

Capital Punishment

Carol S. Steiker* and Jordan M. Steiker†

American capital punishment is at a crossroads. Capital sentencing and executions have declined markedly. Several states have recently abolished the death penalty and others have imposed moratoria on executions. Despite extensive constitutional doctrines regulating state capital practices, state capital systems are still fraught with arbitrariness, inaccuracy, and unfairness. Many of the problems facing American capital punishment are intractable and likely unamenable to significant improvement or reform. This chapter describes the obstacles to reform and the case for moratorium or repeal. It then offers three concrete proposals for retentionist jurisdictions, focusing on improving capital representation, centralizing prosecutorial charging decisions, and limiting the application of the death penalty against persons with serious mental illness.

INTRODUCTION

Capital punishment in the United States is in a state of flux and fragility. After the Supreme Court reinstated the death penalty in 1976, having temporarily abolished it in 1972 in the landmark case of *Furman v. Georgia*,¹ the use of capital punishment rose along virtually every dimension for the next quarter-century. Death sentencing reached its modern-era (post-1976) peak in 1996, when 315 new death sentences were returned.² Executions reached their modern-era peak in 1999, when 98 people were executed.³ Public support for the death penalty rose, peaking in 1994, when 80% of respondents to a Gallup poll favored the death penalty for the crime of murder and only 16% opposed

* Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program, Harvard Law School.

† Judge Robert M. Parker Endowed Chair in Law, University of Texas School of Law.

1. 408 U.S. 238 (1972). The cases reinstating the death penalty in 1976 were *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976).

2. See *Death Sentences in the United States Since 1977 by State and by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited May 8, 2017).

3. See *Facts About the Death Penalty: Number of Executions Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited May 8, 2017).

it.⁴ New York state reinstated the death penalty in 1995, and Congress expanded the federal death penalty to 60 additional federal crimes in the Violent Crime Control and Law Enforcement Act of 1994.⁵ Congress also sharply limited the availability of federal judicial review of state criminal proceedings with the express purpose of expediting state executions through the Anti-Terrorism and Effective Death Penalty Act of 1996.⁶

Since 2000, however, capital punishment in the United States has seen sharp downturns along virtually every dimension. In 2016, only 30 death sentences were returned nationwide, a decline of more than 90% from the modern-era peak. Similarly, only 20 executions took place nationwide, down almost 80% from the modern-era peak. Public support, measured by the Gallup polling organization, hit a modern-era low, with 60% in favor of the death penalty for murder and 37% against. New York invalidated its capital statute a decade after reinstating it, having conducted no executions during the reinstatement period. New Jersey, New Mexico, Illinois, Connecticut, Maryland, and Nebraska all legislatively repealed their capital statutes, though Nebraska's death penalty was reinstated by referendum in November 2016. Several federal and state courts declared certain capital schemes unconstitutional in their entirety. For example, a federal judge in California declared California's death-penalty system unconstitutional in 2014, though the decision was overturned on procedural grounds.⁷ The Connecticut Supreme Court declared the death penalty unconstitutional under the Connecticut Constitution in 2015, sparing the 11 people on death row at the time of the state's legislative repeal, which was prospective only.⁸ Other courts, including the U.S. Supreme Court, have increasingly upheld constitutional challenges to discrete aspects of capital practices, such as standards for the exemption of offenders with intellectual disability and lethal-injection protocols.⁹

4. *Gallup Historical Trends: Death Penalty*, GALLUP (May 8, 2017), <http://www.gallup.com/poll/1606/death-penalty.aspx>.

5. Act of Jan. 4, 1995, ch. 1, 1995 N.Y. Laws 1; Pub. L. No. 103-322, 108 Stat. 1796 (1994).

6. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

7. *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

8. *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

9. *See, e.g., Moore v. Texas*, 137 S. Ct. 1039 (2017) (rejecting Texas' standard for evaluating claims of exemption from the death penalty based on intellectual disability); *In re Ohio Execution Protocol*, 853 F.3d 822 (6th Cir. 2017) (upholding preliminary injunction against Ohio's use of midazolam in its lethal injection protocol), *rev'd en banc*, 2017 WL 2784503 (6th Cir. June 28, 2017).

The death penalty's precipitous decline over the past 15 years is due largely to growing concerns about the fairness, accuracy, and effectiveness of the capital justice process across the United States. These concerns are well-founded and difficult to adequately address through constitutional regulation or legislative reform. Consequently, the most appropriate path forward may well be moratorium or repeal, solutions embraced by a growing number of jurisdictions. In jurisdictions in which moratorium and repeal are not viable options, however, there are discrete policy changes that are worth pursuing to address some central problems in the administration of capital punishment. In what follows, we document the concerns that have led to the death penalty's recent decline and explain why moratorium or repeal is the most appropriate course of action. We also sketch three discrete policy changes nonetheless worth pursuing: (1) enhanced capital defense services; (2) centralized capital charging processes; and (3) exemption from capital punishment for offenders with serious mental illness.

