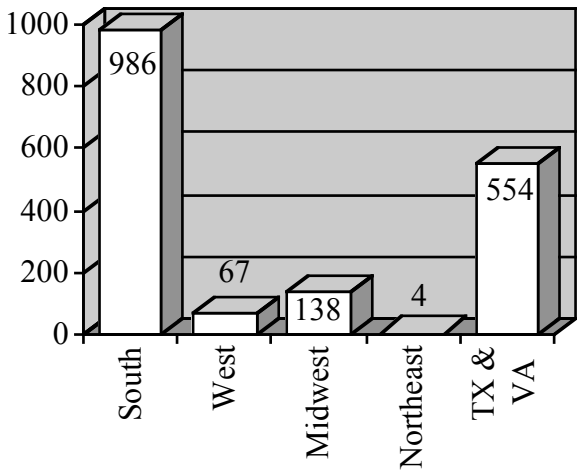
California	690	S. Carolina	63	Connecticut	10
Florida	403	Mississippi	60	Kansas	10
Texas	342	*U.S. Gov't*	58	Utah	10
Pennsylvania	225	Missouri	52	Washington	9
Alabama	200	Arkansas	43	*U.S. Military*	8
Ohio	176	Kentucky	36	Maryland	5
N. Carolina	169	Oregon	33	S. Dakota	3
Arizona	129	Delaware	19	Colorado	3
Georgia	108	Idaho	18	Montana	2
Tennessee	92	Indiana	17	New Mexico	2
Oklahoma	86	Virginia	16	Wyoming	1
Louisiana	84	Illinois	15	N. Hampshire	1
Nevada	78	Nebraska	11	**TOTAL**	**3279**

Race of Death Row Inmates and Death Row Inmates by State Source: NAACP LDF "Death Row, U.S.A." (July 1, 2009)
When added, the total number of death row inmates by state is slightly higher because some prisoners are sentenced to death in more than one state.

NUMBER OF EXECUTIONS BY STATE SINCE 1976

	Total	**2010**	2009		Total	**2010**	2009
Texas	449	**2**	24	Nevada	12	**0**	0
Virginia	105	**0**	3	Mississippi	10	**0**	0
Oklahoma	92	**1**	3	Tennessee	6	**0**	2
Florida	69	**1**	2	Utah	6	**0**	0
Missouri	67	**0**	1	Maryland	5	**0**	0
Georgia	46	**0**	3	Washington	4	**0**	0
Alabama	44	**0**	6	Nebraska	3	**0**	0
N. Carolina	43	**0**	0	Pennsylvania	3	**0**	0
S. Carolina	42	**0**	2	Kentucky	3	**0**	0
Ohio	35	**2**	5	Montana	3	**0**	0
Louisiana	28	**1**	0	Oregon	2	**0**	0
Arkansas	27	**0**	0	Connecticut	1	**0**	0
Arizona	23	**0**	0	Idaho	1	**0**	0
Indiana	20	**0**	1	New Mexico	1	**0**	0
Delaware	14	**0**	0	Colorado	1	**0**	0
California	13	**0**	0	Wyoming	1	**0**	0
Illinois	12	**0**	0	South Dakota	1	**0**	0
				US Gov't	3	**0**	0

Execution By Region*



*Federal executions are listed in the region in which the crime was committed.

DEATH SENTENCING

The number of death sentences per year has dropped dramatically since 1999.

Year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Sentences	**295**	**328**	**326**	**323**	**281**	**306**	**284**	**235**	**167**	**169**	**154**	**140**	**138**	**122**	**119**	**111**	**106***

Source: Bureau of Justice Statistics: "Capital Punishment 2008." *Estimate based on DPIC's research.

JUVENILES

• In 2005, the Supreme Court in *Roper v. Simmons* struck down the death penalty for juveniles. 22 defendants had been executed for crimes committed as juveniles since 1976.

MENTAL HEALTH ISSUES

• *Mental Retardation:* In 2002, the Supreme Court held in *Atkins v. Virginia* that it is unconstitutional to execute defendants with mental retardation.

• *Mental Illness:* The American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the American Bar Association have endorsed resolutions calling for an exemption of the severely mentally ill.

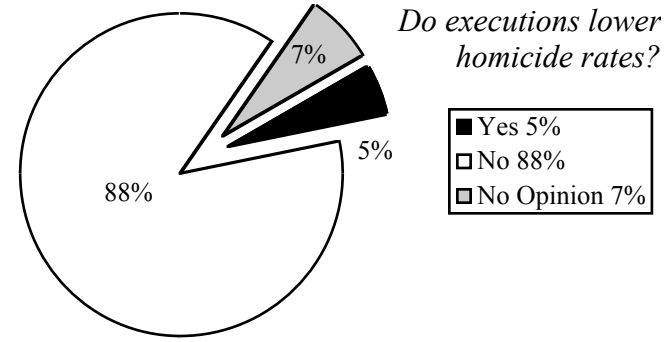
WOMEN

•There were 53 women on death row as of June 30, 2009. This constitutes 1.6% of the total death row population. 11 women have been executed since 1976. "Death Penalty For Female Offenders" by Victor L. Streib, (June 30, 2009)

DETERRENCE

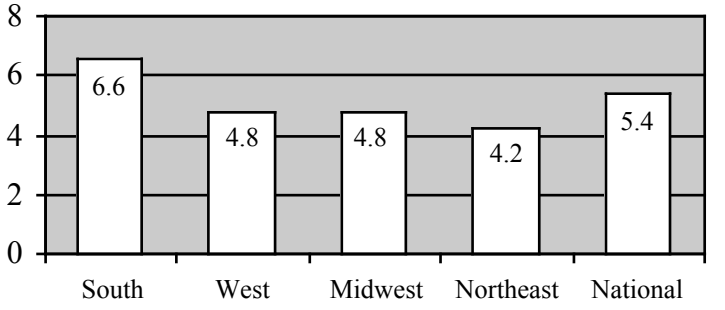
• According to a survey of the former and present presidents of the country's top academic criminological societies, **88% of these experts rejected the notion that the death penalty acts as a deterrent to murder**. (Radelet & Lacock, 2009)

Criminologists View of Deterrence



• Consistent with previous years, the 2008 FBI Uniform Crime Report showed that **the South had the highest murder rate. The South accounts for over 80% of executions.** The Northeast, which has less than 1% of all executions, again had the lowest murder rate.

Murder Rates per 100,000 - 2008



EXECUTIONS SINCE 1976 BY METHOD USED

1023	Lethal Injection	36 states plus the US government use lethal injection as their primary method. Some states utilizing lethal injection have other methods available as backups. Though New Mexico abolished the death penalty in 2009, the act was not retroactive, leaving two prisoners on death row and its lethal injection protocol intact.
156	Electrocution	
11	Gas Chamber	
3	Hanging	
2	Firing Squad	

FINANCIAL FACTS ABOUT THE DEATH PENALTY

• The California death penalty system costs taxpayers $114 million per year beyond the costs of keeping convicts locked up for life. Taxpayers have paid more than $250 million for each of the state's executions. (L.A. Times, March 6, 2005)

• In Kansas, the costs of capital cases are 70% more expensive than comparable non-capital cases, including the costs of incarceration. (Kansas Performance Audit Report, December 2003).

