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Mandatory Justice: The Death Penalty Revisited

# MANDATORY JUSTICE:

## The DEATH PENALTY REVISITED



THE CONSTITUTION PROJECT



# **MANDATORY JUSTICE:**

## The DEATH PENALTY REVISITED

An Initiative of The Constitution Project

ISBN 0-9715449-0-5

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# PREFACE

In 2000, the Constitution Project created a blue-ribbon committee to guide its new Death Penalty Initiative. The Committee's members were supporters and opponents of the death penalty. They were Democrats and Republicans, conservatives and liberals. Collectively, they had experience with nearly every facet of the criminal justice system, as judges, prosecutors, policymakers, victim advocates, defense lawyers, journalists, and scholars. What originally motivated these individuals, and what continues to do so, is their profound concern that, in recent years and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been revealed to be deeply flawed. Their commitment was to an effort to overcome the political and philosophical divisions that have long plagued this country's debate over the death penalty.

In 2001, the Committee released *Mandatory Justice: Eighteen Reforms to the Death Penalty*, which contains the consensus recommendations of this remarkable, and remarkably diverse, group. Since then, courts and state legislatures around the country have instituted changes that, for the most part, improve the accuracy of their capital punishment systems. Many of these changes have had bipartisan support. It appears that the divisions between "liberals" and "conservatives," and between death penalty proponents and opponents, are disappearing. This is surely because, no matter what their political perspectives or views about capital punishment itself, all Americans share a common interest in justice for victims of crimes and for those accused of those crimes.

Ultimately, however, committee members' own experiences continue to support their conclusion that the current system is a disservice to those most closely connected with it. Delays and mistakes prevent victims from experiencing finality and unjustly accused

or convicted individuals lose years of their lives. Equally as important, when we convict the innocent, the actual perpetrators remain at large, and in some cases continue to inflict immeasurable harm on others. A second trial if the perpetrator is apprehended means that victims and their families must endure additional suffering. This country's commitment to protecting the interests of all of these individuals and to a secure society mandates urgent, dramatic, and system-wide changes.

Committee members, many of whom have worked within the system, well know of the conscientious, diligent, and often heroic efforts of those who are judges, prosecutors, defense lawyers, and law enforcement officers, and who must often serve under the most demanding of circumstances. They know that it is extraordinarily difficult, if not impossible, for these public servants to carry out their responsibilities and that, as a result, those the system is designed to protect instead frequently feel victimized by it.

When it released *Mandatory Justice* in 2001, the Committee predicted that additional experience, study, and reflection might require further recommendations. The new recommendations contained in *Mandatory Justice: The Death Penalty Revisited* demonstrate the prescience of that statement. These new recommendations fall into three categories. First are recommendations that address changes in the law since *Mandatory Justice* was issued in 2001. Second are those that address new areas that committee members identified as contributing to errors and injustices. And third are those recommendations that remain unchanged because, unfortunately, the problems they were meant to address continue to afflict our system, engendering the grave injustices that have diminished confidence in it.

In 2000 and 2002, Columbia University legal and social science scholars released a landmark two-part report, entitled "A Broken System: Error Rates in Capital Cases 1973-1995" that galvanized nationwide public debate with its findings that federal courts overturned two-thirds of state capital convictions and sentences for serious constitutional errors, and that these errors were primarily due to egregiously inadequate defense lawyering and prosecutorial misconduct. The report examined capital cases before the 1996 enactment of the Anti-Terrorism and Effective Death Penalty Act, which dramatically reduced the federal courts' ability to review these cases.

The Committee's conclusions in the original *Mandatory Justice* were consistent with the Columbia University study's findings. Since *Mandatory Justice* was released, innocent people have continued to be exonerated and released from death row. According to the Death Penalty Information Center, 119 innocent people around the country have been freed from death row since the 1970's, 28 of them from 2001 to the present. Poor people accused of capital crimes are still represented by lawyers who were intoxicated, slept during trial, and, no matter how well-meaning, lacked the knowledge, skills and

resources to defend a capital case. Individuals with compelling claims of innocence are still confronted with obstacles to the testing of DNA and other potentially exculpatory evidence, and they continue to face procedural barriers to presenting exculpatory evidence to any court. It is still the law that if a lawyer fails to raise an issue in the state courts, a federal court is except in the rarest of circumstances prevented from ruling on it, no matter how valid it may be.

Ironically, as these new recommendations are being sent to press, Congress is considering the Streamlined Procedures Act (SPA), which would create even more barriers by stripping the federal courts of their jurisdiction to hear the vast majority of *habeas corpus* petitions in capital and non-capital cases. The SPA makes an exception for cases of “actual innocence,” but many experts have expressed serious concerns about the proposal, arguing that it would in fact preclude valid claims from wrongly convicted and sentenced individuals and that the exception would not provide sufficient protection.

The exonerations of people in prison and on death row, including over 100 on death row, have taught Americans a hard lesson — that our criminal justice system is fallible, and that courts may convict the wrong person. Public opinion is shifting as a result. Death sentences in all states that allow capital punishment have dropped by 54 percent and executions by 40 percent since 1999.

Many Americans believe that as the technology advances, DNA will act as a “fail-safe” mechanism because it exists in most, if not all, criminal cases. This belief is, however, based on a fundamental misunderstanding. In the vast majority of criminal cases, there is no biological evidence to test. Even if such evidence does exist, in some cases it is destroyed after trial; thus it is unavailable for examination through ever-more sophisticated techniques. DNA is not, and never will be, the “fail-safe” that the public desires.

With the release of *Mandatory Justice* in 2001, members of the Committee joined with a myriad of other individuals and groups expressing their concerns about the death penalty and working tirelessly for change. *Mandatory Justice* has been distributed widely, by both the Constitution Project and allied organizations. State legislators considering reforms to their death penalty systems have relied on its recommendations, and committee members have spoken out on a host of issues related to capital punishment in the media, speeches, and articles in a variety of publications.

As the examples set forth below demonstrate, committee members were committed to the Constitution Project’s mission of using the recommendations as a basis for practical efforts, in a variety of forums, to educate policymakers, the courts, the media, and the public.

The Committee's co-chairs testified before Congress on three occasions in support of provisions in the Innocence Protection Act to improve counsel in capital cases and to make DNA testing more readily available. The co-chairs and members also testified before a variety of state legislatures and other policy-making bodies. Most recently, co-chair Gerald Kogan testified before the New York State legislature in opposition to a bill to reinstate the death penalty that lacked sufficient safeguards. In a written statement, member Scott Turow also urged rejection of the bill. He also sent copies of his book, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty*, along with a personal letter, to key legislators. Member Paula Kurland testified before the Texas state legislature in support of allowing juries to consider the option of life without possibility of parole. All of these efforts were successful.