I. THE CASE FOR MORATORIUM OR REPEAL

While European abolition of the death penalty was achieved largely as a result of a consensus that capital punishment runs afoul of the respect for human dignity that is a universal human right, the sharp decline of the death penalty in the United States reflects growing awareness of irremediable problems in its administration. These problems are numerous and varied, but most of them can usefully be grouped into three categories: (1) fairness, (2) accuracy, and (3) effectiveness. Together, these issues have led a substantial number of jurisdictions to repeal their capital statutes or to adopt moratoria on executions until the problems can be adequately addressed. In light of the systemic and intractable nature of the problems at issue, repeal or moratorium is the most appropriate course of action where it is feasible.

A. FAIRNESS

Concerns about fairness in the administration of capital punishment arise from the enormous discretion generated by the structure of the capital justice process. Most capital statutes make death-eligible murder an extremely broad offense that includes offenders who are non-triggerman accomplices to felony murder, offenses in which the deceased is a member of one of the oft-expanded groups of specially protected victims, and offenses that are otherwise deemed especially "heinous" or "vile," among many other avenues to eligibility. These statutes give county prosecutors great leeway to decide whether and whom

to charge capital.¹⁰ Not surprisingly, the result is wildly divergent capital charging decisions even within states, with geography rather than heinousness determining who is sentenced to death. A recent study revealed that 2% of the counties in the country accounted for the majority of death sentences nationwide since 1976 (and for *all* the death sentences imposed nationwide in 2012, the last full year of the study).¹¹ Another study that was cited numerous times in the Connecticut Supreme Court's constitutional abolition of the death penalty revealed that geography was the single most influential factor in the application of the death penalty within that state.¹²

The discretion of county prosecutors in capital charging decisions is compounded by the discretion of capital sentencing juries. In American history, capital sentencing traditionally remained the province of juries even as judges took on responsibility for most ordinary criminal sentencing. The centrality of the jury was extended and underscored by the Supreme Court's conclusion in 2002 that aggravating factors, usually considered during the sentencing phase of capital trials, are functionally elements of the offense of capital murder and thus constitutionally *required* to be found by the jury.¹³ The broad eligibility for capital murder created by expansive aggravating factors, coupled with the wide-ranging information presented to juries as mitigating evidence, grants substantial discretion to capital sentencing juries to impose or withhold death sentences. As a result, many studies have found significant disparities in sentencing outcomes on the basis of race, gender, and other irrelevant factors.¹⁴ The Supreme Court has essentially closed the door to constitutional challenges to the influence of race on capital sentencing outcomes by holding that evidence of discriminatory sentencing patterns is insufficient to demonstrate a violation of the Equal Protection Clause;

10. For discussions of prosecutorial discretion, see Ronald F. Wright, "Prosecutor Institutions and Incentives," in Volume 3 of the present Report; and John F. Pfaff, "Prosecutorial Guidelines," in Volume 3 of the present Report.

11. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL* (Oct. 2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

12. See John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 673 (2014).

13. *Ring v. Arizona*, 536 U.S. 584 (2002).

14. See Donohue, *supra* note 12 (documenting race and gender disparities in Connecticut); G. Ben Cohen, McCleskey's *Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65, 73–74 (2012) (collecting studies documenting race-of-the-victim disparities in Virginia, Arkansas, California, Colorado, Florida, Illinois, Kentucky, Maryland, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, and Virginia); see also Paul Butler, "Race and Adjudication," in Volume 3 of the present Report; Cassia Spohn, "Race and Sentencing Disparity," in the present Volume.

rather, defendants must introduce evidence of racial discrimination in their individual cases.¹⁵ But “smoking gun” evidence of this type is exceedingly rare, and thus racial disparities continue without legal remedy.

B. ACCURACY

Even more disturbing than arbitrary and discriminatory patterns in the distribution of capital sentences is evidence of wrongful convictions in capital cases. In 2003, Republican Gov. George Ryan granted mass clemency to the more than 160 inmates on death row in Illinois in the wake of 13 exonerations of condemned inmates in that state in less than 20 years. The problem of wrongful convictions in capital cases has since been shown to reach far beyond Illinois or any subset of jurisdictions. Researchers estimate that approximately 4% of those sentenced to death nationwide are actually innocent.¹⁶

One of these researchers has argued convincingly that erroneous convictions occur disproportionately in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. Those circumstances include pressure on the police to clear homicides; the absence of live witnesses in homicide cases; greater incentives for the real killers and others to lie; greater use of coercive or manipulative interrogation techniques; greater publicity and public outrage around capital crimes; the “death qualification” of capital juries, which makes such juries more likely to convict; greater willingness by defense counsel to compromise the guilt phase of capital trials to avoid death during the sentencing phase; and the lessening of the perceived burden of proof due to the heinousness of the offense.¹⁷ One of the most comprehensive recent studies of wrongful convictions (both capital and non-capital) has identified other common causes of conviction of the innocent, such as faulty forensic evidence, false confessions, mistaken eyewitness testimony, unreliable jailhouse informants, and ineffective defense counsel.¹⁸ Although it is possible to attempt to address some of these factors through judicial rulings or legislative reform, many of the

15. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

16. See, e.g., Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230 (2014).

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

18. See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011). See generally Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report; Richard A. Leo, “Interrogation and Confessions,” in Volume 2 of the present Report; Gary L. Wells, “Eyewitness Identification,” in Volume 2 of the present Report; Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report; Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report; Erin Murphy, “Forensic Evidence,” in Volume 3 of the present Report.

