CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
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Class Thirteen - Part Three:
Perspectives on the Death Penalty Since 1976

BRUCE EDWIN CALLINS,
v.
JAMES A. COLLINS,
Director, Texas Department of Criminal Justice

United States Supreme Court
510 U.S. 1141, 114 S.Ct. 1127 (1994)

The petition for a writ of certiorari is denied.

[Although Justice Scalia's concurrence appears first in the reporters, Justice Blackmun's dissent has been placed before it here because Justice Scalia responds to the dissent.]

JUSTICE BLACKMUN, dissenting.

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.

Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die. We hope, of course, that the defendant whose life is at risk will be represented by competent counsel – someone who is inspired by the awareness that a less-than-vigorous defense truly could have fatal consequences for the defendant. We hope that the attorney will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the protection of defendants' rights – even now, as the prospect of meaningful judicial oversight has diminished. In the same vein, we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.

But even if we can feel confident that these actors will fulfill their roles to the best of their human ability, our collective conscience will remain uneasy. Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, *see Furman v. Georgia*, and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness – individualized sentencing.

* * *

To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." That means affording the sentencer the power and discretion to grant mercy in a particular case, and providing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice. Finally, because human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.

On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable: Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, *see McCleskey v. Kemp*, 481 U.S. 279, 313, n.37 (1987), the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants "deserve" to die? – cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, relevant mitigating evidence to be disregarded, and vital judicial review to be blocked. The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[1]

I

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A

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* * * *Furman* aspired to eliminate the vestiges of racism and the effects of poverty in capital sentencing; it deplored the "wanton" and "random" infliction of death by a government

1. Because I conclude that no sentence of death may be constitutionally imposed under our death penalty scheme, I do not address Callins' individual claims of error. I note, though, that the Court has stripped "state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration." Even if Callins had a legitimate claim of constitutional error, this Court would be deaf to it on federal habeas unless "the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." That a capital defendant facing imminent execution is required to meet such a standard before the Court will remedy constitutional violations is indefensible.

with constitutionally limited power. *Furman* demanded that the sentencer's discretion be directed and limited by procedural rules and objective standards in order to minimize the risk of arbitrary and capricious sentences of death.

In the years following *Furman*, serious efforts were made to comply with its mandate. State legislatures and appellate courts struggled to provide judges and juries with sensible and objective guidelines for determining who should live and who should die. * * *

Unfortunately, all this experimentation and ingenuity yielded little of what *Furman* demanded. It soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due a defendant when life is at stake. Just as contemporary society was no longer tolerant of the random or discriminatory infliction of the penalty of death, evolving standards of decency required due consideration of the uniqueness of each individual defendant when imposing society's ultimate penalty.

* * * Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.

B

There is a heightened need for fairness in the administration of death. * * *

* * *

* * * [I]n *Lockett v. Ohio*, 438 U.S. 586 (1978), * * * a plurality acknowledged that strict restraints on sentencer discretion are necessary to achieve the consistency and rationality promised in *Furman*, but held that, in the end, the sentencer must retain unbridled discretion to afford mercy. * * * The Court's duty under the Constitution therefore is to "develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual."

C

I believe the *Woodson-Lockett* line of cases to be fundamentally sound and rooted in American standards of decency that have evolved over time. * * *

Yet, as several Members of the Court have recognized, there is real "tension" between the need for fairness to the individual and the consistency promised in *Furman*. * * * [T]he Constitution, by requiring a heightened degree of fairness to the individual, and also a greater degree of equality and rationality in the administration of death, demands sentencer discretion that is at once generously expanded and severely restricted.

This dilemma was laid bare in *Penry v. Lynaugh*, 492 U.S. 302 (1989). The defendant in *Penry* challenged the Texas death penalty statute, arguing that it failed to allow the sentencing jury to give full mitigating effect to his evidence of mental retardation and history of child abuse. The Texas statute required the jury, during the penalty phase, to answer three "special issues"; if the jury unanimously answered "yes" to each issue, the trial court was obligated to sentence the defendant to death. Only one of the three issues – whether the defendant posed a "continuing threat to society" – was related to the evidence Penry offered in mitigation. But Penry's evidence of mental retardation and child abuse was a two-edged sword as it related to that special issue: "it diminish[ed] his blameworthiness for his crime even as it indicate[d] that there [was] a probability that he [would] be dangerous in the future." The Court therefore reversed Penry's death sentence, explaining that a reasonable juror could have believed that the statute prohibited a sentence less than death based upon his mitigating evidence.

After *Penry*, the paradox underlying the Court's post-*Furman* jurisprudence was undeniable. Texas had complied with *Furman* by severely limiting the sentencer's discretion, but those very limitations rendered Penry's death sentence unconstitutional.

D

The theory underlying *Penry* and *Lockett* is that an appropriate balance can be struck between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing if the death penalty is conceptualized as consisting of two distinct stages. In the first stage of capital sentencing, the demands of *Furman* are met by "narrowing" the class of death-eligible offenders according to objective, fact-bound characteristics of the defendant or the circumstances of the offense. Once the pool of death-eligible defendants has been reduced, the sentencer retains the discretion to consider whatever relevant mitigating evidence the defendant chooses to offer. * * *

Over time, I have come to conclude that even this approach is unacceptable: It simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing. * * * It seems that the decision whether a human being should live or die is so inherently subjective – rife with all of life's understandings, experiences, prejudices, and passions – that it inevitably defies the rationality and consistency required by the Constitution.