Members William S. Sessions and John Gibbons joined Illinois Death Penalty Commission co-chair Thomas Sullivan and Timothy Lewis, a member of the Constitution Project's Right to Counsel Initiative blue-ribbon committee, in two influential *amicus curiae* briefs before the Supreme Court. In *Banks v. Cockrell*, these former federal judges and prosecutors urged the Court to hear Mr. Banks' case, and in a dramatic act, the Court stopped Mr. Banks' execution 10 minutes before it was to occur and agreed to consider his appeal. The same group then argued in a second brief that his conviction and death sentence were tainted by prosecutorial withholding of critical exculpatory evidence. Ultimately, in *Banks v. Dretke*, the Court ordered that the sentence be vacated and that the lower court review his conviction. The Committee and its members submitted amicus briefs in a host of other landmark cases, such as *Wiggins v. Smith*, in which the Supreme Court ordered a new sentencing hearing based on the failure of the defense lawyer to present mitigating evidence at sentencing, *Miller-El v. Cockrell*, in which the Court ordered a new hearing on a claim of racial bias, *Miller-El v. Dretke*, in which the Court granted Mr. Miller-El's *habeas* petition because of that racial bias, and *Roper v. Simmons*, in which the Court struck down the juvenile death penalty.

Several committee members serve on the Honorary Board of the Mid-Atlantic Innocence Project, and on the Advisory Board for the Innocence Commission for Virginia (ICVA), which is a joint project of the Constitution Project, the Mid-Atlantic Innocence Project, and the Accuracy Project at George Mason University. While *Mandatory Justice* presents a broad nationwide view, it does not examine specific cases and specific state practices. By contrast, the ICVA examined 11 acknowledged cases of wrongful conviction in Virginia in making recommendations for reforms. The experience of the Constitution Project and its committee members lent considerable expertise to the ICVA's work.

The Committee's efforts, and those of a host of other organizations and individuals across the country, have had dramatic results. In the states, Democrats and Republi-

cans alike have addressed systemic inaccuracies and injustices. Most prominently, in April 2002, the Illinois Commission on Capital Punishment released a comprehensive report and 85 recommendations for reform. The Commission was appointed by the then-governor, Republican George Ryan, after he found that the state had cleared more death row inmates than it had executed. He imposed a moratorium on the state's use of capital punishment while awaiting the report. The Illinois Legislature has passed several reform measures, but current Governor Rod Blagojevich, a Democrat, has refused to lift the moratorium, declaring that the system is far from "fixed." In New Jersey, where the Supreme Court ordered state corrections officials to change the way lethal injections are administered, Acting Democratic Governor Richard Codey has called on the state legislature to pass a moratorium against executions. There have been commissions to study the death penalty in 14 states, and others are considering proposals for a moratorium and a variety of reforms. As noted above, Texas — one of only two states refusing to allow jurors to consider a sentence of life without possibility of parole instead of the death penalty — has just given them that option.

Death penalty statutes in New York and Kansas were ruled unconstitutional by those states' high courts in 2004. In New York, the Democratic controlled State Assembly defeated an attempt to reinstate the law. Many legislators who had voted for the death penalty when it became law just 10 years ago opposed its reinstatement because of the risk of error.

At the same time, however, there are efforts to create or expand death penalty laws. In Massachusetts, which has no death penalty, Republican Governor Mitt Romney has proposed a statute, based on the recommendations of a task force of forensic and legal experts, that would replace the traditional "reasonable doubt" standard for conviction with a "no doubt" standard. Prospects for the legislation are uncertain, largely because of doubts that this standard could be met.

It is remarkable, given their extraordinarily busy schedules, that committee members have given so much of their time, experience, and effort to this work and it was inevitable that some would be unable to continue. Thus Kurt Schmoke, Timothy Lynch, Mario Cuomo, Rosalyn Carter, Sam Millsap, LeRoy Riddick, and Vin Weber left the Committee at various points over the past few years. Committee members Charles Ruff and Ann Landers passed away. Our original reporters, Duke law professor Robert Mosteller and DePaul law professor Susan Bandes, who so ably drafted the original recommendations and guided the Committee to consensus, were no longer able to put aside other demands on their time. They, along with George Washington University Law Professor Stephen Saltzburg and Dr. William J. Bowers, of the College of Criminal Justice at Northeastern University, no longer serve as reporters. The Constitution Project is grateful for the enormous contributions made by the Committee's former

members and reporters, and for their continued willingness to speak out and provide more informal advice.

At the same time, we are fortunate that other equally influential and expert individuals have joined the Committee. Scott Turow, the best-selling author and member of Governor Ryan's Commission, Charles Blackmar, the former chief justice of the Missouri Supreme Court, and Frank Stokes, a retired FBI Special Agent, have made noteworthy contributions to the Committee's work. Mr. Turow's book about his experience with the death penalty, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty*, is a riveting and pragmatic reflection on the inequities in the imposition of capital punishment, the "condemning of the innocent or the undeserving," and the reluctance of policymakers and the public to support essential reforms.

Our new reporters, Andrew Taslitz and Margaret Paris, professors of law at Howard and Oregon, respectively, carried on seamlessly and with great authority and expertise. We have received first-rate guidance from others as well. Dr. Richard Bonnie, Professor of Law and of Psychiatric Medicine, and Director of the Institute of Law, Psychiatry and Public Policy, at the University of Virginia, advised the Committee on its new recommendations on mental illness and implementation of the Supreme Court's decision in *Atkins v. Virginia*, which prohibits the execution of individuals with mental retardation. We consulted with our colleagues at the Innocence Project at Cardozo School of Law, who blazed the DNA trail, on our new recommendations on that subject. The Constitution Project's wonderful interns, Sophia Smith-Savedoff and Jennifer Reid, have deftly managed the final editing process, to which Adam Ortiz, a Soros Fellow, also contributed.

Despite the shifting membership, the Committee's mission has not changed, and it deserves restatement here. Committee members believe that individuals who commit violent crimes deserve swift and certain punishment. Some of the members of the Committee believe that the range of punishment may include death; others do not. But they all agree that no one should be denied basic constitutional protections, including a competent lawyer, a fair trial, and full judicial review of the conviction and sentence. The denial of such protections heightens the danger of wrongful conviction and sentence.

In 2003, Governor Ryan commuted to life the sentences of all of Illinois' death row inmates, except for four who received outright pardons. Explaining this dramatic action, he said "Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die." Because of his actions, and the efforts of the Constitution Project's committee members and countless others, there has been a profound transformation in our nation's understanding of the inaccuracies and injustices that haunt our capital punishment system and the corresponding risk of wrong-

ful convictions and executions. The recommendations that follow reflects the Committee's belief that, despite this deeper public understanding and the progress that has been made, this risk remains all too real and much more remains urgently to be done.

Virginia E. Sloan  
President and Founder  
The Constitution Project

The Constitution Project, based in Washington, DC, develops bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education.

We are grateful for the support of the Butler Family Foundation, New Prospect Foundation, Arca Foundation, Justice Project, and Open Society Institute for their support for our Death Penalty Initiative over the years.





# **HOW TO READ *MANDATORY JUSTICE:* *THE DEATH PENALTY REVISITED***

For ease of transition, the updated recommendations are incorporated into the text of the original *Mandatory Justice*. In many cases, the original recommendations are as relevant as when they were first issued. In others, changes in the law mean that the recommendations are no longer needed. Thus, for example, the original recommendation in Chapter II that the execution of individuals with mental retardation and of juveniles be prohibited has been included as new Recommendation 4, but its original commentary has been deleted and additional recommendations addressing new limits on death penalty eligibility have been added. In all other chapters, the original language has been maintained and Editors' Notes highlight updates in the law or certain other relevant information. Recommendations and commentary that are new in this publication are designated by the words "2005 Update" following each mention of the new recommendation.