• In Maryland, an average death penalty case resulting in a death sentence costs approximately $3 million. The eventual costs to Maryland taxpayers for cases pursued 1978-1999 will be $186 million. Five executions have resulted. (Urban Institute 2008).

• The most comprehensive study in the country found that the death penalty costs North Carolina $2.16 million per execution *over* the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level. (Duke University, May 1993).

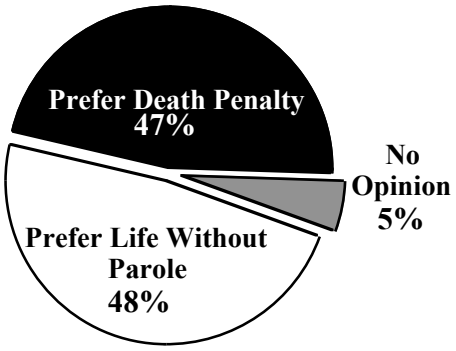
• Enforcing the death penalty costs Florida $51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out since 1976, that amounts to a cost of $24 million for each execution. (Palm Beach Post, January 4, 2000).

• In Texas, a death penalty case costs an average of $2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. (Dallas Morning News, March 8, 1992).

PUBLIC OPINION

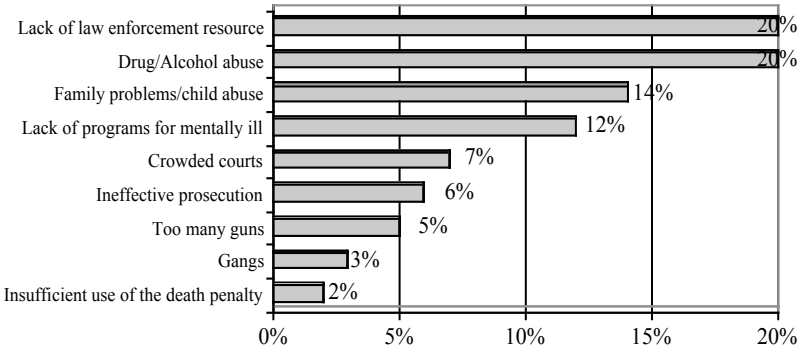
• The May 2006 Gallup Poll found that overall support of the death penalty was 65% (down from 80% in 1994). The same poll revealed that when respondents are given the choice of life without parole as an alternate sentencing option, more choose life without parole (48%) than the death penalty (47%).

Support for Life Without Parole



• A 2009 poll commissioned by DPIC found police chiefs ranked the death penalty **last** among ways to reduce violent crime. The police chiefs also considered the death penalty the **least efficient** use of taxpayers' money.

What Interferes with Effective Law Enforcement?



Percent Ranking Item as One of Top Two or Three

The **Death Penalty Information Center** has available more extensive reports on a variety of issues, including:
"The Death Penalty in 2009: Year-End Report" (December 2009)
"Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis" (October 2009)
"The Death Penalty in 2008: A Year End Report" (December 2008)
"A Crisis of Confidence: Americans' Doubts About the Death Penalty" (2007)
"Blind Justice: Juries Deciding Life and Death with Only Half the Truth" (2005)
"Innocence and the Crisis in the American Death Penalty" (2004)
"International Perspectives on the Death Penalty: A Costly Isolation for the U.S." (1999)
"The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides" (1998)
"Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent" (1997)
"Killing for Votes: The Dangers of Politicizing the Death Penalty Process" (1996)
"Twenty Years of Capital Punishment: A Re-evaluation" (1996)
"With Justice for Few: The Growing Crisis in Death Penalty Representation" (1995)
"On the Front Line: Law Enforcement Views on the Death Penalty" (1995)
"The Future of the Death Penalty in the United States: A Texas-Sized Crisis" (1994)

defence

dorian lovell-pank QC

biography

Dorian Lovell-Pank (6 King's Bench Walk) practises across all aspects of criminal law including, in particular, commercial fraud and corruption, importation of drugs, firearms offences, murder and sexual offences for both prosecution and defence. He was a recorder from 1989 – 2006 (having been an assistant recorder from 1985 – 1989).

Mr Lovell-Pank is on the Panel of Chairman of Police Appeals Tribunal, and a member of the International Bar Association, the American Bar Association, the Foreign & Commonwealth panel of pro bono lawyers and the British-Spanish Law Association (he speaks Spanish fluently).

He was a member of the Bar Council for 10 years, prior to 2006, and of the Committee of the Criminal Bar Association for 17 years.

junior counsel

ben lloyd alistair richardson simon ray

vicky ailes ellie searley

robert blecker

biography

Mr Blecker is a Professor of Law at New York Law School. He teaches a range of courses, and, as a nationally renowned advocate of capital punishment, has co-taught his death penalty course with leading abolitionists, encouraging students to consider both sides of the argument.

Mr Blecker has spent thousands of hours in maximum security prisons in seven states, chronicling the lives and perspectives of street criminals including many killers. He became a close confident of Daryl Holton who was on death row having murdered his four children. Mr Holton considered Mr Blecker his closest friend and participated fully in the film *Robert Blecker Wants Me Dead.*

Mr Blecker is a graduate of Harvard Law School, and is a winner of the Harvard 'Oberman Prize', an award for the best graduate law thesis.

Mr Blecker has chosen the words of Adam Smith (*The Theory of Moral Sentiments,* 1759) and Sir James Fitzjames Stephen (*A History of the Criminal Law of England,* 1883) as his submission for inclusion in the Jury Bundle.

From Adam Smith, *The Theory of Moral Sentiments* (1759)

I.ii.3.5 ANGER DISCORDANT
the hoarse, boisterous, and discordant voice of anger, when heard at a distance inspires us either with fear or aversion. We do not fly towards it, as to one who cries out with pain and agony

It is the same case with hatred. Mere expressions of spite inspire it against nobody but the man who uses them.

I.ii.3.6 HATRED AND ANGER POISON A GOOD MIND
Hatred and anger are the greatest poison to the happiness of a good mind. There is, in the very feeling of those passions, something harsh, jarring, and convulsive, something that tears and distracts the breast, and is altogether destructive of that composure and tranquility of mind which is so necessary to happiness

II.i.1.2 RESENTMENT PROMPTS US TO PUNISH
the sentiment which most immediately and directly prompts us to punish is resentment

II.i.1.6 IF NEITHER WE NOR OUR FRIENDS ARE VICTIMS WE WOULDN'T WISH TO BE THE INSTRUMENT OF HARM
But though dislike and hatred harden us against all sympathy, and sometimes dispose us even to rejoice at the distress of another, yet, if there is no resentment in the case, if neither we nor our friends have received any great personal provocation, these passions would not naturally lead us to wish to be instrumental in bringing it about. . . We would rather that it should happen by other means. .