E

The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards. No matter how narrowly the pool of death-eligible defendants is drawn according to objective standards, *Furman*'s promise still will go unfulfilled so long as the sentencer is free to exercise unbridled discretion within the smaller group and thereby to discriminate. "'The power to be lenient [also] is the power to discriminate.'"

A renowned example of racism infecting a capital-sentencing scheme is documented in *McCleskey v. Kemp*, 481 U.S. 279 (1987). * * * [T]he jury more likely than not would have spared McCleskey's life had his victim been black." * * *

Despite this staggering evidence of racial prejudice infecting Georgia's capital-sentencing scheme, the majority turned its back on McCleskey's claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since *Furman*, but was still unable to stamp out the virus of racism. Faced with the apparent failure of traditional legal devices to cure the evils identified in *Furman*, the majority wondered aloud whether the consistency and rationality demanded by the dissent could ever be achieved without sacrificing the discretion which is essential to fair treatment of individual defendants.

* * *

The fact that we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system does not justify the wholesale abandonment of the *Furman* promise. To the contrary, where a morally irrelevant – indeed, a repugnant – consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a "sober second thought." * * *

F

In the years since *McCleskey*, I have come to wonder whether there was truth in the majority's suggestion that discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness – individualized sentencing. * * * All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.

But even if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed. In fact some members of the Court openly have acknowledged a willingness simply to pick one of the competing constitutional commands and sacrifice the other. * * * These developments are troubling, as they ensure that death will continue to be meted out in this country arbitrarily and discriminatorily, and without that "degree of respect due the uniqueness of the individual." In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.

II

* * * I have explained at length on numerous occasions that my willingness to enforce the capital punishment statutes enacted by the States and the Federal Government, "notwithstanding my own deep moral reservations . . . has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed." *Sawyer v. Whitley*, (BLACKMUN, J., concurring in the judgment). *See also Herrera v. Collins*, (BLACKMUN, J., dissenting). * * *

* * * At the time I voted with the majority to uphold the constitutionality of the death penalty in *Gregg v. Georgia*, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review. * * * Since then, however, the Court has "erected unprecedented and unwarranted barriers" to the federal judiciary's review of the constitutional claims of capital defendants.

The Court's refusal last term to afford Leonel Torres Herrera an evidentiary hearing, despite his colorable showing of actual innocence, demonstrates just how far afield the Court has strayed from its statutorily and constitutionally imposed obligations. In *Herrera*, only a bare majority of this Court could bring itself to state forthrightly that the execution of an actually innocent person violates the Eighth Amendment. This concession was made only in the course of erecting nearly insurmountable barriers to a defendant's ability to get a hearing on a claim of actual innocence. Certainly there will be individuals who are actually innocent who will be unable to make a better showing than what was made by Herrera without the benefit of an evidentiary hearing. The Court is unmoved by this dilemma, however; it prefers "finality" in death sentences to reliable determinations of a capital defendant's guilt. Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the federal judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional.

III

Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it – and the death penalty – must be abandoned altogether." *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (MARSHALL, J., concurring in the judgment). I may not live to see that day, but I have faith that

eventually it will arrive. The path the Court has chosen lessens us all. I dissent.

JUSTICE SCALIA, concurring.

Justice Blackmun dissents from the denial of certiorari in this case with a statement explaining why the death penalty "as currently administered" is contrary to the Constitution of the United States. That explanation often refers to "intellectual, moral and personal" perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.

As Justice Blackmun describes, however, over the years since 1972 this Court has attached to the imposition of the death penalty two quite incompatible sets of commands: the sentencer's discretion to impose death must be closely confined, but the sentencer's discretion not to impose death (to extend mercy) must be unlimited. These commands were invented without benefit of any textual or historical support; they are the product of just such "intellectual, moral, and personal" perceptions as Justice Blackmun expresses today, some of which (viz., those that have been "perceived" simultaneously by five members of the Court) have been made part of what is called "the Court's Eighth Amendment jurisprudence."

Though Justice Blackmun joins those of us who have acknowledged the incompatibility of the Court's *Furman* and *Lockett-Eddings* lines of jurisprudence, he unfortunately draws the wrong conclusion from the acknowledgment. * * * Surely a different conclusion commends itself – to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong.

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority's views upon the people. Justice Blackmun begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us – the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional – for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.

Ralph BAZE and Thomas C. Bowling,
Petitioners,
v.
John D. REES, Commissioner, Kentucky Department of Corrections, et al.

Supreme Court of the United States
553 U.S. 35, 128 S.Ct. 1520 (2008).

The Court held that Kentucky's use of lethal injection did not violate the Constitution.

Justice STEVENS, concurring in the judgment.

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II

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In *Gregg v. Georgia* * * * we explained that unless a criminal sanction serves a legitimate penological function, it constitutes "gratuitous infliction of suffering" in violation of the Eighth Amendment. We then identified three societal purposes for death as a sanction: incapacitation, deterrence, and retribution. In the past three decades, however, each of these rationales has been called into question.