All recommendations continue to be addressed to those who occupy critical roles in the capital punishment system, including the defense attorney, the prosecutor, the jury, the trial judge, and the reviewing courts. As in the Committee's original recommendations, the new recommendations are intended to create safeguards against the endemic tendency of decision makers in the criminal justice system to "pass the buck." They emphasize that each, individually, has the responsibility to ensure, to the best of his or her ability, that justice is done.



# SUMMARY OF RECOMMENDATIONS

## CHAPTER I: ENSURING EFFECTIVE COUNSEL

1. Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train, and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers' performance. An existing public defender system may comply if it implements the proper standards and procedures.
2. Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.
3. The current Supreme Court standard for effective assistance of counsel (*Strickland v. Washington*) is poorly suited to capital cases. It should be replaced in such cases by a standard requiring professional competence in death penalty representation.

## CHAPTER II: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS

- 4-7. There should be only five factors rendering a murderer eligible for capital punishment. Jurisdictions should exclude from death eligibility those cases in which eligibility is based solely upon felony murder and should not use felony murder as an aggravating circumstance. Individuals with severe mental disorders should not be eligible for the death penalty, and states should establish reliable procedures to determine the issue of mental retardation. (2005 Update.)

### **CHAPTER III: EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)**

8. Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.
9. The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as “truth in sentencing.”

### **CHAPTER IV: SAFEGUARDING RACIAL FAIRNESS**

10. All jurisdictions that impose the death penalty should create mechanisms to help ensure that the death penalty is not imposed in a racially discriminatory manner.

### **CHAPTER V: ENSURING SYSTEMS FOR PROPORTIONALITY REVIEW**

11. Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision making process.

### **CHAPTER VI: PROTECTING AGAINST WRONGFUL CONVICTIONS AND SENTENCES**

#### **EXCULPATORY AND NEWLY DISCOVERED EVIDENCE; CREDIBLE CLAIMS OF INNOCENCE**

12. Legislation should provide that, notwithstanding any procedural bars or time limitations, exculpatory DNA evidence may be presented at a hearing to determine whether a conviction or death sentence was wrongful, and if so, that any erroneous conviction or sentence be vacated.
13. Where the results of post-conviction DNA testing exclude the defendant or are inconsistent with the prosecution’s theory, prosecutors should promptly consent to vacate the conviction, and should not retry (or threaten to retry) the defendant unless convinced that compelling evidence remains of the defendant’s guilt beyond a reasonable doubt. (2005 Update.)

14. All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.
15. Capital defendants who establish a credible claim of innocence should have access to post-conviction relief, even after all avenues for relief have been exhausted and regardless of whether there is any other legal bar to the claim of factual error. (2005 Update.)

#### **LEARNING FROM WRONGFUL CONVICTIONS AND SENTENCES AND AVOIDING FUTURE WRONGFUL CONVICTIONS AND SENTENCES**

16. All jurisdictions should a) review capital cases in which defendants were exonerated to identify the causes of the error and to correct systemic flaws, b) adequately fund Capital Case Innocence Projects, c) establish a Capital Case Early Warning Coordinating Council to identify systemic flaws in an effort to avert mistaken convictions *before* they happen, and d) fund efforts to increase sensitivity to innocence issues in capital cases among students, the police, judges, and the American public. (2005 Update.)

#### **DNA EVIDENCE**

17. DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.
18. Government officials should promptly and readily consent to DNA testing on biological evidence from criminal investigations that remains in their custody. The state should also make evidence available for DNA testing in cases in which defendants convicted of capital crimes have already been executed and post-mortem DNA testing may be probative of guilt or innocence. (2005 Update.)
19. If the government fails to submit DNA profiles from the defendant's or a related case to DNA databanks, the defendant should have the right to petition a court for, and that court should have the power to issue, an order that the government submit the profiles to those databanks. (2005 Update.)

#### **FORENSIC LABORATORIES**

20. The testimony of a prosecution forensic examiner not associated with an accredited forensics laboratory should be excluded from evidence. (2005 Update.)

21. Laboratories should be accredited only when they meet stringent scientific standards. (2005 Update.)
22. Forensics laboratories should audit all death penalty cases when there is reason to believe that an examiner engaged in forensic fraud or an egregious act of forensic negligence in any case (whether capital or not) during the examiner's professional career. (2005 Update.)

#### **VIDEOTAPING AND RECORDING OF CUSTODIAL INTERROGATIONS**

23. Custodial interrogations of a suspect in a homicide case should be videotaped or digitally video recorded whenever practicable. Recordings should include the entire custodial interrogation process. Where videotaping or digital video recording is impracticable an alternative uniform method, such as audiotaping should be established. Where no recording is practicable, any statements made by the homicide suspect should later be repeated to the suspect and his or her comments recorded. Only a substantial violation of these rules requires suppression at trial of a resulting statement. (2005 Update.)

### **CHAPTER VII: DUTY OF JUDGE AND ROLE OF JURY**

24. Appellate courts reviewing capital convictions for sufficiency of the evidence should reverse if a reasonable jury could not have found guilt beyond a reasonable doubt. (2005 Update.)
25. If a jury imposes a life sentence, the judge in the case should not be allowed to "override" the jury's recommendation and replace it with a sentence of death.
26. The judge in a death penalty trial should instruct the jury that if any juror has a lingering doubt about the defendant's guilt, that doubt may be considered as a "mitigating" circumstance that weighs against a death sentence.
27. The judge in a death penalty trial must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.

### **CHAPTER VIII: ROLE OF PROSECUTORS**

28. Prosecutors should provide "open-file discovery" to the defense in death penalty cases. Prosecutors' offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and

investigative agencies. Even if a jurisdiction does not adopt open-file discovery, it is especially critical in capital cases that the defense be given all favorable evidence (*Brady* material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies.

29. Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identifications and statements of informants and co-defendants) particularly subject to human error.
30. Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced. (2005 Update.)
31. All capital jurisdictions should establish a Charging Review Committee to review prosecutorial charging decisions in death eligible cases. Prosecutors in death eligible cases should be required to submit proposed capital and non-capital charges to the committee. The committee shall issue binding approval or disapproval of proposed capital charges, with an accompanying explanation. Each jurisdiction shall forbid prosecutors from filing a capital charge without the committee's approval. (2005 Update.)
32. Foreign nationals who were not afforded rights to consular notification and access under the Vienna Convention on Consular Relations (VCCR) shall not be eligible for the death penalty. The chief law enforcement officer for each state with capital punishment and for the federal government shall ensure full compliance with the VCCR. An independent authority shall report regularly to the chief executive or legislature about compliance with the VCCR. (2005 Update.)





# BLACK LETTER RECOMMENDATIONS

## CHAPTER I: ENSURING EFFECTIVE COUNSEL

### 1. Each State Should Create Independent Appointing Authorities.

Each state should create or maintain a central, independent appointing authority whose role is to “recruit, select, train, monitor, support, and assist” attorneys who represent capital clients.<sup>1</sup> The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and *certiorari*. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures.