causes of wrongful convictions—such as pressures on investigators, prosecutors, and defense counsel, the mistakes or lies of witnesses, and the effects of publicity and emotional decision-making on juries—are not easily remedied. As a result, others have followed Gov. Ryan’s lead in abandoning their support for the death penalty because of the inevitability of wrongful executions.¹⁹

C. EFFECTIVENESS

The arbitrariness and unreliability of capital punishment described above render the death penalty incapable of meeting the twin purposes recognized by the Supreme Court: retribution and deterrence.²⁰ Given that current patterns of imposition of the death penalty are better explained by geography and race than by heinousness of the crime, the death penalty does not accord with retributive values, as it is not limited to or reliably applied against “the worst of the worst.”²¹ Similarly, arbitrariness and error in the imposition of capital sentences undermine the death penalty’s ability to promote deterrence.

But even beyond the problems of arbitrariness and error, two other factors prevent the death penalty from achieving its purported ends. First, even though juvenile offenders and offenders with intellectual disability have been constitutionally exempted from the death penalty,²² offenders with mental illness remain eligible for capital punishment and are disproportionately represented on death row. A recent study found that 43% of inmates executed between 2000 and 2015 had received a mental-illness diagnosis at some point in their lives, a much higher percentage than those in the general public.²³ Those suffering from mental illness at the time of their offenses likely have reduced culpability for their behavior as a result of their illness, undermining

19. See, e.g., Mark L. Earley, *A Pink Cadillac, an IQ of 63, and a Fourteen-Year-Old from South Carolina: Why I Can No Longer Support the Death Penalty*, 49 U. RICH. L. REV. 811 (2015) (former attorney general of Virginia who oversaw 36 executions explaining his changed stance on the death penalty).

20. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”). For a discussion of these purposes, see Jeffrie G. Murphy, “Retribution,” in the present Volume; and Daniel S. Nagin, “Deterrence,” in the present Volume.

21. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”).

22. See *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304 (2002) (offenders with intellectual disability).

23. See Frank R. Baumgartner & Betsy Neill, *Does The Death Penalty Target People Who Are Mentally Ill? We Checked*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/?utm_term=.b9c6076d2d5e.

the retributive justice of a death sentence. Similarly, mentally ill offenders are less likely to be able to rationally consider the costs and benefits of their actions and thus are less likely to be subject to any deterrent effect that the death penalty might have. Such considerations are precisely what led the Supreme Court to exempt juvenile offenders and offenders with intellectual disability from the ambit of the death penalty. The continued eligibility of the mentally ill for capital punishment in every American jurisdiction that imposes it significantly undermines the ability of the punishment to meet its penological goals.

Second, even if the death penalty were imposed with complete fairness and accuracy and only on those in perfect mental health, it would *still* be unlikely to promote its penological purposes because of its declining use and the lengthy delays that exist between the imposition of death sentences and their execution. The enormous declines in the imposition of the death penalty have rendered it an exceedingly rare sentence that in recent years has yielded executions, on average, nearly 18 years after the sentence is imposed.²⁴ Moreover, these are only the death sentences that actually result in executions. Many sentences are permanently vacated, and many death-sentenced inmates die of other causes before they can be executed. Executing a minority of death-sentenced offenders decades after their crimes—when both they and the communities seeking retribution for their crimes have often changed dramatically—yields only attenuated retributive justice, if that. Moreover, the ability of capital punishment to promote deterrence is fatally undermined by its delayed and uncertain implementation, as speed and certainty in the imposition of criminal sanctions are widely recognized as key to their deterrent effect.²⁵ A blue-ribbon panel of experts recently reviewed 30 years of empirical evidence and found it insufficient to establish a deterrent effect of capital punishment.²⁶

The lengthy delays that inhibit the effectiveness of capital punishment are largely the product of the constitutional requirements for capital trials and the capital review process imposed by the U.S. Supreme Court. Even if it were possible (or legal) for jurisdictions to minimize or avoid some of these requirements in order to reduce delays, such avoidance would undermine the fairness and accuracy of the capital justice process, resulting in an impossible choice. As Justice Breyer noted, “In this world, or at least in this Nation, we can

24. See *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting).

25. See generally Nagin, *supra* note 20.

26. See NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY (D. Nagin & J. Pepper eds., 2012).

have a death penalty that at least arguably serves legitimate penological purposes or we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both."²⁷

In the absence of the capacity to fulfill some legitimate penological purpose, the death penalty becomes an exercise in "the gratuitous infliction of suffering" that calls into question not only its wisdom but also its constitutionality under the Eighth Amendment, as the Supreme Court recognized in its 1972 decision in *Furman*.²⁸