While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.[10] Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option.[11] And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.[12]

The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.

We are left, then, with retribution as the primary rationale for imposing the death penalty. And indeed, it is the retribution rationale that animates much of the remaining enthusiasm for the death penalty.[14] As Lord Justice Denning argued in 1950, "'some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.'" Our Eighth Amendment jurisprudence has narrowed the class of offenders eligible for the death penalty to

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10. Forty-eight States now have some form of life imprisonment without parole, with the majority of statutes enacted within the last two decades.

11. See R. Dieter, *Sentencing For Life: Americans Embrace Alternatives to the Death Penalty* (Apr.1993), http:// www. death penalty info.org/article.php? scid=45 & did=481.

12. In one study, potential capital jurors in Virginia stated that knowing about the existence of statutes providing for life without the possibility of parole would significantly influence their sentencing decisions. In another study, a significant majority of potential capital jurors in Georgia said they would be more likely to select a life sentence over a death sentence if they knew that the defendant would be ineligible for parole for at least 25 years. Indeed, this insight drove our decision in *Simmons v. South Carolina,* that capital defendants have a due process right to require that their sentencing juries be informed of their ineligibility for parole.

14. Retribution is the most common basis of support for the death penalty. A recent study found that 37% of death penalty supporters cited "an eye for an eye/they took a life/fits the crime" as their reason for supporting capital punishment. Another 13% cited "They deserve it." The next most common reasons – "sav[ing] taxpayers money/cost associated with prison" and deterrence – were each cited by 11% of supporters. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics. 147 (2003) (Table 2.55), online at http://www.albany.edu/sourcebook/pdf/t255.pdf.

include only those who have committed outrageous crimes defined by specific aggravating factors. It is the cruel treatment of victims that provides the most persuasive arguments for prosecutors seeking the death penalty. A natural response to such heinous crimes is a thirst for vengeance.[15]

At the same time, however, * * * our society has moved away from public and painful retribution towards ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic. In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim. This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based. * * *

Full recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question recently posed by Professor Salinas, a former Texas prosecutor and judge: "Is it time to Kill the Death Penalty?" The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.[17]

Some argue that these costs are the consequence of judicial insistence on unnecessarily elaborate and lengthy appellate procedures. To the contrary, they result "in large part from the States' failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing." They may also result from a general reluctance by States to put large numbers of defendants to death, even after a sentence of death is imposed. In any event, they are most certainly not the fault of judges who do nothing more than ensure compliance with constitutional guarantees prior to imposing the irrevocable punishment of death.

III

"[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." *Furman v. Georgia,* (Marshall, J., concurring) ("The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive'"). Our cases holding that certain sanctions are "excessive," and therefore prohibited by the Eighth Amendment, have relied heavily on "objective criteria," such as legislative enactments. * * *

Justice White was exercising his own judgment in 1972 when he provided the decisive vote in *Furman*[.] * * * His conclusion that death amounted to "cruel and unusual punishment in the constitutional sense" as well as the "dictionary sense," rested on both an uncontroversial legal premise and on a factual premise that he admittedly could not "prove" on the basis of objective criteria. As a matter of law, he correctly stated that the "needless extinction of life with

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15. For example, family members of victims of the Oklahoma City bombing called for the Government to "'put [Timothy McVeigh] inside a bomb and blow it up.'" Commentators at the time noted that an overwhelming percentage of Americans felt that executing McVeigh was not enough.

17. For a discussion of the financial costs as well as some of the less tangible costs of the death penalty, see Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1 (1995) (discussing, *inter alia*, the burden on the courts and the lack of finality for victim's families). * * *

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* * * [Kozinski & Gallagher] conclude that "we are left in limbo, with machinery that is immensely expensive, that chokes our legal institutions so they are impeded from doing all the other things a society expects from its courts, [and] that visits repeated trauma on victims' families . . . ."

* * *

only marginal contributions to any discernible social or public purposes . . . would be patently excessive" and violative of the Eighth Amendment. As a matter of fact, he stated, "like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty." I agree with Justice White that there are occasions when a Member of this Court has a duty to make judgments on the basis of data that falls short of absolute proof.

Our decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in *Furman,* of arbitrary application identified by Justice Stewart, and of excessiveness identified by Justices Brennan and Marshall. In subsequent years a number of our decisions relied on the premise that "death is different" from every other form of punishment to justify rules minimizing the risk of error in capital cases. *See, e.g., Gardner v. Florida*. Ironically, however, more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.

Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.[18]

Another serious concern is that the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender. Our former emphasis on the importance of ensuring that decisions in death cases be adequately supported by reason rather than emotion, *Gardner,* has been undercut by more recent decisions placing a thumb on the prosecutor's side of the scales. Thus, in *Kansas v. Marsh,* the Court upheld a state statute that requires imposition of the death penalty when the jury finds that the aggravating and mitigating factors are in equipoise. And in *Payne v. Tennessee,* the Court overruled earlier cases and held that "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family is admissible despite the fact that it sheds no light on the question of guilt or innocence or on the moral culpability of the defendant, and thus serves no purpose other than to encourage jurors to make life or death decisions on the basis of emotion rather than reason.