### 2. Each Jurisdiction Should Provide Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provide Adequate Funding for Expert and Investigative Services.

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal post-conviction and *certiorari*. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the “extraordinary responsibilities of counsel in death penalty litigation.”<sup>2</sup> Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney

meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

**3. The *Strickland v. Washington* Standard for Effective Assistance of Counsel and Capital Sentencing Should be Replaced.**

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare.<sup>3</sup> Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney's incompetence. Moreover, there should be a strong presumption in favor of the attorney's obligation to offer at least some mitigating evidence.

## **CHAPTER II: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS**

**4. Individuals with Mental Retardation, Those Who Were Under 18 at the Time of the Offense and Those Convicted of Felony Murder Should Be Excluded from Death Penalty Eligibility.**

Jurisdictions should exclude from eligibility for the death penalty those cases involving persons with mental retardation; persons under the age of eighteen at the time of the crimes for which they are convicted, and those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur should be excluded from eligibility for capital punishment. (2005 Update.)

**5. Death Penalty Eligibility Should be Limited to Five Factors:**

- The murder of a peace officer killed in the performance of his or her official duties when done to prevent or retaliate for that performance.
- The murder of any person (including but not limited to inmates, staff, and visitors) occurring at a correctional facility.
- The murder of two or more persons regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts, as long as a) the deaths were the result of either an intent to kill more than one person, or b) the defendant knew the act or acts would cause death or create a strong probability of death or great bodily harm to the murdered individuals or others.

- The intentional murder of a person involving the infliction of torture. In this context, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means that the defendant relished the infliction of extreme physical pain upon the victim, evidencing debasement or perversion, or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.
- The murder by a person who is under investigation for, or who has been charged with or has been convicted of, a crime that would be a felony, of anyone involved in the investigation, prosecution, or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators. (2005 Update.)

**6. Felony Murder Should be Excluded as the Basis for Death Penalty Eligibility.**

The five eligibility factors in Recommendation 5, which are intended to be an exhaustive list of the only factors that may render a murderer eligible for capital punishment, do not include felony murder as a basis for imposing the death penalty. To ensure that the death penalty is reserved for the most culpable offenders and to make the imposition of the death penalty more proportional, jurisdictions that nevertheless choose to go beyond these five eligibility factors should still exclude from death eligibility those cases in which eligibility is based solely upon felony murder. Any jurisdiction that chooses to retain felony murder as a death penalty eligibility criterion should not permit using felony murder as an aggravating circumstance. (2005 Update.)

**7. Persons with Severe Mental Disorders Should be Excluded from Death Penalty Eligibility.**

Persons with severe mental disorders whose capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct, or to conform their conduct to the requirements of law was significantly impaired at the time of the offense should be excluded from death eligibility. [0](2005 Update.)

## **CHAPTER III: EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)**

**8. Each Jurisdiction Should Ensure the Availability of a Life Sentence without Parole.**

In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.

**9. The Court Should Explain the Meaning of a Life Sentence without Parole (Truth in Sentencing).**

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the

minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

## **CHAPTER IV: SAFEGUARDING RACIAL FAIRNESS**

### **10. Each Jurisdiction Should Implement Comprehensive Programs to Safeguard Racial Fairness.**

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component — perhaps the most important — is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision making process.

## **CHAPTER V: ENSURING SYSTEMS FOR PROPORTIONALITY REVIEW**

### **11. Each State Should Implement Procedures to Ensure Proportionate Death Sentences.**

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

## **CHAPTER VI: PROTECTING AGAINST WRONGFUL CONVICTIONS AND SENTENCES**

### **EXCULPATORY DNA EVIDENCE AND NEWLY DISCOVERED EVIDENCE; CREDIBLE CLAIMS OF INNOCENCE**

#### **12. The Presentation of Exculpatory DNA Evidence Should Be Allowed Notwithstanding Procedural Bars.**

If exculpatory evidence is produced by DNA testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

**13. Prosecutors Should Consent to Vacating a Conviction and/or a Sentence When DNA Testing Excludes the Defendant or When the Result Is Inconsistent with the Government's Prosecution Theory.**

Where post-conviction DNA testing is performed and excludes the defendant, or otherwise yields a result that is inconsistent with the theory under which he or she was prosecuted, convicted, or sentenced, prosecutors should promptly and readily consent to vacate the conviction and/or sentence. In such cases, prosecutors should neither threaten to retry nor commence retrial proceedings against the defendant, unless, notwithstanding the exculpatory DNA test results, there remains highly credible evidence of the defendant's guilt beyond a reasonable doubt. (2005 Update.)

**14. Procedural Barriers to the Introduction of Newly Discovered Exculpatory Evidence Should Be Lifted.**

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

**15. Post-Conviction Review in Cases of Credible Claims of Innocence Should Be Provided.**

Post-conviction relief should be available to review, and correct causes of error in, the cases of all capital defendants who establish a credible claim of innocence, even after all traditional appellate and post-conviction avenues for relief have been exhausted and regardless of whether there is any other legal bar to the claim of factual error. (2005 Update.)

**LEARNING FROM WRONGFUL CONVICTIONS AND SENTENCES AND AVOIDING FUTURE WRONGFUL CONVICTIONS AND SENTENCES**

**16. Procedures for Systemic Review of Exonerations and for Avoiding Future Errors Should Be Established.**

- Jurisdictions should provide mechanisms for the review of capital cases in which defendants were exonerated, for the purpose of identifying the causes of the error and for correcting systemic flaws affecting the accuracy, fairness, and integrity of the capital punishment system.
- Jurisdictions should adequately fund the creation (where they do not exist) and operation of Capital Case Innocence Projects.
- Each jurisdiction should establish a Capital Case Early Warning Coordinating Council to identify on an ongoing basis systemic flaws that, once corrected, should help in an effort to avert mistaken convictions before they happen.

- Jurisdictions should also adequately fund efforts to increase sensitivity to innocence issues in capital cases in high schools, colleges, law schools, police academies, judicial training programs, and among the broader American public. (2005 Update.)

## **DNA EVIDENCE**

### **17. The Government Should Preserve and Use DNA Evidence to Establish Innocence or Avoid an Unjust Execution.**

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent.

### **18. The Government Should Consent to Preserve, Inspect, and Test Biological Evidence.**

All government officials should promptly and readily consent to preservation, inspection, and testing of biological evidence in their custody that is reasonably likely to aid in identifying the true perpetrator(s) of a criminal offense. Such consent should be freely given, without requiring the individual seeking DNA testing to engage in protracted litigation, in both the pre-trial, trial, and post-conviction phases of criminal proceedings. This obligation should also extend to cases in which capital defendants have been executed, given the public's strong and continued interest in ensuring the accuracy of the criminal justice system, and the lack of any interest by the state in barring DNA testing once a death sentence has been meted out. (2005 Update.)