RESENTMENT: YOU SHALL BE PUNISHED BY OUR MEANS
But it is quite otherwise with resentment: if the person who had done us some great injury, who had murdered our father or our brother, for example, should soon afterwards die of a fever, or even be brought to the scaffold upon account of some other crime, though **it might sooth our hatred, it would not fully gratify our resentment.**

RESENTMENT IS ONLY SATISFIED IF OFFENDER GRIEVES IN THE RIGHT WAY
Resentment would prompt us to desire, not only that he should be punished, but that he should be punished by our means, and upon account of that particular injury which he had done to us. Resentment cannot be fully gratified, unless the offender is not only made to grieve in his turn, but to grieve for that particular wrong which we have suffered from him. He must be made to repent and be sorry for this very action, that others, through fear of the like punishment, may be terrified from being guilty of the like offense.

GRATIFYING RESENTMENT IS PRIMARY: ALL UTILITARIAN PURPOSES FOLLOW

The natural gratification of this passion tends, of its own accord, to produce all the political ends of punishment: the correction of the criminal, and the example to the public.

II.i.2.5 OUR HEART BEATS TIME TO HIS GRIEF

As we sympathize with the sorrow of our fellow-creature whenever we see his distress, so we likewise enter into his abhorrence and aversion for whatever has given occasion to it. **Our heart, as it adopts and beats time to his grief, so it is likewise animated with that spirit by which he endeavours to drive away or destroy the cause of it.** The . . passive fellow-feeling, by which we accompany him in his sufferings, readily gives way to that more vigorous and active sentiment by which we go along with him in the effort he makes, either to repel them, or to gratify his aversion to what has given occasion to them.

SYMPATHY WITH DISTRESS OF SUFFERER ANIMATES RESENTMENT; REJOICE TO SEE HIM ATTACK, EVEN TO VENGEANCE WITHIN A CERTAIN DEGREE

When we see one man oppressed or injured by another, the sympathy which we feel with the distress of the sufferer seems to serve only to animate our fellow feeling with his resentment against the offender. We are rejoiced to see him attack his adversary in his turn, and are eager and ready to assist him whenever he exerts himself for defense, or even for vengeance within a certain degree.

IMAGINARY RESENTMENT OF THE DEAD

the imaginary resentment .. in fancy we lend to the dead, who is no longer capable of feeling that or any other human sentiment. But as we put ourselves in his situation, as we enter, as it were, into his body, and in our imaginations, in some measure, animate anew the deformed and mangled carcass of the slain, when we bring home in this manner his case to our own bosoms, we feel upon this, as upon many other occasions, an emotion which the person principally concerned is incapable of feeling, and which yet we feel by an illusive sympathy with him.

The sympathetic tears which we shed for that immense and irretrievable loss, which in our fancy he appears to have sustained, seem to be but a small part of the duty which we owe him. The injury which he has suffered demands, we think, a principal part of our attention. We feel that resentment which we imagine he ought to feel, and which he would feel, if in his cold and lifeless body there remained any consciousness of what passes upon earth. His blood, we think, calls aloud for vengeance. The very ashes of the dead seem to be disturbed at the thought that his injuries are to pass unrevenged.

from this natural sympathy with the imaginary resentment of the slain . . Nature, antecedent to all reflections upon the utility of punishment, has . . stamped upon the human heart, in the strongest and most indelible characters, an immediate and instinctive approbation of the sacred and necessary law of retaliation.

II.i.3.2 CAN'T FULLY CONDEMN THE CONDUCT IF THE MOTIVES ARE GOOD
wherever the conduct of the agent appears to have been entirely directed by motives and affections which we thoroughly enter into and approve of, we can have no sort of sympathy with the resentment of the sufferer, how great soever the mischief which may have been done to him.

When two people quarrel, if we take part with and entirely adopt the resentment of one of them, it is impossible that we should enter into that of the other. Our sympathy with the person whose motives we go along with, and whom therefore we look upon as in the right, cannot but harden us against all fellow-feeling with the other, whom we necessarily regard as in the wrong

II.i.4.3 MUST DISAPPROVE THE AGENT'S MOTIVES TO ADOPT RESENTMENT OF SUFFERER
we cannot at all sympathize with the resentment of one man against another, merely because this other has been the cause of his misfortune, unless he has been the cause of it from motives which we cannot enter into. **Before we can adopt the resentment of the sufferer, we must disapprove of the motives of the agent, and feel that our heart renounces all sympathy with the affections which influenced his conduct.**

II.i.4.4 REJECTS ALL FELLOW FEELING (ABHORS ATTITUDES)
[W]hen our heart rejects with abhorrence all fellow-feeling with the motives of the agent, we then heartily and entirely sympathize with the resentment of the sufferer. Such actions seem then to deserve, and call aloud for, a proportionable punishment; and we entirely enter into, and thereby approve of, the resentment which prompts to inflict it. The offender necessarily seems then to be the proper object of punishment, when we thus entirely sympathize with, and thereby approve of, that sentiment which prompts to punish.

II.i.5.4 COMPOUND SENTIMENT: ANTIPATHY TO AGENT: SYMPATHY WITH SUFFERER
As we cannot indeed enter into the resentment of the sufferer, unless our heart beforehand disapproves the motives of the agent, and renounces all fellow-feeling with them; so the sense of demerit . . seems to be a compounded sentiment, and to

be made up of two distinct emotions; a direct antipathy to the sentiments of the agent, and an indirect sympathy with the resentment of the sufferer.

II.i.5.6 RENOUNCES WITH HORROR AND ABOMINATION ALL FELLOW FEELING

When we read about [great] perfidy and cruelty . . our heart rises up against the detestable sentiments which influenced their conduct, and renounces with horror and abomination all fellow-feeling with such execrable motives. So far our sentiments are founded upon the direct antipathy to the affections of the agent: and the indirect sympathy with the resentment of the sufferers is still more sensibly felt. . . . Our sympathy with the unavoidable distress of the innocent sufferers is not more real nor more lively, than our fellow-feeling with their just and natural resentment. The former sentiment only heightens the latter, and the idea of their distress serves only to inflame and blow up our animosity against those who occasioned it. When we think of the anguish of the sufferers, we take part with them more earnestly against their oppressors; we enter with more eagerness into all their schemes of vengeance, and feel ourselves every moment wreaking, in imagination, upon such violators of the laws of society, that punishment which our sympathetic indignation tells us is due to their crimes. Our sense of the horror and dreadful atrocity of such conduct, the delight which we take in hearing that it was properly punished, the indignation which we feel when it escapes this due retaliation, our whole sense and feeling, in short, of its ill desert, of the propriety and fitness of inflicting evil upon the person who is guilty of it, and of making him grieve in his turn, arises from the sympathetic indignation which naturally boils upon the breast of the spectator, whenever he thoroughly brings home to himself the case of the sufferer.