A third significant concern is the risk of discriminatory application of the death penalty. While that risk has been dramatically reduced, the Court has allowed it to continue to play an unacceptable role in capital cases. Thus, in *McCleskey v. Kemp,* the Court upheld a death sentence despite the "strong probability that [the defendant's] sentencing jury . . . was influenced by the fact that [he was] black and his victim was white." * * *

Finally, given the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me. Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the

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18. See *Uttecht v. Brown,* (STEVENS, J., dissenting) (explaining that "[m]illions of Americans oppose the death penalty," and that "[a] cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases").

exoneration of an unacceptable number of defendants found guilty of capital offenses. The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman,* (White, J., concurring).[19]

* * *

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

* * * I write separately to provide what I think is needed response to Justice STEVENS' separate opinion.

I

* * *

[Justice Stevens'] conclusion is insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes. Besides that more general proposition, the very text of the document recognizes that the death penalty is a permissible legislative choice. The Fifth Amendment expressly requires a presentment or indictment of a grand jury to hold a person to answer for "a capital, or otherwise infamous crime," and prohibits deprivation of "life" without due process of law. The same Congress that proposed the Eighth Amendment also enacted the Act of April 30, 1790, which made several offenses punishable by death. * * * There is simply no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional other than the opinions in *Furman v. Georgia,* which established a nationwide moratorium on capital punishment that Justice STEVENS had a hand in ending four years later in *Gregg*.

II

What prompts Justice STEVENS to repudiate his prior view and to adopt the astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution? His analysis begins with what he believes to be the "uncontroversial legal premise" that the "'extinction of life with only marginal contributions to any discernible social or public purposes . . . would be patently excessive' and violative of the Eighth Amendment." Even if that were uncontroversial in the abstract (and it is certainly not what occurs to me as the meaning of "cruel and unusual punishments"), it is assuredly controversial (indeed, flat-out wrong) as applied to a mode of punishment that is explicitly sanctioned by the Constitution. As to that, *the people* have determined whether there is adequate contribution to social or public purposes, and it is no business of unelected judges to set that judgment aside. But even if we grant Justice STEVENS his "uncontroversial premise," his application of that premise to the current practice of capital punishment does not meet the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *

19. Not a single Justice in *Furman* concluded that the mention of deprivation of "life" in the Fifth and Fourteenth Amendments insulated the death penalty from constitutional challenge. The five Justices who concurred in the judgment necessarily rejected this argument, and even the four dissenters, who explicitly acknowledged that the death penalty was not considered impermissibly cruel at the time of the framing, proceeded to evaluate whether anything had changed in the intervening 181 years that nevertheless rendered capital punishment unconstitutional. * * * And indeed, the guarantees of procedural fairness contained in the Fifth and Fourteenth Amendments do not resolve the substantive questions relating to the separate limitations imposed by the Eighth Amendment.

* *

According to Justice STEVENS, the death penalty promotes none of the purposes of criminal punishment because it neither prevents more crimes than alternative measures nor serves a retributive purpose. * * * Justice STEVENS concludes that the availability of alternatives [life imprisonment without parole], and what he describes as the unavailability of "reliable statistical evidence [of deterrence]," renders capital punishment unconstitutional. In his view, the benefits of capital punishment – as compared to other forms of punishment such as life imprisonment – are outweighed by the costs.

These conclusions are not supported by the available data. Justice STEVENS' analysis barely acknowledges the "significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one." Sunstein & Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L.Rev. 703, 706 (2006); see also *id.,* at 706, n. 9 (listing the approximately half a dozen studies supporting this conclusion). According to a "leading national study," "each execution prevents some eighteen murders, on average." "If the current evidence is even roughly correct . . . then a refusal to impose capital punishment will effectively condemn numerous innocent people to death."

Of course, it may well be that the empirical studies establishing that the death penalty has a powerful deterrent effect are incorrect, and some scholars have disputed its deterrent value. But that is not the point. It is simply not our place to choose one set of responsible empirical studies over another in interpreting the Constitution. Nor is it our place to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather than commonsense predictions about human behavior. * * *

But even if Justice STEVENS' assertion about the deterrent value of the death penalty were correct, the death penalty would yet be constitutional (as he concedes) if it served the appropriate purpose of retribution. * * * Justice STEVENS, however, concludes that, because the Eighth Amendment "protect[s] the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim," capital punishment serves no retributive purpose at all. The infliction of any pain, according to Justice STEVENS, violates the Eighth Amendment's prohibition against cruel and unusual punishments, but so too does the imposition of capital punishment *without pain* because a criminal penalty lacks a retributive purpose unless it inflicts pain commensurate with the pain that the criminal has caused. In other words, if a punishment is not retributive enough, it is not retributive at all. To state this proposition is to refute it, as Justice STEVENS once understood. "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg* (joint opinion of Stewart, Powell, and STEVENS, JJ.).