### **19. The Government Should Be Required to Submit DNA Profiles to DNA Databanks in Certain Cases.**

If law enforcement agencies fail to submit to a state or federal DNA databank (1) unidentified DNA profiles obtained from evidence in a defendant's case, and/or (2) unidentified DNA profiles from cases that reasonably appear to be related to the offense for which another defendant was convicted, the defendant should have the right to petition a court, and the court shall have the right to issue an order requiring the state to submit such profiles to state and federal DNA databanks for comparison purposes. (2005 Update.)

**FORENSIC LABORATORIES****20. The Testimony of Forensic Examiners Not Associated with Accredited Laboratories Should Be Excluded.**

Testimony from a forensics examiner offered by the prosecution in capital cases should be excluded from evidence when the examiner is not associated with an accredited forensics laboratory. (2005 Update.)

**21. Accreditation of Laboratories Should Be Limited.**

Accreditation should be permitted only for laboratories that:

- employ certified technicians;
- do not release results based on insufficiently validated techniques;
- articulate and enforce written standard protocols; and
- require examiner proficiency testing in the particular technique in question. (2005 Update.)

**22. Forensic Laboratories Should Be Audited in Cases of Egregious Negligence or Fraud.**

Every forensics laboratory should have in place a procedure for triggering an audit of all death penalty cases handled by any of its examiners when there is reason to believe that the examiner has engaged in an egregious act of forensic negligence or in any act of forensic fraud in any case (whether capital or not) that he or she has handled during his or her professional career. (2005 Update.)

**VIDEOTAPING AND RECORDING OF CUSTODIAL INTERROGATIONS****23. Interrogations of Homicide Suspects Should Be Videotaped or Digitally Recorded Whenever Practicable.**

- When a recording is made of a custodial interrogation, the original recording shall promptly be downloaded and maintained by procedures adequate to prevent tampering and to maintain a proper chain of custody.
- Only in the unusual case will it be impracticable to videotape or digitally video record a custodial interrogation when it occurs at a police facility or other place of detention.
- Recording should include not merely the statement made by the suspect after custodial interrogation, but the entire custodial interrogation process.
- Where videotaping or digital video recording is impracticable, some alternative uniform method for accurately recording the entire custodial interrogation process, such as by audio taping, should be established.
- Police investigators should carry audiotape recorders for use when conducting custodial interrogations of suspects in homicide cases outside the police station or in other locations where video recording is impracticable, and all such interviews should be audio taped.



- Where neither visual nor audio recording is practicable, any statements made by the homicide suspect should at a later time be repeated to the suspect on videotape or by digital video recording and his or her comments recorded.
- Whenever only an audio recording is made, the state shall bear the burden of proving by a preponderance of the evidence, at any pre-trial hearing or at trial, that videotaping or digital video recording of the entire custodial interrogation process was impracticable; if there has not even been an audio recording made, the state shall further bear the burden of proving by a preponderance of the evidence that audio recording or some other uniform method of complete and accurate recording was impracticable.
- Video or audio recording of the entire custodial interrogation process does not require the suspect's permission.
- Only a substantial violation of these rules requires suppression of a resulting suspect statement at trial. Any violation of these rules shall be presumed substantial unless the state proves the opposite by a preponderance of the evidence. A violation in all cases shall be deemed substantial if one or more of the following paragraphs is applicable:
  - The violation was gross, willful, and prejudicial to the accused. A violation shall be deemed willful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it. A violation shall also be deemed willful if it was caused by a police department's failure adequately to train its officers and other relevant personnel or by its failure adequately to provide officers and other relevant personnel with properly maintained and adequate equipment to comply with this rule.
  - The violation was of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement, such as where the accused person waives his or her right to videotaping because police contributed to the person's belief that an untaped oral statement could not be used at trial.
  - The violation created a significant risk that an incriminating statement may have been untrue, such as may happen where the secrecy of the interrogation process encourages police to use interrogation methods that create a significant risk of false confessions in a department with a proven record of using such flawed methods.
  - In determining whether a violation not covered by the previous conditions is substantial, the court shall consider all the circumstances including:
    - the extent of deviation from lawful conduct, for example, by videotaping only a small portion of the interrogation process (major deviation) versus videotaping most, but not all, of the process (minor deviation);
    - the extent to which the violation was willful;



- the extent to which exclusion will tend to prevent violations of this recommendation;
- whether there is a generally effective system of administrative or other sanctions that makes it less important that exclusion be used to deter such violations in the future;
- the extent to which the violation prejudiced the defendant's ability to support a motion to exclude a confession, or to defend him or herself in the proceeding in which the statement is sought to be offered in evidence against the defendant.
- whether the violation made it particularly difficult to prove the use of coercive investigation techniques where adequate alternative forms of corroborating evidence are unavailable and a defendant has made out a *prima facie* case of coercion.
- Whenever there is a failure for any reason to videotape, record or audiotape any portion of, or all of, the entire custodial interrogation process, and the statement was not otherwise suppressed, a defendant shall be entitled, upon request, to a cautionary jury instruction, appropriately tailored to the individual case, noting that failure; permitting the jury to give it such weight as the jury feels that it deserves; and further permitting the jury to use it as the basis for finding that the statement was either not made or was made involuntarily. (2005 Update.)

## CHAPTER VII: DUTY OF JUDGE AND ROLE OF JURY

### 24. Courts Should Apply a More Stringent Standard for Appellate Review of Evidentiary Sufficiency.

The current standard for appellate review of evidentiary sufficiency in criminal cases is inappropriate in capital cases. It should be replaced with a standard requiring reversal if a reasonable jury could not have found guilt beyond a reasonable doubt. (2005 Update.)

### 25. Judges Should be Prohibited from Overriding a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death.

Judicial override for a jury's recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury's recommendation of death.

**26. Trial Judges Should Instruct Juries on Lingering (Residual) Doubt.**

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: “If you have any lingering doubt as to the defendant’s guilt of the crime or any element of the crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant.”

**27. Judges Should Ensure That Capital Sentencing Juries Understand Their Obligations to Consider Mitigating Factors.**

- Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror’s sentencing decision, and (2) mitigating circumstance need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror’s sentencing decision. In light of empirical evidence documenting serious juror confusion about the nature of the jury’s obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury’s hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to consider the defendant’s mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.
- The judge’s obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.

## **CHAPTER VIII: ROLE OF PROSECUTORS**

**28. Prosecutors Should Provide Expanded Discovery and Ensure that Exculpatory Information is Provided to the Defense.**

- Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the pros-

ecution that is as full and complete as possible, consistent with the requirements of public safety.

- Full “open-file” discovery should be required in capital cases. However, discovery of the prosecutor’s files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only when the prosecution clearly demonstrates that restrictions are required to protect witnesses’ safety, or shows similarly substantial threats to public safety.
- If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory (*Brady*) evidence to the defense. In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance; (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing; and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for *in camera* review to determine whether such evidence meets the *Brady* standards of helpfulness to the defense and materiality to outcome. When willful violations of *Brady* duties are found, meaningful sanctions should be imposed.

**29. Prosecutors Should Establish Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed.**

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

**30. There Should be a Mandatory Period of Consultation Before Prosecutors Decide Whether to Commence a Death Penalty Prosecution.**

Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.