II.i.5.7-9 TOO GREAT RESENTMENT - REVENGE - IS ODIOUS

Resentment is commonly regarded as so odious a passion . . Gratitude and resentment, however, are in every respect, it is evident, counterparts to one another; and if our sense of merit arises from a sympathy with the one, our sense of demerit can scarce miss to proceed from a fellow-feeling with the other. . . . when the resentment of the sufferer does not in any respect go beyond our own, when no word, no gesture, escapes him that denotes an emotion more violent than what we can keep time to, and when he never aims at inflicting any punishment beyond what we should rejoice to see inflicted

how great an effort must be made in order to bring down the rude and undisciplined impulse of resentment to this suitable temper

too violent resentment, instead of carrying us along with it, becomes itself the object of our resentment and indignation. We enter into the opposite resentment of the person who is the object of this unjust emotion, and who is in danger of suffering {too greatly -rb} from it. Revenge, therefore, the excess of resentment, appears to be the most detestable of all the passions, and is the object of the horror and indignation of every body. And as . . this passion is excessive a hundred times for once that it is moderate, we are very apt to consider it as altogether odious and detestable, because in its most ordinary appearances it is so.

INTUITION NOT REASON LEADS US TO PUNISH PROPERLY

The Author of nature has not entrusted it to [human] reason to find out that a certain application of punishments is the proper means . . but has endowed [us] with an immediate and instinctive approbation

II.ii.1.4 RESENTMENT IS THE SAFEGUARD OF JUSTICE

Resentment . . is the safeguard of justice and the security of innocence

II.ii.1.5 WE FEEL OURSELVES STRICTLY BOUND BY JUSTICE

we feel ourselves to be under a stricter obligation to act according to justice than agreeably to friendship, charity, or generosity. . . . We feel ourselves to be tied, bound, and obliged to the observation of justice

II.ii.3.7 PUNISHMENT IS HUMAN DIGNITY

[T]he dictates of a humanity that is more generous and comprehensive. . reflect that mercy to the guilty is cruelty to the innocent, and oppose to the emotions of compassion which they feel for a particular person, a more enlarged compassion which they feel for mankind.

II.ii.3.8 HATRED LEGITIMATE

But though it is their intrinsic hatefulness and detestableness, which originally inflames us against them, we are unwilling to assign this as the sole reason why we condemn them, or to pretend that it is merely because we ourselves hate and detest them. The reason, we think, would not appear to be conclusive. Yet why should it not; if we hate and detest them because they are the natural and proper objects of hatred and detestation?

II.iii.1.3 CAN ONLY BE SATISFIED TO INFLICT PUNISHMENT ON SOMEBODY WHO FEELS PAIN

But before anything can be the proper object of . . resentment, it must not only be the cause of pleasure or pain, it

must likewise be capable of feeling them. Without this other quality, those passions cannot vent themselves with any sort of satisfaction. As they are excited by the causes of pleasure and pain, so their gratification consists in retaliating those sensations upon what gave occasion to them; which it is to no purpose to attempt upon what has no sensibility.

II.iii.1.4 OUR ENEMY MUST NOT ONLY FEEL PAIN, BUT ASSOCIATE IT WITH HIS OWN PAST CRUELTY

The object, on the contrary, which resentment is chiefly intent upon is not so much to make our enemy feel pain in his turn, as to make him conscious that he feels it upon account of his past conduct, to make him repent of that conduct, and to make him sensible, that the person whom he injured did not deserve to be treated in that manner.

II A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883)
SIR JAMES FITZJAMES STEPHEN

Everything which is regarded as enhancing the moral guilt of a particular offense is recognized as a reason for increasing the severity of the punishment awarded to it.

In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.

I am also of opinion that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community.

I think it highly desirable that criminals should be hated; that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.

These views are regarded by many persons as being wicked because it is supposed that we never ought to hate, or wish to be revenged upon any one. The doctrine that hatred and vengeance are wicked in themselves appears to me to contradict plain facts, and to be unsupported by an argument deserving of attention. Love and hatred, gratitude for benefits, and the desire of vengeance for injuries, imply each other as much as convex and concave. Butler vindicated resentment which cannot be distinguished from revenge and hatred except by name, and Bentham included the pleasures of malevolence amongst the fifteen which, as he said, constitute all our motives of action. The unqualified manner in which they have been denounced is in itself a proof that they are deeply rooted in human nature. No doubt they are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement, but unqualified denunciations of them are as ill-judged as unqualified denunciations of sexual passion. The forms in which deliberate anger and righteous disapprobation are expressed, and the execution if criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other.

I also think that in the present state of public feeling, at all events amongst the classes which principally influence legislation, there is more ground to fear defect than excess in these passions. Whatever

may have been the case in periods of greater energy, less knowledge, and less sensibility than ours, it is now far more likely that people should witness acts of grievous cruelty, deliberate fraud, and lawless turbulence, with too little hatred and too little desire for deliberate measured revenge than that they should feel too much.

The expression and gratification of these feelings is however only one of the objects for which legal punishments are inflicted. Another object is the direct prevention of crime, either by fear, or by disabling or even destroying the offender, and this which is I think commonly put forward as the only proper object of legal punishments is beyond all question distinct from the one just mentioned and of coordinate importance with it. The two objects are in no degree inconsistent with each other, on the contrary they go hand in hand, and may be regarded respectively as the secondary and the primary effects of the administration of criminal justice.

The judge in the exercise of that discretion ought to have regard to the moral guilt of the offence . . . as well as to its specific public danger.

Many persons, who would not say that hatred and punishments founded on it are wicked, would say that both the feeling itself and the conduct which it suggests are irrational, because men and human conduct are as much the creatures of circumstances as things, and that it is therefore as irrational to desire to be revenged upon a man for committing murder with a pistol as to desire to be revenged on the pistol with which the man commits murder. The truth of the premiss of this argument I neither assert nor deny. It is certainly true that human conduct may be predicted to a great extent. It is natural to believe that an omniscient observer of it might predict not only every act, but every modification of every thought and feeling, of every human being born or to be born; but this is not inconsistent with the belief that each individual man is an unknown something -- that as such he is other and more than a combination of the parts which we can see and touch, -- and that his conduct depends upon the quality of the unknown something which he is.

paul cassell

biography

Mr Cassell is the Ronald N. Boyce Presidential Professor of Criminal Law at S.J. Quinney College of Law at the University of Utah. He began teaching at the University of Utah in 1992, however, from 2002 – 2007 he served as a US District Court Judge for the district of Utah, having been appointed by President George W. Bush.

Mr Cassell teaches criminal procedure, crime victims' rights, criminal law and related courses. He is also a keen litigator, and currently litigates crime victims' rights around the US on a pro bono basis, and is the author of two books.

Earlier in his career, he prosecuted many felony crimes in his roles as an Associate Deputy Attorney General in the US Department of Justice and an Assistant US Attorney in the Eastern District of Virginia.

Mr Cassell has chosen to highlight the murder of Colleen Reed (1991) as his submission for inclusion in the Jury Bundle.

Colleen Reed was murdered on December 29, 1991 by Kenneth Allen McDuff, whose execution was commuted by the Supreme Court's temporary abolition of capital punishment in 1972 and who was later paroled.

kent scheidegger

biography

Mr Scheidegger became the Legal Director of the Criminal Justice Legal Foundation in 1986. He is a former chairman of the Criminal Law Procedure Practice Group of the Federalist Society and has served on the Group's executive committee since 1996.

Mr Scheidegger has written over 100 briefs in cases before the US Supreme Court, and legal arguments he authored have been cited in the Congressional Record and incorporated in several precedent-setting US Supreme Court decisions. His articles on criminal and constitutional law have been published in law reviews, national legal publications and Congressional reports.