Justice STEVENS' final refuge in his cost-benefit analysis is a familiar one: There is a risk that an innocent person might be convicted and sentenced to death – though not a risk that Justice STEVENS can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system. His analysis of this risk is thus a series of sweeping condemnations that, if taken seriously, would prevent any punishment under any criminal justice system. According to him, "[t]he prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive." But prosecutors undoubtedly have a similar concern that *any* unanimous conviction would rarely be returned by 12 randomly selected jurors. That is why they, like defense counsel, are permitted to use the challenges for cause and peremptory challenges that Justice STEVENS finds so troubling, in order to arrive at a jury that both sides believe will be more likely to do justice in a particular case. * * * According to Justice

STEVENS, "the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender." That rationale, however, supports not Justice STEVENS' conclusion that the death penalty is unconstitutional, but the more sweeping proposition that any conviction in a case in which facts are disturbing is suspect – including, of course, convictions resulting in life without parole in those States that do not have capital punishment. The same is true of Justice STEVENS' claim that there is a risk of "discriminatory application of the death penalty." The same could be said of any criminal penalty, including life without parole; there is no proof that in this regard the death penalty is distinctive.

But of all Justice STEVENS' criticisms of the death penalty, the hardest to take is his bemoaning of "the enormous costs that death penalty litigation imposes on society," including the "burden on the courts and the lack of finality for victim's families." Those costs, those burdens, and that lack of finality are in large measure the creation of Justice STEVENS and other Justices opposed to the death penalty, who have "encumber[ed][it] . . . with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it" – the product of their policy views "not shared by the vast majority of the American people." *Kansas v. Marsh,* (SCALIA, J., concurring).

III

But actually none of this really matters. As Justice STEVENS explains, * * * "I have relied *on my own experience* in reaching the conclusion that the imposition of the death penalty" is unconstitutional.

Purer expression cannot be found of the principle of rule by judicial fiat. In the face of Justice STEVENS' experience, the experience of all is, it appears, of little consequence. The experience of the state legislatures and the Congress – who retain the death penalty as a form of punishment – is dismissed as "the product of habit and inattention rather than an acceptable deliberative process." The experience of social scientists whose studies indicate that the death penalty deters crime is relegated to a footnote. The experience of fellow citizens who support the death penalty is described, with only the most thinly veiled condemnation, as stemming from a "thirst for vengeance." It is Justice STEVENS' experience that reigns over all.

* * *

I take no position on the desirability of the death penalty, except to say that its value is eminently debatable and the subject of deeply, indeed passionately, held views – which means, to me, that it is preeminently not a matter to be resolved here. And especially not when it is explicitly permitted by the Constitution.

Gov. Edward G. Rendell's Message to the Pennsylvania Legislature

January 14, 2011

To Members of the Pennsylvania General Assembly:

As of this date, I have signed 119 execution warrants since taking office in January 2003, and not one execution has been carried out during the last eight years. In fact, none are even close to having a final date set. The only executions carried out since the death penalty was reinstated in Pennsylvania in the late 1970s were two in 1995 and one in 1999, and those three men – Keith Zettlemoyer, Leon Moser, and Gary Heidnik – had waived their appeals and asked that their sentence be carried out.

There are inmates on death row today who were convicted and sentenced to death during my tenure as District Attorney of Philadelphia County (1978-1986). As a former District Attorney and as a death penalty supporter, I believe the death penalty can be a deterrent – but only when it is carried out relatively expeditiously. Of course, great care must be taken to ensure the guilt of the

offender, and every advance in science and technology should be made available to the defendant. However, a 15-, 20-, or 25-year lapse between imposition of a death sentence and the actual execution is no deterrent. In the public's eye, the crime and the victim may be long forgotten. To criminals on the street, our death penalty is simply not a reality.

The time lapse between conviction and execution generally results from capital defendants' efforts to exhaust every legal challenge to their conviction and death sentence that is available to them under state and federal law. That is the way it should be; every meritorious issue must be raised and addressed. While Congress and this body have enacted laws to help curtail and streamline the appellate process in capital cases, the length of time between the imposition of the sentence and actual execution, if it occurs at all, can be decades and is still too long. Victims' survivors are frustrated; the police are frustrated. The lengthy appeals process not only costs taxpayers substantial money, but it also robs the victims' families and friends of peace of mind, and they get no closure.

Therefore, it seems to me that the time has come to re-examine the efficacy of the death penalty under these circumstances. I would ask you to explore whether there can be any additional steps taken that allow for a thorough and exhaustive review of the facts and the law in each case, but that would significantly shorten the time between offense and carrying out the sentence. If you conclude that there is no avenue to achieve this, then I ask you to examine the merits of continuing to have the death penalty on the books – as opposed to the certainty of a life sentence without any chance of parole, pardon or commutation. You should also explore whether creating that type of life sentence would require a Constitutional amendment.

Sincerely,
Edward G. Rendell, Governor

Governors call a halt to executions in Oregon, Colorado and Washington

Oregon Gov. John Kitzhaber announced on Nov. 22, 2011, that he will not allow the execution of any death row inmate while he is in office. The governor said the death penalty is morally wrong and unjustly administered.

"I am convinced we can find a better solution that keeps society safe, supports the victims of crime and their families and reflects Oregon values," he stated in a written statement. "I refuse to be a part of this compromised and inequitable system any longer; and I will not allow further executions while I am Governor."