**31. Jurisdictions Should Require a Mandatory Review of Prosecutorial Charging Decisions in Death Eligible Cases.**

- To ensure fairness in the application of the death penalty, each jurisdiction should establish a Charging Review Committee responsible for reviewing prosecutorial charging decisions in death eligible cases. The committee should be composed of elected prosecutors and retired judges.
- The following procedures should be implemented with respect to each jurisdiction's Charging Review Committee:
- Prosecutors in all cases involving alleged death eligible conduct should be required to submit proposed charges, capital or non-capital, to the Charging Review Committee, accompanied by written statements explaining their charging rationales.
- The committee should be required to review these proposed charges and supporting statements of rationale, and to respond with appropriate comments and/or recommendations.
- In addition, in the subcategory of death eligible cases in which the prosecution proposes capital charges, the committee should be required to issue binding approval or disapproval of those capital charges and should expressly state its reasons for its decision.
- Each jurisdiction should expressly forbid prosecutors from filing capital charges without the approval of its Charging Review Committee. (2005 Update.)

**32. The Vienna Convention on Consular Relations Should Be Enforced.**

- Every capital defendant who is a foreign national should be ineligible for the death penalty if not provided with consular rights under the Vienna Convention on Consular Relations (VCCR).
- Each entity with authority to impose or carry out the death penalty should impose on its attorney general (or another central law enforcement officer) the duty of ensuring full compliance with the VCCR.
- This duty should include training law enforcement actors about consular rights and monitoring adherence to those rights.
- An independent authority, such as an inspector general, should report regularly about compliance to the entity's chief executive or legislative body. (2005 Update.)

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†† Review of *Mandatory Justice: The Death Penalty Revisited* pending.





# CHAPTER I:

## ENSURING EFFECTIVE COUNSEL

### SUMMARY

1. Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train, and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers' performance. An existing public defender system may comply if it implements the proper standards and procedures.
2. Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.
3. The current Supreme Court standard for effective assistance of counsel (*Strickland v. Washington*) is poorly suited to capital cases. It should be replaced in such cases by a standard requiring professional competence in death penalty representation.

### Overview to Chapter I

The lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error — including the real possibility of executing an innocent person. A defendant tried without adequate counsel is far more likely to be charged with and convicted of a capital crime and to receive a death sentence. Indeed, as capital litigator and Yale law professor Stephen Bright has observed, the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die — far more important than the nature of the crime or the character of the accused. The lack of adequate counsel is a one-two punch. Substandard counsel is more likely

not only to result in a client's receiving a death sentence, but also to create an inadequate trial record through failure to investigate and failure to preserve objections. The attorney's errors, unless they meet the problematic standards of *Strickland v. Washington*<sup>1</sup> (discussed below) not only adversely affect the client at trial and sentencing, but also vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later. Furthermore, because there is no constitutional right to counsel after the first state appeal, even in capital cases, some states do not appoint counsel for post-conviction or *habeas corpus* review, further insulating trial errors from correction.

Death penalty litigation is a highly specialized, legally complex field, a “minefield for the unwary,” in the words of the ABA Criminal Justice Section.<sup>2</sup> Adequate preparation requires not only a grasp of rapidly changing substantive and procedural doctrine, but also labor-intensive and time-consuming factual investigation. Capital attorneys, from the trial stage through post-conviction review, should be well-trained, experienced, and adequately compensated, and have sufficient time and resources to perform competently when representing clients who are facing the possibility of execution. Instead, study after study documents a national crisis in the quality of counsel in death penalty cases and calls for reform — with little success.

Some states (for example, Alabama, Mississippi, and Texas) have no public defender system, and no central appointing authority to screen and monitor appointed counsel.

#### EDITOR'S NOTE

Alabama and Mississippi still have no public defender system. Texas has now created a Task Force on Indigent Defense, although no statewide public defender system yet exists and the state's standards for indigent defense do not comply with the ABA's recommendations governing appointed counsel.

Many states assign only a single lawyer to represent a capital defendant; do not require any level of experience or expertise; do not provide or require training; do not screen out lawyers with serious disciplinary records; fail to monitor performance of counsel; inadequately compensate counsel; and refuse to provide funds for crucial investigators, experts, and other essential resources. Unsurprisingly, few attorneys are willing to take on capital cases, and those who do are often “thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital case.”<sup>3</sup>

Nevertheless, courts have found that the vast majority of this attorney incompetence does not fall below the lax standards for effective counsel under *Strickland*, which requires the defendant to show both that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence. There-

fore, the client continues to pay for the attorney's errors, sometimes with his or her life. The state, the families of victims, and society as a whole pay the price as well. Litigation becomes increasingly protracted, complicated, and costly, putting legitimate convictions at risk, subjecting the victims' families to continuing uncertainty, and depriving society of the knowledge that the real perpetrator is behind bars. In short, the likelihood of error precludes the assurance that the outcome is fair or reliable.

Our recommendations seek to improve this state of affairs in three overlapping ways. First, we recommend the creation of central, independent authorities to appoint, monitor, train, and screen capital attorneys, and otherwise ensure the quality of capital representation — at all stages of litigation. Second, we recommend that each jurisdiction adopt standards for the appointment of counsel by these authorities, and, additionally, that each jurisdiction adopt standards ensuring adequate compensation of such counsel, as well as adequate funding for expert and investigative services. Third, we recommend that the current standard of review for ineffective assistance be replaced, in capital sentencing, with a more stringent standard better keyed to the particular requisites of capital representation.

## **RECOMMENDATION 1: Each State Should Create Independent Appointing Authorities.**

Each state should create or maintain a central, independent appointing authority whose role is to “recruit, select, train, monitor, support, and assist” attorneys who represent capital clients.<sup>4</sup> The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and *certiorari*. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures.

### **EDITOR'S NOTE**

Key actors on the national and state levels have recently recognized the acute problems with counsel in capital cases. The Innocence Protection Act, which encourages states to enhance training and resources for capital defense lawyers and provides for increased DNA testing, became law in October 2004 as part of the Justice for All Act. President George W. Bush, in his 2005 State of the Union address, declared that capital cases must be handled more carefully and that more resources should be directed to correcting the problem of inadequate defense lawyers.

## EDITOR'S NOTE (CONTINUED)

In a dramatic statement in his May 2005 State of the Judiciary Address to the Joint Session of the Louisiana House and Senate, the Supreme Court's Chief Justice, Pascal F. Calogero, Jr., spoke about his court's recent finding that the state's present indigent defense system is "terribly flawed." He urged the legislature to remedy the situation, saying that until it makes adequate funds available, "upon motion of the defendants [in capital cases], the trial judge may halt the prosecution . . . until adequate funds become available to provide for these indigent defendants' constitutionally protected right to counsel." Justice Calogero concluded that the "opinion does not unfairly put the courts in the position of siding with the defense [but] . . . simply recognized the fact that the courts, as guardians of a fair and equitable process, must not let the state take a person's liberty without due process."

## COMMENTARY

This recommendation, similar to recommendations made by the ABA, the National Legal Aid Defender Association (NLADA), and other groups, is based on the recognition that each jurisdiction needs a formal, centralized, and reasoned process for ensuring that every capital defendant receives competent counsel. Without such a process, as numerous studies have shown, competent representation becomes more a matter of luck than a constitutional guarantee.