Prior to receiving his law degree in 1982, Mr Scheidegger served in the US Air Force as a Nuclear Research Officer. From 1982 – 1984 he practised civil law in Northern California and then was general counsel of California Cooler, Inc. from 1984 – 1986.

Mr Scheidegger has chosen his article *Smokes and Mirrors on Race and the Death Penalty*, published in *Engage* (Volume 4, Issue 2), as his submission for inclusion in the Jury Bundle.

Smoke and Mirrors on Race and the Death Penalty

By Kent Scheidegger

Introduction

Claims that the death penalty is enforced in a manner that discriminates on the basis of race have long been prominent in the capital punishment debate. In its 1972 decision in *Furman* v. *Georgia*,[1] the Supreme Court relied on the Eighth Amendment's Cruel and Unusual Punishment Clause to throw
out the capital punishment laws then in existence, but the Equal Protection Clause lay just beneath the surface of the opinions.[2] Congress and 38 state legislatures rewrote their laws to put more structure into the sentencing decision so as to reduce the possibility of racial bias.[3]

In January 2003, a study of capital punishment in Maryland was widely reported as confirming the claim that race remains a large factor. "Large Racial Disparity Found By Study of Md. Death Penalty," said the headline in the Washington Post.[4] A hard look at the numbers tells a different story. First, however, a review of the background is in order.

The *McCleskey* Case

The most widely known study of race and capital punishment is the one involved in a Supreme Court case, *McCleskey* v. *Kemp.*[5] The NAACP Legal Defense and Education Fund, Inc. (LDF) asked a group of researchers headed by Dr. David Baldus to undertake a study for the specific purpose of using the results to challenge Georgia's capital punishment system.[6] The LDF also arranged funding for the study. One result of this study was undisputed. "What is most striking about these results is the total absence of any race-of-defendant effect."[7] The reforms after *Furman* v. *Georgia* had successfully eliminated discrimination against black defendants as a substantial factor in capital sentencing. This was consistent with a variety of studies done in other states.[8]

With their primary argument disproved by their own study, McCleskey's defenders proceeded to a federal *habeas corpus* hearing on a different theory. The Baldus group claimed to have found a "race-of-victim" effect. That is, after controlling for other factors, murders of black victims are some-what less likely to result in a death sentence than murders of white victims.[9] Based on mechanical "culpability index," Dr. Baldus identified a class of clearly aggravated cases where the death penalty was consistently imposed, a class of clearly mitigated cases where it was almost never imposed, and a mid-range where it was sometimes imposed,[10] exactly the way a discretionary system should work. It was only within the mid-range that the race of the victim was claimed to be a factor. After an extensive hearing with experts on both sides, the federal District Court found numerous problems with Dr. Baldus's data and methods. Most important, though, was a finding that the model claiming to show a race-of-victim effect had failed to account for the legitimate factor of the strength of the prosecution's case for guilt. When a different model that accounted for that factor was used, the race-of-victim effect disappeared.[11]

Despite this finding, and contrary to normal appellate practice, the Court of Appeals and the Supreme Court assumed on appeal that Dr. Baldus had actually proven his case.[12] Ever since, the Supreme Court's opinion in *McCleskey* has been cited for "facts" which it merely assumed, and which the trial court had found were false.[13] The Court held that even if the statistics were valid, "McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty."[14]

This holding points out what is so very odd about this race-of-victim bias claim. The benchmark of our society for what kind of case "deserves" the death penalty is established in those cases where race is not a factor, i.e., in those cases where the murderer, the victim, and the decision-makers are all the same race. Traditionally, at least in the Southeast, that would be the case where they are all white. A race-of-defendant bias would mean that there are black defendants on death row who would have been sentenced to life if their cases had been measured by the benchmark. That is a valid ground for attacking the death penalty, as

was done successfully in *Furman*. However, a race- of-victim effect means that every murderer on death row would still be there if the bias were eliminated and every case judged by the race neutral benchmark, but a few more murderers would be there as well. The unjust verdicts which result from a system biased against black victims are the cases that should result in a death sentence according to the race-neutral criteria, but which result in life sentences instead. McCleskey's sentence was correct when measured against the race-neutral benchmark, and he was justly executed for gunning down a police officer in the performance of his duty. The unjust sentences, if Dr. Baldus is correct, are in the similar cases where equally culpable murderers get off with life.

Post-*McCleskey* Studies

The *McCleskey* decision shut down Baldus-type studies as tools of federal litigation. Similar studies since then have been done in a few states where state courts chose not to follow *McCleskey* on independent state grounds, where legislative or executive branches commissioned them, or where there were done independently of government.

The California Attorney General commissioned the RAND Corporation to study that state's system in preparation for *McCleskey*-type litigation which was subsequently dismissed. Using a different methodology, Klein and Rolph found no evidence of racial discrimination based on either the race of the victim or the race of the defendant.[15]

In New Jersey, the Supreme Court appointed a succession of special masters, the first one being Dr. Baldus, to study the death penalty in that state. The 2001 report of Judge David Baime reports that the statistical evidence supports neither the thesis of race-of-defendant bias nor that of race-of-victim bias in determining the likelihood that a defendant will be sentenced to death.[16] Statewide data do show that proportionately more white-victim cases advance to the penalty phase. However, this is not actually caused by race of the victim, but rather by different prosecutorial practices in counties with different populations. Prosecutors in the more urban counties, with proportionately more black residents and hence more black-victim cases, take fewer potentially capital cases to a penalty trial. Conversely, prosecutors in the less urban counties, which generally have higher per-centage white populations, seek relatively more death sentences. "New Jersey is a small and densely populated state. It is, nevertheless, a heterogenous one. It is thus not remarkable that the counties do not march in lock-step in the manner in which death-eligible cases are prosecuted."[17]

The Nebraska Legislature commissioned a study, which was headed by Dr. Baldus and George Woodworth, the lead researchers of the *McCleskey* study. This study found no significant evidence of sentencing disparity based on race of the defendant, race of the victim, or socioeconomic status.[18] The study did find differences among counties, particularly between urban and rural. The Baldus group uses the term "geographic disparity"[19] to describe the same phenomenon that Judge Baime calls not marching in lockstep. However, the Baldus group found that the trial judges, who did the sentencing in Nebraska at this time, effectively corrected for the difference.[20]

In January 2000, the United States Justice Department released raw data on the ethnic breakdown of persons for whom the death penalty was sought at various stages of federal prosecutions and on those finally sentenced to death.[21] Federal prosecution of violent crime has been targeted specifically at drug-trafficking organized crime for many years. From 1988 to 1994, the only federal death penalty in force was the Drug Kingpin Act.[22] No one should be surprised that the organizations smuggling drugs from Latin America are largely Hispanic or that the drug-fueled, violent gangs of the inner city are largely black. So there should have been no surprise that the federal death row has a very large percentage of black and Hispanic murderers, as this report showed it does. The shock and dismay that accompanied the release of this report[23] was entirely unwarranted. The data-gathering process continued and, sure enough, the proportion of minorities for whom the death penalty is sought or obtained reflects the pool of potentially capital cases which are appropriate for federal prosecution.[24]

A study by a legislative commission in Virginia produced results similar to the New Jersey and Nebraska studies. "The findings clearly indicate

that race plays no role in the decisions made by local prosecutors to seek the death penalty in capital-eligible cases."[25] However, urban prosecutors do seek it less often than rural ones.[26] Ininterviews with the urban prosecutors, the reason most often given for seeking the death penalty less often was the reluctance of urban juries to impose it.[27]

The Maryland Study

With the background of these other studies in mind, analysis of the Paternoster study in Maryland[28] is straightforward. Prior to the year 2000, there had been four studies of the death penalty in Maryland, but none of them had information on the aggravating and mitigating circumstances of the individual cases. Thus, they lacked the essential information to make a judgment about the administration of the death penalty in Maryland.[29] In 2000, Governor Glendenning funded a study to gather that information.