D. MORATORIUM OR REPEAL

The above concerns have prompted the precipitous decline in the use of the death penalty since 2000 and have increasingly led to wholesale repeal or moratoria across a wide swath of jurisdictions. After New York's highest court invalidated its capital statute, the New York Legislature refused to reinstate the death penalty in 2005, and the governor ordered the state's execution apparatus dismantled in 2008. Six additional state legislatures (New Jersey, New Mexico, Illinois, Connecticut, Maryland, and Nebraska) voted affirmatively to repeal their capital statutes in the past decade (although Nebraska's statute was reinstated by referendum in 2016). Four additional states (Colorado, Pennsylvania, Oregon, and Washington) currently have gubernatorial moratoria on executions. A recent comprehensive report by the bipartisan Oklahoma Death Penalty Review Commission—co-chaired by former Gov. Brad Henry, former United States Magistrate Judge Andy Lester, and former Oklahoma Court of Criminal Appeals Judge Reta Strubhar—recommends that Oklahoma adopt a moratorium on executions until the state's legislature, executive branch, and judiciary take actions to address the systemic flaws in Oklahoma's death-penalty system.

The actions of state elected officials rejecting or restraining the death penalty have been echoed in decisions by judges addressing the constitutionality of federal and state death-penalty statutes and in the work of nonpartisan legal organizations. Two federal trial court judges have questioned the

27. *Glossip*, 135 S. Ct. at 2772 (Breyer, J., dissenting).

28. *Furman*, 408 U.S. at 312 (White, J., concurring) (explaining that a "penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment").

constitutionality of the federal death-penalty statute in its entirety.²⁹ A federal trial court judge declared the California death penalty unconstitutional (though the decision was overturned on appeal), and the Connecticut Supreme Court declared capital punishment unconstitutional under that state's Constitution.³⁰ Two sitting Supreme Court justices have questioned the constitutionality of the death penalty throughout the country.³¹ The nation's largest legal organization, the American Bar Association, voted for a moratorium on capital punishment in 1997, a decision that has found further support in the ABA's critical assessments of state death-penalty practices over the ensuing two decades.³²

Perhaps most significantly, the nation's premier legal think tank, the American Law Institute, voted in 2009 to withdraw the death-penalty provisions of its influential Model Penal Code—provisions that had provided the template for the modern death-penalty statutes upheld in 1976 and currently in force throughout the United States. The ALI explained that its withdrawal was motivated by “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”³³ The ALI not only withdrew its model death-penalty provisions but also indicated its intention not to undertake any further attempts at law reform in the area of capital punishment, underscoring the “intractable” nature of the problems that it identified. In the words of Adam Liptak, reporting on the ALI's decision for the *New York Times*, “What the institute was saying is that the capital justice system in the United States is irretrievably broken.”³⁴

29. See *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002) (declaring federal death penalty statute unconstitutional), *rev'd*, 313 F.3d 49 (2d Cir. 2002); *United States v. Fell*, No. 5:01-cr-12-01, 2016 WL 7238930 (D. Vt. Dec. 13, 2016) (denying motion to declare federal death penalty statute unconstitutional, but raising constitutional questions for the Supreme Court to consider).

30. *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015); *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

31. *Glossip*, 135 S. Ct. at 2726 (Breyer, J., dissenting, joined by Ginsburg, J.) (suggesting that the Court receive “full briefing on ... whether the death penalty violates the Constitution”).

32. See *State Death Penalty Assessments*, AM. BAR ASS'N, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited May 8, 2017).

33. See Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 354 (2010). As a matter of full disclosure, we (Carol Steiker and Jordan Steiker) were the authors of a report to the ALI recommending that it withdraw the death penalty provisions of the Model Penal Code.

34. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES (Jan. 4, 2010), <http://www.nytimes.com/2010/01/05/us/05bar.html>.

The growing recognition of the magnitude and difficulty of the problems in the capital justice system, by many of those most knowledgeable about the workings of the system, strongly suggests that the most appropriate course of action with regard to the death penalty is repeal or moratorium pending system overhaul.

II. ENHANCED CAPITAL DEFENSE SERVICES

Notwithstanding the strong reasons offered above for suspending or abolishing states' death-penalty schemes, there are several steps states should take short of moratoria and abolition to improve prevailing capital practices. The area most in need of reform is capital representation. The Court's approval of several capital statutes in 1976 following its invalidation of prevailing schemes in 1972 heralded the modern era of capital punishment. Perhaps nothing changed more dramatically as a result of the Court's intervention and the new statutory schemes than the demands placed on the capital defense function. The statutes upheld by the Court called for bifurcated proceedings, in which capital sentencers would separately decide the questions of guilt/innocence and whether the death penalty should be imposed.³⁵ The uniform creation of a "punishment phase" in the new state schemes meant that capital lawyers would have to dedicate time, thought, and resources to the issue of punishment, whereas prior capital practice tended to focus primarily on the question of guilt of the underlying offense. The new statutes included mandatory appeals, and in the wake of the new statutes, states updated and expanded opportunities for death-sentenced inmates to challenge their convictions and sentences in state post-conviction proceedings. Congress, too, created a right to counsel for indigent death-sentenced inmates in federal habeas proceedings.³⁶ In addition, the Supreme Court's intervention brought a whole new set of capital-specific doctrines governing, among other things, the selection of capital juries,³⁷ the adequacy of state's "aggravating factors,"³⁸ the sufficiency of state schemes to facilitate consideration of mitigating evidence,³⁹ proportionality limits on the imposition of the death penalty,⁴⁰ and newly recognized requirements of "heightened reliability" in capital cases.⁴¹

35. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

36. 18 U.S.C. § 3599 (2012).

37. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

38. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

39. *Lockett v. Ohio*, 438 U.S. 586 (1978).

40. *Coker v. Georgia*, 433 U.S. 584 (1977).

41. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Defense lawyers were ill-equipped to meet the challenges posed by the new structure of state capital schemes and the newly recognized federal constitutional limits applicable to state capital regimes. By the mid-1970s, there was simply no functioning capital defense bar in virtually any jurisdiction.⁴² At the trial level, though there were many lawyers with experience trying capital cases, such lawyers tended to be “generalists” who treated such cases as they would other cases involving serious felonies; they had no experience investigating and presenting mitigation evidence relevant to the newly established punishment phase. Nor were such lawyers trained to negotiate settlements in capital cases; the prevailing practice was to contest guilt and hope for the best. Moreover, trial lawyers lacked experience navigating two separate trials and often poorly coordinated their guilt/innocence and punishment-phase defenses, in ways that were not only unhelpful to their clients but often counterproductive. For the few lawyers who endeavored to meet the challenges posed by the emphasis on mitigation in the post-*Furman* statutes, they lacked the resources to be successful. States often capped the amount of compensation available in capital trials at absurdly low levels, making investigation and presentation of evidence a practical impossibility, especially when expert testimony was essential to the mitigation case.

Representation on direct appeal and in newly expanded state habeas proceedings was likewise poor. Just as there were no “capital trial lawyers” in the mid-1970s, there were few if any experts in capital appeals and state postconviction representation. In many states, trial lawyers would file their own direct appeals, and they often lacked knowledge about the emerging constitutional doctrines governing capital trials; they also lacked the time and resources to mount comprehensive challenges to the new state statutory provisions, even ones that were manifestly vulnerable given the Court’s new capital doctrines. State postconviction proceedings became newly significant, because they offered capital defendants the opportunity to develop new facts relevant to the constitutionality of their convictions and sentences (most notably, challenges to the adequacy of trial representation and the disclosure obligations for prosecutors under *Brady v. Maryland*).⁴³ But lawyers appointed to undertake such representation, like their trial counterparts, tended to ignore the investigative responsibilities that came with the new postconviction opportunities; such lawyers often confined their challenges to “record-based” claims, many of which were unreviewable in state postconviction

42. See CAROL STEIKER & JORDAN STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 196–97* (2016).

43. 373 U.S. 83 (1963).

proceedings. Representation on federal habeas was mixed at best. In some states the Administrative Office of the U.S. Courts created specialized offices for federal habeas representation, but in many other jurisdictions lawyers were appointed to represent inmates in individual cases, often with no standards or qualifications for appointed counsel. The resulting representation on federal habeas ran the full gamut—from professional, effective representation in some cases to ineffective, uninspired representation in others. The increased complexity of the federal habeas forum, especially after the passage of the Anti-Terrorism and Effective Death Penalty Act,⁴⁴ magnified the significance of disparities in federal habeas representation.

In 1989, the American Bar Association, alarmed by the uneven and inadequate representation in capital cases, issued *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*,⁴⁵ which sought to specify both the duties of individual lawyers in capital cases and the obligations of states to craft institutional structures that would adequately support the capital defense mission. By the early 1990s, the deficiencies in capital representation were increasingly apparent. Stephen Bright, a leading capital attorney in Georgia, penned a comprehensive critique of prevailing representation practices.⁴⁶ He concluded that the lottery for death sentences condemned by *Furman* essentially had been replaced by a new lottery—one in which the distribution of the American death penalty turned on the quality of counsel at various stages. He offered numerous illustrations of how poor lawyering at trial, on appeal, or in postconviction proceedings resulted in death sentences and executions, and the extent to which individual lawyers, states, and judges routinely failed to ensure adequate representation.

In 1997, the ABA passed a resolution calling for a moratorium on executions in the United States because of concerns about continuing unfairness, inaccuracy, and discrimination in the administration of the death penalty.⁴⁷ The first ground listed in support of its moratorium was the failure of states to embrace or satisfy the requirements of the *Guidelines*.⁴⁸ The ABA subsequently updated its

44. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

45. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf.

46. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

47. *Death Penalty Moratorium Resolution*, AM. BAR ASS'N (1997), http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.html.