The recommendation provides two approaches to achieving this centralization. In jurisdictions with a public defender system or other centralized appointing authority, that authority may be fully adequate, either currently or by adding steps to ensure proper monitoring, training, and other assistance. Such training and assistance should be available to all capital defense attorneys in the jurisdiction. In jurisdictions with no public defender system in place, the recommendation calls for establishing a central appointing authority. It provides some flexibility in determining who appoints or sits on the central appointing authority. However, the independence of the authority and its freedom from judicial or prosecutorial conflicts are crucial to ensure that its members can act without partisanship and in a manner consistent with the highest professional standards.

Some of the recommendation's language is identical to that of the 1990 ABA recommendations, but the ABA recommendations have been widely ignored. Instead, many states award capital cases by contract or appointment, employing explicit or implicit incentives to these attorneys to keep their costs low and their hours on the case few. The attorneys may be chosen based on friendship with the judge, a desire not to "rock the boat," their willingness to work cheaply, their presence in the halls of the courthouse, or other factors poorly correlated with zealous or even competent representation. Many of them have little knowledge of capital litigation or even criminal law in general. Many of them have little experience or skill in the courtroom. A disproportionate number of

them have records of disciplinary action, and even disbarment.<sup>5</sup> Even the best of these lawyers are placed in a situation in which most incentives are skewed toward doing a cursory job, or even losing — especially in high profile cases. Establishing independent appointing authorities to alleviate many of these problems is a crucial and central recommendation of this Committee.

## **RECOMMENDATION 2: Each Jurisdiction Should Provide Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provide Adequate Funding for Expert and Investigative Services.**

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal post-conviction and certiorari. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the “extraordinary responsibilities inherent in death penalty litigation.”<sup>6</sup> Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

## **COMMENTARY**

### **Qualifications of Counsel**

Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants. It is also a safeguard far too often ignored. All jurisdictions should adopt minimum standards for the provision of an adequate capital defense at every level of litigation. The most crucial stage of any capital case is trial. Qualified counsel at this stage would add immeasurably to the effort to keep the trial “the main event” in the capital process, and to streamline the post-trial appellate and conviction procedures. But even with improved representation at trial, the need for quality legal representation at post-trial stages will continue to be great, given the unacceptability of error, the rapid changes in the substantive law, and the possibilities of newly discovered evidence at later stages.

The standards for qualified counsel will vary according to the requisites of the particular stage of proceedings. There is some flexibility as to which minimum standards a jurisdiction ought to adopt. However, we suggest that minimum standards should, at the least, require two attorneys on each capital case. We recommend that jurisdictions adopt

the ABA or NLADA standards for appointment of counsel in capital cases. At the trial level, these include, among other requirements, that (1) the lead attorney have at least five years of criminal litigation experience, as well as experience as lead or co-counsel in at least one capital case; (2) co-counsel have at least three years of criminal litigation experience; (3) each counsel have significant experience in jury trials of serious felony cases; (4) each attorney have had recent training in death penalty litigation; and (5) each attorney have demonstrated commitment and proficiency. Similar standards should be met at the appellate and post-conviction stages, although at these stages the type of relevant prior experience will vary. The important thing is that, at all stages, a set of stringent and uniform minimum standards should be adopted, implemented, and enforced.

### **Compensation of Counsel**

A major cause of inadequacy of capital representation is the lack of adequate compensation for those taking on demanding, time-consuming cases, which, if done correctly, demand thousands of hours of preparation time. Douglas Vick estimates that a capital case may take from 500 to 1,200 hours at the trial level alone, and an additional 700 to 1,000 hours for direct appeal of a death sentence, with hundreds of additional hours required at each successive stage.<sup>7</sup> Assuming an hourly wage of \$100, he estimates that the cost of attorney time in a typical capital case, excluding any additional services, would be about \$190,000. Many jurisdictions impose shockingly low maximum hourly rates or arbitrary fee caps for capital defense.<sup>8</sup> Even the most dedicated lawyer will find it difficult to spend the time needed on a capital case under these conditions. As the NLADA notes, these are “confiscatory rates” that impermissibly interfere with the Sixth Amendment right to counsel.<sup>9</sup> Moreover, courts often will not make funds available for reasonable expert, investigative, support, or other expenses. Factual investigation, including witness interviews, document review, and forensic (for example, DNA, blood, or ballistics) testing, is a crucial component of adequate preparation for both trial and sentencing in capital cases. In addition, the defense’s frequent inability to hire experts on central issues in a case, such as forensics or psychological background, is another major obstacle to the fairness of the proceedings, particularly in light of far greater prosecutorial access to such resources. Attorneys should not be forced to choose whether to spend a severely limited pool of funds on their own fees or on experts and investigators.

Each jurisdiction should develop standards that avoid arbitrary ceilings or flat payment rates, and instead take into consideration the number of hours expended plus the effort, efficiency, and skill of capital counsel.<sup>10</sup> The hourly rate should reflect the extraordinary responsibilities and commitment required of counsel in death penalty cases.<sup>11</sup> Failure to provide adequate funding and resources is a failure of the system that forces even the most committed attorneys to provide inadequate assistance. Its consequences should fall not on the capital defendant, but on the government. One model for imposing such consequences is that proposed by the ABA: Where the capital defendant was not pro-

vided with qualified and adequately compensated counsel, several procedural barriers to review should be held inapplicable.

### **RECOMMENDATION 3: The *Strickland v. Washington* Standard for Effective Assistance of Counsel and Capital Sentencing Should be Replaced.**

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare.<sup>12</sup> Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney's incompetence. Moreover, there should be a strong presumption in favor of the attorney's obligation to offer at least some mitigating evidence.

### **COMMENTARY**

The adoption of a more stringent standard can be accomplished by each state, either legislatively or judicially, so long as the state court relies on state rather than federal law.<sup>13</sup> The current Supreme Court standard for effective assistance of counsel, *Strickland v. Washington*, permits "effective but fatal counsel" and requires the defendant to show both that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence.<sup>14</sup> Randall Coyne and Lyn Entzerth observe:

Myriad cases in which defendants have actually been executed confirm that *Strickland's* minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences.<sup>15</sup>

*Strickland* is a poorly conceived standard in all criminal cases. It is particularly unfortunate in capital cases for two reasons. First, the standard is inadequate simply because the consequences of attorney error at trial are so great in a capital case, and the opportunities for error so vast. Second, the standard, inadequate as it has been in measuring the competence of attorneys at trial, has proven especially poorly suited for measuring competence in the punishment phase of a capital trial. Moreover, the requirement that the capital defendant prove not only the ineffectiveness of counsel, but also that it caused the defendant prejudice, is extremely hard to satisfy when the question is whether he or she would have received a different sentence had counsel done a better job. Given the



unpredictability of a jury's decision whether to exercise mercy in light of a particular set of facts, and given the fact that the attorney's very failure to investigate deprives the defendant of crucial information, the standard rarely can be met. The harshness of *Strickland's* prejudice prong means that capital defendants whose counsel was ineffective even under *Strickland's* stringent ineffectiveness prong will nevertheless be executed unless they can meet the onerous standard of demonstrating a reasonable probability that, if not for attorney incompetence, they would not have been sentenced to death. Instead of perpetuating this unfair standard, we should shift the burden to the state. After a finding of attorney ineffectiveness, if the state cannot show that the defendant would have been sentenced to death even with competent counsel, the sentence ought to be reversed and the defendant re-sentenced.