The study began with a database of approximately 6,000 cases where the defendant was convicted of first- or second-degree murder between 1978 and 1999.[30] That is about 40% less than the approximately 10,000 cases of murder and voluntary manslaughter in that period,[31] so presumably the remainder were voluntary manslaughter, unsolved cases, or cases where a perpetrator was identified but evidence was insufficient to convict.

One of the essential requirements of a valid post-*Furman* death penalty statute is that it first narrow the category of defendants for whom the death penalty can even be considered.[32] Maryland law does this by requiring that the murder meet all of the following criteria: (1) the murder was first degree; (2) the defendant was a principal in the first degree (i.e., the actual killer, rather than just an accomplice); (3) the defendant was at least 18; (4) the defendant was not retarded; and (5) at least one of a list of ten aggravating circumstances is true.[33] The most common aggravating circumstance is murder in the course of a rape, robbery, or certain other felonies. The Paternoster group determined that 1,311 out of 5,978 murder convictions were "death eligible."[34] Before any decision-maker exercises any discretion, Maryland law whittles the class of murderers eligible for the death penalty to a mere 22% of the total. Maryland's criteria therefore easily meet the constitutional requirement of a meaningful narrowing of the eligible class.

Prosecutor discretion in seeking the death penalty and continuing the case to a penalty hearing further reduced the number of hearings to 14% of the original 1,311. Juries actually imposed death sentences in about 42% of the cases where they were asked, or about 6% of the originally eligible cases. The key question is what part, if any, racial discrimination plays in these two discretionary steps: the decision of the prosecutor to ask the jury for the death penalty, and the decision of the jury, when asked, to actually impose it. A further subdivision is whether the race of the defendant or the race of the victim makes a difference.

The study also asks about so-called "geographic disparity," at one point even equating such "disparity" with "arbitrariness."[35] The study appears to simply assume throughout that variation by county is a problem on the same order as racial discrimination. In other words, contrary to Judge Baime's report in New Jersey,[36] the Paternoster report appears to assume that Maryland's counties *should* "march in lock-step." This assumption
colors the entire report.

The report then tabulates numbers of cases by race and by county without adjusting for case characteristics.[37] However, the meat of the study lies in the adjusted race data, and the combined effects of race and county. First, there is the result, that by all rights, *should* have been the headline story. After adjusting for relevant case characteristics, so as to compare apples to apples, there is no difference between the death sentence rates of black and white offenders, beyond the inevitable level of statistical "noise" inherent in such studies. "In sum, *we have found no evidence that the race of the defendant matters in the processing of capital cases in the state.*"[38]

Although this result is consistent with the other studies discussed above, it is completely contrary to the popular conception of the death penalty in America. For any American institution to elim-

nate the primary racial effect of concern to the point that it is lost in the statistical grass is an accomplishment to be celebrated with fireworks and champagne. Instead, this finding was barely noticed.

On the race-of-victim effect, the picture is murky. There are various ways to analyze the data. Some ways show a significant race-of-victim effect while others do not.[39] Different regression models can be constructed by choosing which variables to include. Paternoster reports that "considered *alone* the race of the victim matters, those who kill white victims are at a substantially increased risk of being sentenced to death . . . ."[40] But considering race alone is wrong. A different model considering race and jurisdiction together yields a very different result:

"When the prosecuting jurisdiction is added to the model, the effect for the victim's race diminishes substantially, and is no longer statistically signifcant. This would suggest that jurisdiction and race-of-victim are confounded. There are state's attorneys in Maryland who more frequently pursue the death penalty than others. It also happens that there are more white victim homicides committed in those jurisdictions where there is a more frequent pursuit of the death penalty."[41]

What this means in English, is that some counties in Maryland elect tougher-on-crime prosecutors and have tougher juries than other counties. In the tougher counties, a murder in the middle range is more likely to result in a death sentence than a similar murder in a softer county. Support for tough-on-crime measures generally and capital punishment in particular is substantially correlated with race. One poll earlier this year found whites in favor of capital punishment (68-27) and blacks opposed (40-56).[42] For this reason, the tougher counties are likely to have a higher proportion of white residents and hence white crime victims.

What the Paternoster group calls "geographic disparity" is, in reality, local government in action. This is exactly the way our system is *supposed* to work. We elect our trial-level prosecutors by county so that local people have local control over how the discretion of that office is exercised. If the voters of suburban Baltimore County choose to elect a prosecutor who seeks the death penalty frequently, while the voters of downtown Baltimore City elect one who seeks it rarely, that is their choice.

Prosecutors also make judgments about the kinds of cases in which the juries of their area will impose the death penalty. This form of local control, the jury of the vicinage, is one of our cherished rights going back to the common law. Parliament's violation of this right was one of the reasons for the American Revolution.[43] The right is guaranteed, albeit in modified form appropriate for the federal courts, in the Sixth Amendment.

Why, one might ask, is there so much hyperventilating about "geographic disparity"? Apparently, it is because all the other discrimination arguments against capital punishment have failed. The post-*Furman* reforms have been a resounding success in smashing the form of discrimination of greatest concern: the race of the defendant. In study after study, race-of-victim bias is either nonexistent or disappears when legitimate variables are accounted for. What is left is to create a brand new requirement of statewide uniformity, flatly contrary to the American tradition of local control, and then declare our judicial system a failure for violating this *ex post facto* requirement. It is an elaborate sleight of hand.

The Real Problem

Debunking the racial discrimination claim does not mean that everything is just fine in Maryland, or any other state. The Paternoster study does indicate a very real problem. The people of Baltimore City and Prince George's County are receiving an inferior quality of justice. A murderer who kills a resident of one of those counties is more likely to get off with a life sentence under circumstances where the death penalty is warranted.

Failure to use the death penalty where it is warranted can have fatal consequences for innocent people. Although the deterrence debate has not yet been conclusively resolved, a mounting

body of scholarship confirms what common sense has always told us: a death penalty that is actually enforced saves innocent lives.[44]

We can make a rough calculation with the Paternoster study's unadjusted geographic data[45] to get an idea of the magnitude of the problem. Baltimore City had a fraction of 0.435 of the state's 1311 death-eligible homicides, or 570. At the statewide average rate of death sentences, that would yield 33, instead of the 10 that Baltimore City actually produced. The Emory study estimates that each execution saves 18 innocent lives through deterrence.[46] If the additional 23 death sentences had been imposed and carried out,[47] over 400 murders could have been deterred.