Kitzhaber, who previously served two terms as governor from 1995 to 2003, allowed two executions in his first term. "I have regretted those choices ever since," the governor stated. "Both because of my own deep personal convictions about capital punishment and also because in practice, Oregon has an expensive and unworkable system that fails to meet basic standards of justice."

The death penalty is not handed down fairly – some inmates on death row have committed similar crimes as those who are serving life sentences, he said. In addition, Oregon has only executed those who give up their appeals and volunteer for execution, Kitzhaber said, calling the state's system "a perversion of justice."[1]

Governor John Hickenlooper of Colorado granted an indefinite stay of execution on May 22, 2013 to Nathan Dunlap, who was set for execution that August. In his Executive Order, the governor expressed concerns about the state's death penalty system, calling it flawed and inequitable. Hickenlooper stated, "If the State of Colorado is going to undertake the responsibility of executing a human being, the system must

1. William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011, Statement of Governor Kitzhaber.

operate flawlessly. Colorado's system for capital punishment is not flawless." The governor underscored that his decision to grant a reprieve in this case was because of larger objections to the death penalty, and he was not granting clemency to Dunlap. He concluded, "It is a legitimate question whether we as a state should be taking lives."

Gov. Jay Inslee declared a moratorium on executions in Washington on February 11, 2014. "Equal justice under the law is the state's primary responsibility. And in death penalty cases, I'm not convinced equal justice is being served," the governor said. "The use of the death penalty in this state is unequally applied, sometimes dependent on the budget of the county where the crime occurred."[2]

Gov. Inslee gave five reasons for his decision:

> First, the practical reality is that those convicted of capital offenses are, in fact, rarely executed. Since 1981, the year our current capital laws were put in place, 32 defendants have been sentenced to die. Of those, 19, or 60%, had their sentences overturned. One man was set free and 18 had their sentences converted to life in prison.
>
> When the majority of death penalty sentences lead to reversal, the entire system itself must be called into question.
>
> Second, the costs associated with prosecuting a capital case far outweigh the price of locking someone up for life without the possibility of parole.
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> * * *
>
> Third, death sentences are neither swift nor certain. Seven of the nine men on death row committed their crimes more than 15 years ago, including one from 26 years ago. * * *
>
> Fourth, there is no credible evidence that the death penalty is a deterrent to murder. * * *
>
> And finally, our death penalty is not always applied to the most heinous offenders.
>
> That is a system that falls short of equal justice under the law and makes it difficult for the State to justify the use of the death penalty.[3]

Mark W. WILES, Petitioner-Appellant,
v.
Margaret BAGLEY, Warden,
Respondent-Appellee.

United States Court of Appeals,
for the Sixth Circuit
561 F.3d 636 (2009).

Before MARTIN, SILER and SUTTON, Circuit Judges.

Sutton, J., delivered the opinion of the court, in which Siler, J., joined. Martin, J.,delivered a separate concurring opinion.

SUTTON, Circuit Judge.

Mark Wiles murdered a fifteen-year-old boy with a kitchen knife during a botched burglary in 1985. After he waived his right to a jury trial, a panel of three Ohio judges convicted him of aggravated murder and aggravated burglary, then sentenced him to death. * * * Wiles sought a writ of habeas corpus under 28 U.S.C. § 2254, arguing (among other things) that he was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments. Because Wiles has not shown that he was prejudiced by his counsel's alleged shortcomings, we affirm.

* * *

2. Ian Lovettfeb *Executions Are Suspended by Governor in Washington*, N.Y. TIMES, Feb. 11, 2014; Governor Inslee's remarks announcing a capital punishment moratorium, Feb. 11, 2014.

3. *Id*. at 3d and 4th pages.

BOYCE F. MARTIN, JR., Circuit Judge, concurring.

I concur in the panel opinion. Wiles has not shown that his counsel was unconstitutionally ineffective during the mitigation phase of his trial.

• • •

Now in my thirtieth year as a judge on this Court, I have had an inside view of our system of capital punishment almost since the death penalty was reintroduced in the wake of *Furman v. Georgia*. During that time, judges, lawyers, and elected officials have expended great time and resources attempting to ensure the fairness, proportionality, and accuracy that the Constitution demands of our system. But those efforts have utterly failed. Capital punishment in this country remains "arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair." *Moore v. Parker,* 425 F.3d 250, 268 (6th Cir.2005) (Martin, J., dissenting). At the same time, the system's necessary emphasis on competent representation, sound trial procedure, and searching post-conviction review has made it exceedingly expensive to maintain.

The system's deep flaws and high costs raise a simple but important question: is the death penalty worth what it costs us? In my view, this broken system would not justify its costs even if it saved money, but those who do not agree may want to consider just how expensive the death penalty really is. Accordingly, I join Justice Stevens in calling for "a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces." *Baze v. Rees,*128 S.Ct. 1520, 1548-49 (Stevens, J., concurring). Such an evaluation, I believe, is particularly appropriate at a time when public funds are scarce and our state and federal governments are having to re-evaluate their fiscal priorities.[4] Make no mistake: the choice to pay for the death penalty is a choice *not* to pay for other public goods like roads, schools, parks, public works, emergency services, public transportation, and law enforcement. So we need to ask whether the death penalty is worth what we are sacrificing to maintain it.