48. See *id.*

guidelines in 2003,⁴⁹ providing even greater detail about the minimally necessary tasks and structures for effective capital representation. The ABA also created a project to review state implementation of its death-penalty recommendations, which subsequently issued numerous state-by-state reports along numerous dimensions, including adherence to the representation *Guidelines*.⁵⁰

Much has changed since 1976. There are more lawyers trained in capital defense, at trial, on appeal, and in postconviction proceedings. States almost uniformly provide greater resources than they did in the 1970s and '80s. Yet fundamental problems remain. No state thus far has satisfied all of the *Guidelines'* recommendations: many states fail to adequately police the qualifications of lawyers at all stages; they fail to impose appropriate workload limits; they do not ensure adequate training for capital-specific tasks; they do not ensure sufficient insulation of defense counsel to encourage independent, zealous defense; and they do not guarantee sufficient funding for attorney compensation, mitigation investigation, and experts. Perhaps most fundamentally, states simply have not designed plans, as required by the *Guidelines*, to ensure "high quality legal representation in death penalty cases."⁵¹

It might be thought that these failures are less pressing given the sharp decline in capital sentences over the past two decades. If only a few dozen offenders are sentenced to death nationwide each year, why does the inadequacy of capital defense systems even matter? First, capital sentences will continue to be imposed—perhaps in even greater proportion—on those defendants with mediocre or poor representation. Prosecutors are increasingly exercising their discretion to settle cases.⁵² In turn, defense lawyers who work diligently in pretrial negotiations to identify grounds for a non-death sentence, develop a relationship with their clients to facilitate a plea, and persuasively present their case for settlement will not likely find their clients among the increasingly small number of offenders in their jurisdiction whom prosecutors take to trial. The substantial decline in public demand for death sentences and the accompanying rise in the costs associated with capital trials and appeals provide

49. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (2003) [hereinafter 2003 ABA GUIDELINES], https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines.html.

50. See *State Death Penalty Assessments*, AM. BAR ASS'N, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited May 8, 2017) (the state-by-state reports of the ABA Death Penalty Due Process Review Project, formerly known as the ABA Moratorium Implementation Project).

51. See 2003 ABA GUIDELINES *supra* note 49, § 2.1.

52. For a discussion of plea bargaining, see Jenia I. Turner, "Plea Bargaining," in Volume 3 of the present Report.

strong incentives for prosecutors to seek death only in those cases where there will be a one-sided contest. Just as Bright decried the American death-penalty system in the 1990s as one that assigned the death penalty for the worst lawyer rather than the worst crime, so too will disparities in representation continue to account for the inequitable distribution of death sentences going forward.

Second, and perhaps more importantly, close to 3,000 offenders currently remain on death row, and the quality of representation for those offenders will continue to bear on the accuracy and fairness of the American death penalty. Inadequate representation continues to plague the appeals and postconviction processes. Many states continue to rely on court-appointed lawyers to handle these cases, frequently with inadequate appointment standards and almost uniformly without systems for monitoring performance. Resources for postconviction lawyers vary tremendously across jurisdictions and even within them.

Postconviction lawyers in particular are essential to uncovering errors at trial, including the reliability of outdated forensic science. Many cases of wrongful conviction have been uncovered in postconviction litigation, yet significant swaths of cases involve no serious postconviction investigation. Postconviction litigation is also essential to policing the adequacy of trial counsel, but postconviction proceedings often fail to serve this purpose. The federal constitutional standard to prevail on claims of ineffective assistance of counsel is notoriously demanding, affording strong deference to the strategic choices of trial counsel.⁵³ Constitutional litigation simply does not catch the many cases in which subpar representation contributed to a death verdict. Indeed, federal habeas courts must provide “double deference” in cases where state courts have rejected claims of inadequate representation, deferring to the state court’s own deferential review of trial representation.⁵⁴ And if inadequate postconviction lawyering results in an improper conviction or sentence being sustained, there is no recourse: Prevailing constitutional doctrine holds that inadequate representation in state postconviction or federal habeas is not a grounds for relief.⁵⁵ Inmates who receive inadequate representation at all levels find the quickest path to execution.

53. *Strickland v. Washington*, 466 U.S. 668 (1984); *Burger v. Kemp*, 483 U.S. 776 (1987).

54. 28 U.S.C. § 2244(d)(1) (2012) (allowing relief for claims adjudicated in state court only if state court decision denying relief is contrary to, or an unreasonable application of, clearly established federal law).

55. *Murray v. Giarratano*, 492 U.S. 1 (1989) (rejecting constitutional right to representation for indigent prisoners seeking postconviction relief in capital cases).

Given the inadequacy of constitutional litigation to solve the problems of deficient representation, and the importance of high-quality representation to the fair, accurate, and nondiscriminatory application of the death penalty, it is incumbent upon states to reform their systems of capital representation. The ABA *Guidelines* provide a detailed road map for establishing an appropriate system. States could go a long way toward compliance with the *Guidelines* by opting to fund capital offices at every level (trial, direct appeal, and state postconviction proceedings). Although capital defender offices are not a failsafe against inadequate lawyering, appointment systems carry too many inherent risks. Appointment systems undermine attorney independence, as judges frequently choose lawyers for reasons unrelated to excellence in representation and sometimes incompatible with such representation (e.g., patronage or diminished likelihood of “making trouble”). Appointed lawyers often lack the resources and training to adhere to prevailing norms. Capital defender offices yield economies of scale and provide for specialization and expertise. Many of the key *Guidelines* recommendations—establishing a defense team, training of attorneys, monitoring of attorneys, and provision of resources—are much easier to ensure in the context of statewide or regional capital defender offices.

Thus, we conclude that the best way to improve the delivery of capital representation services is to establish capital defense offices at all levels (trial, direct appeal, and state postconviction). The goal of such offices should be to facilitate compliance with the ABA *Guidelines* for effective capital representation.