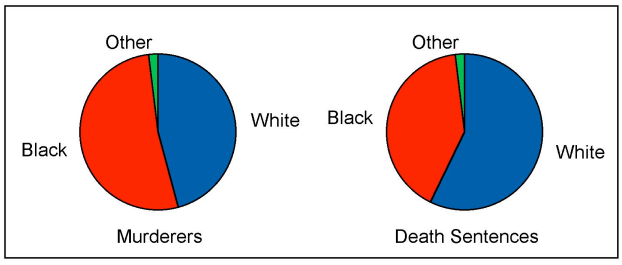
That is a staggering toll of death caused by insufficient use and execution of the death penalty. Even if this rough calculation is off by a factor of four, that would still be over 100 people murdered who could have been saved.

To properly protect the people in Baltimore City and other jurisdictions like it, we must restore public confidence in and support of capital punishment, so that prosecutors can seek it in appropriate cases, and juries will impose it. The first step toward that end is to debunk the myth that capital punishment is imposed discriminatorily. The numbers are there in the opponents' own studies, once we cut through the spin and look at the facts.

Engage (Volume 4, Issue 2)

Footnotes

1 408 U. S. 238.
2 See *Graham* v. *Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring).
3 See *Gregg* v. *Georgia*, 428 U. S. 153, 179-180 (1976); U. S. Dept. Of Justice, U. S. Bureau of Justice Statistics, Capital Punishment 2001, Tables 1 & 2 (2002).
4 Susan Levine & Lori Montgomery, Large Racial Disparity Found By Study of Md. Death Penalty, Washington Post, Jan. 8, 2003, p. A1.
5 481 U. S. 279 (1987).
6 See D. Baldus, G. Woodworth & C. Pulaski, Equal Justice and the Death Penalty 44 (1990).
7 *Id.*, at 150.
8 See *id.*, at 254.
9 The alarmist claim that the Baldus study shows that killers of white victims are "four times as likely" to receive a death sentence as killers of black victims is literally a textbook example of how to lie with statistics. See Barnett, How Numbers Can Trick You, 97 Technology R. 38, 42-43 (1994).
10 See Baldus, *supra* note 6, at 91, Figure 5.
11 *McCleskey* v. *Zant*, 580 F. Supp. 338, 368 (ND Ga. 1984). 12 *McCleskey* v. *Kemp*, 481 U. S. 279, 291, n. 7 (1987).
13 See, e.g., *Callins* v. *Collins*, 510 U. S. 1141, 1153-1154 (1994) (Blackmun, J., dissenting).
14 481 U. S., at 307.
15 Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 44 (1991).
16 D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001), http://www.judiciary.state.nj.us/baime/baimereport.pdf.
17 *Id.*, at 62.
18 D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, Executive Summary 14-22 (2001).
19 *Id.*, at 18.
20 *Id.*, at 21.
21 U. S. Dept. of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000) (2000).
22 *Id.*, at 1.
23 See, e.g., Bonner & Lacey, Pervasive Disparities Found in the Federal Death Penalty, N. Y. Times, Sept. 12, 2000, at A6.
24 U. S. Dept. of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review 4 (2001).
25 Joint Legislative Audit and Review Commission, Review of Virginia's System of Capital Punishment, iii (2002), http://jlarc.state.va.us/reports/rpt274.pdf
26 *Ibid.*
27 *Id.*, at 31.
28 R. Paternoster, et al., An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003) (cited below as "Paternoster"). The study is on the University of Maryland Web site as http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf (Executive Summary) and http://www.urhome.umd.edu/newsdesk/pdf/ finalrep.pdf (Final Report). Page cites below are to the Executive Summary unless otherwise noted.
29 *Id.*, at 4.
30 *Id.*, at 7.
31 U. S.Bureau of Justice Statistics, Data Online, query run July 28, 2003; http://bjsdata.ojp.usdoj.gov/dataonline/Search/Homicide/State/StatebyState.cfm. The FBI collects data on a category it calls "murder and nonnegligent manslaughter."
32 See *Tuilaepa* v. *California*, 512 U. S. 967, 972 (1994).
33 Paternoster, *supra* note 28, at 5-7.
34 *Id.*, at 9.
35 *Id.*, at 1.
36 See *supra* note 17 and accompanying text.
37 Paternoster, *supra* note 28, at 13-23.
38 *Id.*, at 26 (emphasis in original).
39 See *id.*, at 27-28 (logistical regression shows significant race-of-victim effect, according to generally accepted statistical criterion, while stepwise regression does not).
40 *Id.*, at 32 (emphasis added).
41 *Ibid.*
42 Sussman, No Blanket Commutation, Poll: Most Oppose Clearing Death Row (Jan. 24, 2003), http://abcnews.go.com/sections/us/ DailyNews/commutation_poll030124.html.
43 Declaration of Independence (1776) ("For transporting us beyond Seas to be tried for pretended Offences").
44 See Dezhbakhsh, Rubin, and Shephard, Does Capital Punishment Have a Deterrent Effect?, 33 American Law and Economics Review 344 (2003); Mocan, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, Journal of Law and Economics (forthcoming Oct. 2003), http://econ.cudenver.edu/mocan/papers/GettingOffDeathRow.pdf; Cloninger & Marchesini, "Execution and Deterrence: A Quasi-Controlled Group Experiment," 33 Applied Economics 569, 576 (2001); California District Attorneys' Association, Prosecutors' Perspective on California's Death Penalty 44-46 (2003), http://www.cdaa.org/WhitePapers/DPPaper.pdf
45 See Paternoster, *supra* note 28, Report Figure 5. The adjustments for case characteristics, see *id.*, Report Figure 10F, are significant but not needed for the order-of-magnitude calculations being made here.
46 See Dezhbakhsh, et al., *supra* note 44.
47 Actually carrying them out is another problem and the subject of another paper. The primary reason death sentences are not carried out in Maryland has been changes in the rules after trial.



Source: Source: *Homicide Trends in the US* (US Bureau of Justice) and *Capital Punishment* (BJS). The time period is from 1976 – 2005.

Amicus

Assisting Lawyers for Justice on Death Row

Amicus – then known as The Andrew Lee Jones Fund – was founded in 1992 in memory of Andrew Lee Jones, who was executed in Louisiana in 1991. The charity's objectives are to assist in the provision of legal representation for those awaiting capital trial and punishment in the US, or any other country, and to raise awareness of potential abuses of defendants' rights.

Amicus' main activities are:

01. Internships

The charity arranges volunteer placements with US capital defence attorneys' offices. Since 1992, Amicus has placed interns in every US death penalty state, and has especially close relationships with over 20 offices in 15 key states. Amicus places over 35 volunteers a year for internships of between three and 18 months.

As many US capital defence attorneys' offices operate within severe funding constraints, Amicus interns provide an essential contribution to the preservation of defendants' rights to a fair trial and to their rights of appeal.