And, while this is a matter that would benefit from further study,[5] the evidence indicates that, on average, every phase of a capital case is more expensive than in a non-capital case, and that the lifetime cost of a capital case is substantially more than the cost of incarcerating an inmate for life without parole.[6] Surprising as that may seem, the

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4. Here, I will focus on the public costs of capital punishment. But it has significant, often overlooked private costs as well. *See, e.g.,* Thomas P. Sullivan, *Efforts to Improve the Illinois Capital Punishment System: Worth the Cost?,* 41 U. RICH. L.REV.. 935, 967 (2007) (noting "the psychological and often the financial injuries inflicted on victims' families," upon the defendant's family, and upon the defendants themselves); * * *

5. *See*, *E.g.*,Susan S. Everingham, Rand Corp., INVESTIGATING THE COSTS OF THE DEATH PENALTY IN CALIFORNIA (2008) (discussing challenges in assessing the total costs of the death penalty), *available at* www.rand.org/pubs/testimonies/ CT300/.

One aspect of this problem that merits further attention is the relationship between the threat of a capital charge and plea bargain rates. *Compare* Kent S. Scheidegger, Criminal Justice Legal Foundation, THE DEATH PENALTY AND PLEA BARGAINING TO LIFE SENTENCES (2009) (arguing that the availability of the death penalty affects plea bargain rates), *available at* www.cjlf.org/papers/wpaper09-01.pdf, *with* Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment,* 8 AM. L. & ECON. REV. 116 (2006) (concluding that availability of a capital charge affects the terms of plea bargains but not their frequency).

6. For data on the costs of state capital cases, see California Commission on the Fair Administration of Justice, FINAL REPORT 147 (2008) (estimating that a system of life without parole would save $121.2 million annually); John Roman, Et al., Urban Institute, THE COST OF THE DEATH PENALTY IN MARYLAND 2 (2008) (finding that average lifetime cost of a capital case is $1.9 million more than the average non-capital case); Washington State Bar Association, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE

COMMITTEE ON PUBLIC DEFENSE (2006) (finding that the cost of a capital trial and post-conviction proceedings is $467,000 more than life without parole); Mary E. Forsberg, NEW JERSEY POLICY PERSPECTIVE, MONEY FOR NOTHING? THE FINANCIAL COST OF NEW JERSEY'S DEATH PENALTY (2005) (finding capital punishment created $253 million in additional costs from 1983 to 2005, or $11 million per year); State of Kansas, Legislative Division of Post Audit, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 10 (2003) (estimating the median cost of a capital case to be $1.2 million through execution – 70% more than life without parole); Indiana Criminal Law Study Commission, COMMISSION REPORT ON CAPITAL SENTENCING (2002) (finding death penalty system is 35-38% more costly than one of life without parole); S.V. Date, *The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually,* PALM BEACH POST, Jan. 4, 2000, at 1A (estimating that the death penalty costs Florida an additional $51 million Annually); Philip J. Cook & Donna B. Slawson, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 78 (1993) ("The extra cost per execution of prosecuting a case capitally is more than $2.16 million."); Christy Hoppe, *Executions Cost Texas Millions Study Finds It's Cheaper to Jail Killers for Life,* DALLAS MORNING NEWS, Mar. 8, 1992, at 1 A (reporting that the cost of an average capital case was $2.3 million-three times as much as a non-capital case imposing a 40-year sentence); Pamela Manson, *Matter of Life or Death: Capital Punishment Costly Despite Public Perception, It's Cheaper to Keep Killers in Prison,* ARIZ. REPUBLIC, Aug. 23, 1993, at A1; Stephen Magagnini, *Closing Death Row Would Save State $ 90 Million a Year,* SACRAMENTO BEE, Mar. 28, 1988, at A1; Robert Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations,*23 LOYOLA L.A. L.REV. 45 (1989); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty,* 18 U.C. DAVIS L. REV. 1221 (1985).

For trial cost data on the federal level, see Jon B. Gould & Lisa Greenman, Judicial Conference Committee on Defender Services, UPDATE ON THE COST, QUALITY, AND AVAILABILITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 24 (2008) (finding the median defense cost of authorized cases to be $353,185 as opposed to $44,809 in non-authorized cases), *available at* www.uscourts.gov/defenderservices/FDPC_Contents.cfm. The report does not address the costs of prosecution or post-conviction costs.

reason for it is simple: "lawyers are more expensive than prison guards."[7] To begin, capital cases involve more pre-trial and trial costs than non-capital cases. Capital cases are far less likely to be resolved through plea bargain,[8] and they generally require far greater time, support services, and expertise to prepare.[7] And capital trials are generally longer and more complex that non-capital trials. Beyond more attorneys and attorney time, capital cases tend to involve more experts and related expenses from experts and support staff. They also require a "death-qualified" jury, and bring the added costs of the "second trial" conducted during the penalty phase. And, because both sides of a capital case are usually funded at public expense, these additional costs must be counted twice in calculating the added cost of a capital prosecution.