III. CENTRALIZED CAPITAL CHARGING PROCESSES

In the pre-*Furman* era, one of the central concerns about the American death penalty was its relatively infrequent application both in terms of death sentences and executions. The problem was compounded by the widespread perception that the few recipients of capital punishment were not selected based on the severity of their crimes but on the basis of arbitrary or discriminatory factors. That concern did not disappear after the Court upheld capital statutes in 1976 and states experienced a significant climb in capital sentences and executions through the 1990s. But in recent years, as death sentences have experienced remarkable declines, the concern about arbitrariness and discrimination has taken a new form: prevailing death sentences are increasingly concentrated in

a small number of counties within a small number of states.⁵⁶ In the period 2004-2009, only 1% of counties in the U.S. returned on average at least one death sentence per year.⁵⁷

This geographical concentration of death sentences is problematic for several reasons. First, such concentration suggests that the site of the crime rather than its seriousness will determine whether an offender receives a death sentence. Second, and relatedly, it suggests increased politicization of the death penalty, with manifestly different outcomes based on the charging inclinations of local prosecutors. Third, where geography overlaps with race, the resulting death sentences might be not merely arbitrary but also discriminatory. Fourth, when only a handful of counties are producing the bulk of contemporary sentences, the death sentences produced might overstate contemporary support for the death penalty; the decisions of a few prosecutors will generate death sentences at the same time that the rest of the country turns its back on the death penalty.

The best mechanism for avoiding geographical concentration of death sentences—and ensuring even-handed application of state capital punishment laws—is to require local prosecutors to consult with a statewide entity before seeking the death penalty. The statewide entity, which would include prosecutors from around the state, would deliberate about the appropriateness of seeking death in light of present and past cases. States could structure the process so that local prosecutors could not seek death unless their decisions were ratified by the statewide entity.

This recommendation faces several challenges. Some prosecutors would argue that the decision to seek death is a purely local prerogative and is properly informed by local opinion. On this view, locally informed charging decisions produce a “mini-federalism” akin to the federalism that allows some states to retain and use the death penalty frequently and others to abolish it altogether. The problem with this argument is that local counties operate under the same state capital punishment law: Treating offenders differently because they live under different legal regimes is distinguishable from treating offenders differently despite common criminal statutes. Moreover, the notion that prosecutors are simply responding to “local demand” in seeking death is undercut by the widespread practice of death-qualifying juries. In many high death-sentencing counties, such as Philadelphia and Harris County (Houston), popular support for the death penalty is not higher than the level of support in nearby low death-sentencing counties; the removal of potential jurors

56. See DIETER, *supra* note 11.

57. *Id.* at 10.

who have qualms about the death penalty allows prosecution preferences to overcome local preferences, and the popular election of district attorneys does not necessarily cure this disconnect.

A second objection is that a statewide committee would have difficulty enumerating workable criteria to ensure consistency across cases. This objection is a powerful one, because capital cases do not fall neatly into “death” and “life” categories. Numerous tangible and intangible factors inform the death-penalty decision. But the objection proves too much. If it is impossible to generate workable criteria to ensure consistency across cases, the death penalty is hopelessly arbitrary. Consideration by a statewide committee whether to endorse a decision to seek death would provide a valuable check against local overreaching and force actors within the system to reflect on fairness across cases.

A third objection would criticize the “one-way ratchet” of this proposed statewide process. Only decisions to seek the death penalty would be reviewable by the statewide entity; decisions declining to seek death would be unreviewable. On this objection, the goal of even-handed enforcement must account for *under-enforcement* as well as *over-enforcement* of the death penalty. This objection is powerful as well, but the practical obstacles to *requiring* local authorities to seek death against their considered judgment are overwhelming. Local actors will inevitably have to carry out the prosecution; if local authorities regard the death penalty as inappropriate, it is impossible to control the resources and vigor they bring to the effort. Moreover, given the rarity of homicide cases in which death is sought, the administrative expense of reviewing each decision declining to seek death would be significant and undermine the workability of statewide review. Finally, the central goal of statewide review is to ensure that the death penalty is truly reserved for the “worst of the worst.” Allowing some very aggravated cases to slip through the cracks is less problematic in the present moment than the possibility that the indiscriminate use of the death penalty by some local prosecutors runs against statewide community standards.

Thus, we conclude that states that authorize local authorities to make capital charging decisions should establish a statewide entity with the power to review and reject decisions to seek death by local prosecutors.

IV. EXEMPTION FROM CAPITAL PUNISHMENT FOR OFFENDERS WITH SERIOUS MENTAL ILLNESS

Although the U.S. Supreme Court has constitutionally exempted juvenile offenders and offenders with intellectual disability from the ambit of the death penalty, it has not extended a similar exemption to offenders with severe mental illness, despite similarities in the limitations faced by all three groups of offenders.⁵⁸ Nor has any active death-penalty state passed legislation enacting such an exemption, despite the fact that polls indicate that a substantial majority of Americans oppose the death penalty for the mentally ill.⁵⁹ Such an exemption would advance the accuracy of the capital justice process, given the inability of many of those with mental illness to assist in their defense. Moreover, such an exemption would remove from death eligibility those whose punishment would least advance the goals of retribution and deterrence.