02. Case-work

At any one time, Amicus has over 200 UK-based lawyers and law students volunteering to undertake essential case-work to assist under-resourced US capital defence attorneys.

Amicus curiae briefs: Literally meaning "a friend of the court," *amicus curiae* briefs are a way in which professional groups, organisations and charities are able to assist a court in coming to a decision, by describing comparative standards, international law and the practices of other nations. At the request of capital defence attorneys, Amicus has presented briefs on a number of topics (such as the execution of juveniles and of the mentally retarded, the treatment of juries and rules of evidence) at various stages of cases' proceedings, including to the US Supreme Court.

Drafting motions: UK-based case-workers prepare motions for use by capital defence attorneys across the US both before and during trials and appeals, such as motions against the use of gruesome photographs and on the use of the lethal injection as a means of execution. Amicus also provides assistance with the drafting of clemency statements and petitions in a number of states. This voluntary practical assistance from UK-based lawyers is often vital to capital defence attorneys who are facing very tight timescales, with limited resources, prior to and during trial and appeal.

International applications: UK lawyers are very experienced in arguing before international tribunals on points of international law. As, until recently, the Privy Council in London was the final court of appeal for many Caribbean countries, many UK lawyers have argued many of the issues which pertain to the death penalty in the US before an extremely sophisticated tribunal. In addition, UK-based lawyers have argued Caribbean cases before the United Nations Human Rights Commission. Amicus lawyers have drafted applications to the Inter-American Commission of Human Rights, in Washington, on behalf of US capital defence attorneys in capital cases. Applications have covered such issues as the Vienna Convention on Consular Relations (where appellants were not given proper access to consular officials), the admission of unadjudicated previous convictions in the sentencing phase and the appropriateness of executing juveniles and the mentally ill.

03. Training

Amicus runs a comprehensive training programme in US criminal law and procedure, legal research, evidence and professional conduct, attended by over 300 participants a year. The training is available for any intern intending to go to the US (including those not being placed by Amicus), equipping them to be of maximum use to an office immediately on arrival, and for UK-based volunteer case-workers. The charity is

registered as a CPD (continuing professional development) training provider by the Bar Council and by the Law Society. Amicus also runs regional introductory training days to complement its London- and Birmingham-based training courses.

Amicus collaborated with the Middle Temple Library to ensure that all the key US capital punishment criminal and constitutional texts are available in the UK, as part of the Middle Temple's American Collection (the largest collection of US law in London) and Capital Punishment Collection (which includes key texts and materials for jurisdictions around the world, including the US). Both collections are housed on the third floor of the Middle Temple Library, with access for all barristers and with entry arrangements for non-barristers arranged by Amicus.

04. Academic research

In addition to providing practical assistance, Amicus seeks to promote rigorous reporting, research and analysis of the issues surrounding the death penalty.

Amicus Journal: This internationally-recognised publication is a leading reporter on the significant issues effecting capital punishment worldwide, providing a forum for dialogue on issues concerning the death penalty and related topics. The Journal includes articles by academics and practitioners on current legal issues and on the death penalty from the perspective of disciplines other than law. It also features news from around the world, case reports, book reviews and front-line reportage from interns working in capital defence offices.

Projects: Amicus undertakes specific research projects for use by practitioners, legislators and academics to assist in the development of a better understanding of the issues surrounding capital punishment and the application of the death penalty. In 2005, Amicus concluded a three year project, funded by the Foreign & Commonwealth Office, based on detailed research conducted by over 60 Amicus interns placed in offices in every US capital punishment state, with the publication of two highly-regarded reports: *Vienna Convention Compliance in Capital Cases in the United States*; and *Executions of Juveniles and Mentally Retarded Defendants in the United States*.

05. Events

Amicus holds events to raise awareness of the issues surrounding the application of the death penalty in the US. Building on its long-standing events programme in London and Birmingham, the charity has extended its reach nation-wide, holding a variety of regional events and activities (for example, in Manchester, Oxford, Newcastle and Leeds).

Events include talks by leading US capital defence attorneys and former death row inmates, including by Juan Melendez (who was exonerated, and released from death row, after almost 18 years behind bars) and Sonia 'Sunny' Jacobs. Sunny and her partner, Jessie Tafero, were wrongly convicted of murder and sentenced to death in 1976. Sunny was finally exonerated and released from prison after 17 years, but, in spite of the evidence of his innocence, Jessie was executed in 1990.

06. Legal education

Three recipients of some Amicus funding have completed US legal education and are practising full-time as capital defence attorneys. Amicus' long-term objective is to reinstate US legal education grants to individuals who commit to practising as capital defence attorneys post-qualification.

Currently, however, the charity's funding position means that the short-term focus is on extending further the intern and case-work programmes to meet the immediate demands in the US.

And...

Amicus' activities rely on the commitment and hard work of its volunteers. Although the key objective of the volunteers is to further the aims of the charity – by providing vital assistance and support to US capital defence attorneys – their work with Amicus develops their skills and experience immeasurably, and it nurtures a long-term commitment to pro bono activities generally. Many Amicus volunteers practise law in the UK, and they find that their roles have enhanced their professional capabilities, providing added benefits to their employers and their clients.

"Whatever you think about the death penalty, a system that will take life must first give justice."

Former President of the American Bar Association,
John J. Curtin, Jr

THE STORY *of* andrew lee jones

Andrew was born in rural Louisiana, the fifth son of a black share-cropping family. His life changed on the death of his father, when the family was evicted from their home and Andrew, devastated by the death of a much-loved father, took off to Baton Rouge. He fell into a life of petty crime.

In 1984, Andrew was charged with the murder of the daughter of his estranged girlfriend. The evidence offered at his trial – which lasted less than a day – was that he knew the victim. No scientific evidence was produced by the prosecution. There was no evidence of a break-in at the girl's house despite the prosecution's allegations of the use of force. Andrew himself had no recollection of that fateful night. Prior to the trial, a defence witness was beaten by the police and withdrew his statement.

Andrew was found guilty and sentenced to death by an all-white jury in a courtroom where the only black faces were those of the family members, despite 30% of the local population being black. Black jury members are traditionally excluded from serving in Easton Baton Rouge parish.

On 19 July 1991, the Board of Pardons met to hear the final pleas for clemency from witnesses and appeals from the defence lawyers. Discussion of guilt or innocence is not part of this procedure. Andrew's mother, brothers and sister begged for his life, and a psychiatrist and a psychologist gave information relating to the family situation, and Andrew's state of mind.

Finally, the defence lawyer at the trial gave evidence. He offered his apologies for not giving Andrew a fair defence – as a court-appointed lawyer he had received the papers only a short time prior to the trial. He was no qualified to conduct capital trials, being less than five years out of law school, and this was his first capital trial. He saw his client only occasionally prior to the trial, and he had only recently been made aware that his client was medicated with Thorazine, a psychotropic drug, before and during the trial. The amount of medication given during his trial exceeded the amount needed for tranquilising purposes.

However, Andrew was refused clemency and he was duly executed by the State of Louisiana.

In his memory, and in recognition of the need for people like Andrew to receive proper legal representation when facing the ultimate penalty, Amicus was formed in 1992.

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