Capital cases also involve a significantly longer post-conviction appeal process than non-capital cases. Unlike non-capital cases, capital cases

7. U.C. Berkeley Law Professor Franklin Zimring, *quoted in* Sam Howe Verhovek, *Across the U.S., Executions are Neither Swift Nor Cheap,* N.Y. TIMES, February 22, 1995, at A1.

8. Roughly 95% of state and federal felony cases are resolved through plea bargain. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings,* 82 TUL. L.REV.. 1237, 1238 (2008). Most capital cases, on the other hand, proceed to trial. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence,* 46 CASE W. RES. L.REV.. 1, 11 (1995) ("80% of capital cases go to trial."); GOULD & GREENMAN, *supra* note 3, at 18 (reporting that 65% of capital cases handled by federal defenders between 1998 and 2004 went to trial).

7. *See, E.g.,*American Bar Association, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 3 (rev. ed. 2003) ("[D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases."). The ABA Guidelines go on to outline these duties and functions in detail.

almost invariably proceed through all avenues of post-conviction relief, including direct appeal, state post-conviction proceedings, at least one federal habeas petition, and multiple petitions for certiorari. Naturally, this is because capital defendants (and advocacy groups) have a much stronger motive to pursue post-conviction remedies. But that is their right. Plus, experience has shown that every stage of review is needed to guard against wrongful convictions and correct the unusually high rate of error that plagues capital cases.[12] However, the upshot of higher rates of collateral attack and reversal is that state and federal courts are packed with capital cases,[13] and the cases themselves take decades to wind their way through the system.[14] More appeals means more costs, regardless of why the appeals arise. And reversal means repeating all or part of the process and thus duplicating its time and expense.

So, in almost every way, capital cases are more expensive than non-capital cases.[15] And given the death penalty's exorbitant costs and many basic flaws, it is clear to me that our scarce public resources can be put to better use. This is especially so given what the public is getting for its money – little more than the time of lawyers and judges and the "illusion" of capital punishment.[16] Moral objections aside, the death penalty simply does not justify its expense.

Recent news reports indicate that the cost of the death penalty is becoming part of the public debate on capital punishment and has begun to

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12. A prominent study of state and federal capital cases between 1973 and 1995 fixed the overall error rate in capital cases at 68% (as opposed to 15% in non-capital cases). James S. Liebman, Jeffrey Fagan & Valerie West, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995 at 8-9 (2000), *available at* www.law.columbia.edu/instructional services/liebman/. The study further found that 40% of the death sentences that were upheld on direct appeal and through state post-conviction were subsequently overturned during federal habeas proceedings. *Id.* at 6.

13. Including Wiles, 118 of Ohio's 166 death row inmates (71%) have cases pending in federal court. 28 more (17%) have cases pending in state court.

14. This case, involving a death sentence imposed in 1986 (when the law clerk assisting me on this case was three years old), is unexceptional in this regard. The average elapsed time from sentence to execution in 2007 was 153 months-twelve years and nine months. The median elapsed time since sentencing for inmates on death row at the end of 2007 was 133 months.

15. This is in spite of the fact that capital defense services continue to be underfunded, much to the prejudice of indigent capital defendants. *See generally* Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer,* 103 YALE L.J. 1835 (1994); *see also* ABA Moratorium Implementation Project, STATE DEATH PENALTY ASSESSMENTS: KEY FINDINGS (2007) (finding, among other things, "[T]hat . . . (4) Capital indigent defense systems, whether statewide or county-by-county, *generally are significantly underfunded;* (5) Many states are failing to provide for the appointment of two lawyers at all stages of a capital case, nor are they guaranteeing access to investigators and mitigation specialists; (6) Many states are requiring only minimal training and experience for attorneys handling death penalty cases; and (7) The compensation paid to appointed capital defense attorneys is *often woefully inadequate,* dipping to well under $50 per hour in some cases") (emphasis added).

16. * * * Only nine of the thirty-six states which retain the death penalty carried out executions in 2008, a year in which there was a total of thirty-seven executions nationwide. At the end of 2007, there were 3,220 prisoners on death row.

Whatever one's opinion of the intractable debate over deterrence, the empirical evidence is too inconclusive to warrant much weight. *See generally* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate,* 58 STAN. L.REV. 791 (2005) (conducting an exhaustive review of the empirical literature on the death penalty and concluding, "Our estimates suggest not just 'reasonable doubt' about whether there is any deterrent effect of the death penalty, but profound uncertainty. We are confident that the effects are not large, but we remain unsure even of whether they are positive or negative").

influence policymaking.[17] That strikes me as a very positive development. I hope it continues.

17. *See, e.g., Opponents Focus on Cost in Death Penalty Debate* (National Public Radio April 1, 2009); Judy Kerr, *What Price Vengeance,* SAN FRANCISCO CHRONICLE, Mar. 13, 2009, at A15; *Saving Lives and Money,* THE ECONOMIST, Mar. 12, 2009, * * *

In addition to New Mexico, which abolished the death penalty on March 18, 2009, a number of states, including Colorado, Nevada, Montana, Nebraska, Kansas, Maryland, and New Hampshire are reconsidering their capital punishment policies, in part because the cost of the death penalty. Colorado, for example, is currently considering a bill (H.B.09-1274) that proposes to abolish the death penalty and instead spend the money saved on investigating cold cases.