Four national organizations—the American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the American Bar Association—have taken formal positions opposing the execution of defendants with severe mental illness. The ABA has developed a detailed, concrete policy proposal, elaborated at length in a recently published white paper. The ABA’s proposal is as follows:

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.⁶⁰

58. For a discussion of mental illness, see Stephen J. Morse, “Mental Disorder and Criminal Justice,” in Volume 1 of the present Report.

59. See, e.g., *POLL: Americans Oppose Death Penalty for Mentally Ill by 2-1*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/5956> (last visited May 8, 2017).

60. AM. BAR ASS’N DUE PROCESS REV. PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 7–8 (Dec. 2016), http://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

The ABA resolution's accompanying report explains that this paragraph is meant to apply only to those with "severe" mental disorders and disabilities, such as schizophrenia and schizoaffective disorder, bipolar disorders, major depressive disorder, and post-traumatic stress disorder (PTSD). The report specifically excludes from this exemption those whose conditions are manifested primarily by criminal behavior or voluntary substance use. The resolution also recommends exempting from execution some capital defendants who develop a severe mental disorder or disability after a death sentence has been imposed.⁶¹

The ABA's proposed exemption for capital defendants with severe mental illness has served as a template for a significant number of states in which legislative exemptions have recently been proposed. Legislators in seven states—Arkansas, Indiana, Ohio, South Dakota, Tennessee, Texas, and Virginia—have recently proposed bills that would prohibit the death penalty for defendants who suffered from a serious mental illness at the time of their offense.⁶² These bills, which have all had bipartisan support, have largely tracked the ABA proposal.

Despite strong public support for such legislation in opinion polls, opponents, including many prosecutors, argue that the exemption is unnecessary because of existing protections afforded by competency reviews, the insanity defense, and the availability of mitigating evidence. Such arguments are unfounded. The standard for competency to stand trial is an extremely low one, and many defendants are cleared as competent for the purposes of trial despite undeniably suffering from severe mental illness. Moreover, the competency determination addresses the defendant's mental state only at the time of trial or the time of execution and does not address the defendant's mental state at the time of the offense.⁶³ The insanity defense, which *does* address the defendant's mental state at the time of the offense, likewise generally sets a very low bar for sanity. As a consequence, the insanity offense is infrequently invoked and

61. *Id.* at 8.

62. Rebecca Beitsch, *States Consider Barring Death Penalty for Severely Mentally Ill*, PEW CHARITABLE TRUSTS (Apr. 17, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/04/17/states-consider-barring-death-penalty-for-severely-mentally-ill>.

63. To determine a defendant's competence to stand trial, the court must ask whether, at the time of trial, the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). As for competence to be executed, courts must determine that, at the time of execution, "those who are executed know the fact of their impending execution and the reason for it." *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part and concurring in the judgment); see also *Panetti v. Quarterman*, 551 U.S. 930, 959–60 (2007) (the condemned's understanding of the reason for his impending execution must be rational rather than delusional).

even more infrequently successful, as it applies only to a narrow category of individuals with very particular manifestations of mental illness. Finally, the ability of capital defense lawyers to ask sentencing jurors to consider a defendant's mental illness as mitigating has often proved unavailing in light of the common misperceptions that lay jurors have about mental illness.

The Supreme Court has recognized as a constitutional matter that offenders with intellectual disability may face a special risk of wrongful conviction and death sentencing because of their impaired ability to consult with counsel, their potentially inappropriate affect in court, and the risk that juries will consider them more dangerous because of their disability.⁶⁴ Defendants with severe mental illness face similar risks for similar reasons, and thus an exemption would increase the accuracy of the capital justice system. In addition, the Supreme Court has recognized that the execution of offenders with intellectual disability and juvenile offenders does not serve the retributive or deterrent purposes of capital punishment because of the reduced culpability of such offenders and their lessened susceptibility to deterrence.⁶⁵ Exactly the same considerations apply to offenders with severe mental illness, and thus an exemption would remove from the ambit of the death penalty those for whom the punishment would least serve any legitimate penological purposes.

We conclude that states should adopt an exemption from capital punishment for offenders with severe mental illness, tracking the general contours of the exemption proposed by the American Bar Association.

RECOMMENDATIONS

In light of the irremediable systemic problems in the administration of the death penalty in the United States, the most appropriate course of action is moratorium or repeal of the death penalty where it is feasible. In the absence of moratorium or repeal, we recommend three discrete policy changes to address some widespread problems in state capital justice systems:

1. To improve the delivery of capital representation services, states should establish capital defense offices at all levels (trial, direct appeal, and state postconviction). The establishment of such offices should be undertaken to facilitate compliance with the ABA *Guidelines* for effective capital representation.

64. See *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

65. *Id.* at 319–20 (offenders with intellectual disability); *Roper v. Simmons*, 543 U.S. 551, 569–73 (2005) (juvenile offenders).

2. States should establish a statewide entity with the power to review and reject decisions to seek death by local prosecutors.
3. States should adopt an exemption from capital punishment for offenders with severe mental illness, tracking the general contours of the exemption proposed by the American Bar Association.