In case after case, attorneys who failed to present any mitigation evidence at all, or who have presented a bare minimum of such evidence, were found to have satisfied *Strickland*.<sup>16</sup>

#### EDITOR'S NOTE

In *Rompilla v. Beard*<sup>F1</sup>, and *Wiggins v. Smith*<sup>E2</sup>, the Supreme Court overturned two death sentences because the defense lawyers failed to investigate and present mitigating evidence at sentencing.

Yet mitigation evidence is an absolutely essential part of the punishment phase.<sup>17</sup> As capital litigation expert Welsh White has observed, "the failure to present mitigation evidence is a virtual invitation to impose the death penalty."<sup>18</sup> The proper development of mitigating evidence involves a complete construction of the defendant's social history, including all significant relationships and events. This duty cannot be satisfied merely by interviewing the defendant. Moreover, the utility of offering mitigation evidence cannot be determined in advance of a thorough investigation. Indeed, White asserts that every capital attorney he interviewed agreed that "developing the defendant's social history will always lead to some mitigating evidence that can be effectively presented at the penalty phase."<sup>19</sup> There may be the rare case in which an attorney makes an informed decision not to put on any mitigation evidence, but such a scenario is highly unlikely. Therefore, there should be a strong presumption in favor of the attorney's duty to put on some mitigation evidence.



# **CHAPTER II: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS**

## **SUMMARY**

There should be only five factors rendering a murderer eligible for capital punishment. Jurisdictions should exclude from death eligibility those cases in which eligibility is based solely upon felony murder and should not use felony murder as an aggravating circumstance. Individuals with severe mental disorders should not be eligible for the death penalty, and states should establish reliable procedures to determine the issue of mental retardation. (2005 Update.)

## **EDITOR'S NOTE**

In its original recommendations (now Recommendation 4), the Committee urged that the death penalty for juveniles and individuals with mental retardation be prohibited. In 2002, in *Atkins v. Virginia*, the United States Supreme Court barred the death penalty for individuals with mental retardation. In 2005, in *Roper v. Simmons*, it did so for juveniles. Updated recommendations and accompanying commentary, set forth below, now address the procedures jurisdictions should establish to adjudicate cases of mental retardation, the exclusion of individuals with severe mental disorders from death eligibility, and a broader felony murder exclusion. The original commentary may be found at [www.constitutionproject.org](http://www.constitutionproject.org).

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment, as set forth in Recommendations 5, 6, and 7 below.

#### **RECOMMENDATION 4: Individuals with Mental Retardation, Those Who Were Under 18 at the Time of the Offense and Those Convicted of Felony Murder Should be Excluded from Death Penalty Eligibility.**

Jurisdictions should exclude from eligibility for the death penalty those cases involving persons with mental retardation; persons under the age of eighteen at the time of the crimes for which they are convicted, and those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

#### **RECOMMENDATION 5: Death Penalty Eligibility Should be Limited to Five Factors.**

- The murder of a peace officer killed in the performance of his or her official duties when done to prevent or retaliate for that performance.
- The murder of any person (including but not limited to inmates, staff, and visitors) occurring at a correctional facility.
- The murder of two or more persons regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts, as long as a) the deaths were the result of either an intent to kill more than one person, or b) the defendant knew the act or acts would cause death or create a strong probability of death or great bodily harm to the murdered individuals or others.
- The intentional murder of a person involving the infliction of torture. In this context, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means that the defendant relished the infliction of extreme physical pain upon the victim, evidencing debasement or perversion, or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.
- The murder by a person who is under investigation for, or who has been charged with or has been convicted of, a crime that would be a felony, of anyone involved in the investigation, prosecution, or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators. (2005 Update.)

## COMMENTARY

### **Recommendation 5 Overview: The Constitutional Requirement and Function of Aggravating Circumstances**

Current United States Supreme Court case law provides that no statute may constitutionally mandate imposition of the death penalty for all first-degree or similar murderers.<sup>1</sup> Rather, the jury must make an individualized, case-by-case determination of whether a particular defendant is “death-worthy.”<sup>2</sup> However, the jury’s discretion must be guided by reasonably clear criteria.<sup>3</sup> The jury must consider both the nature and circumstances of the crime and the character and background of the offender,<sup>4</sup> and there must be some rational criteria for separating the death-worthy from all other first-degree murderers.<sup>5</sup>

Typically, the presence of “aggravating circumstances” guides the jury’s decision and limits the pool of convicted murders eligible for death.<sup>6</sup> Most commonly, as first articulated in the American Law Institute’s Model Penal Code, jurors must find the existence of at least one statutory aggravating factor to render an offender death eligible.<sup>7</sup> Some jurisdictions permit jurors to consider non-statutory aggravators as well—those circumstances of the crime and of the offender’s character that, though not listed as aggravators in any statute, are nevertheless logically relevant to identifying the “worst of the worst” murderers.<sup>8</sup>

All jurisdictions must, however, permit jurors to weigh aggravating against “mitigating” circumstances in deciding who among the death eligible is also death-worthy, thus meriting execution.<sup>9</sup> The United States Supreme Court has held that jurors must have largely free reign to consider as a mitigator “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”<sup>10</sup> Statutes typically allow defendants to offer evidence about mitigating circumstances set forth in a statute and any unlisted, non-statutory mitigators relevant to the defendant’s character or record or to the case circumstances.<sup>11</sup> Although some jurisdictions in theory depart from identifying aggravating and mitigating circumstances, in fact the approach of those jurisdictions is the functional equivalent of the aggravating/mitigating circumstances approach.<sup>12</sup> This Committee, in Recommendation 26 of this Report, has also recommended that the jury be instructed in appropriate cases that it may consider as a mitigating circumstance any “lingering doubt” about the defendant’s guilt, even if that doubt does not rise to the level of a reasonable doubt.

Aggravating circumstances must therefore serve to “narrow the class of persons eligible for the death penalty and [to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>13</sup> The latter means that the purpose of punishment is rationally promoted by the choice to impose death.<sup>14</sup>

Overall, aggravating circumstances should be designed to give meaningful guidance to juries.<sup>15</sup> The Committee agrees with Justice Brennan’s dissent in *Lowenfeld v. Phelps*,<sup>16</sup> in which he complained that the Court had in practice departed from that goal:

Narrowing the class of death eligible offenders is not “an end in itself” any more than aggravating circumstances are. Rather, as our cases have emphasized consistently, the narrowing requirement is meant to channel the discretion of the sentencer. It forces the capital sentencing jury to approach its task in a structured, step-by-step way, first determining whether all the circumstances justify its imposition. The only conceivable reason for making narrowing a constitutional requirement is its function in structuring sentencing deliberations. By permitting the removal of the narrowing function from the sentencing process altogether, the Court reduces it to a mechanical formality entirely unrelated to the choice between life and death.<sup>17</sup>

### **The Trend Toward Increasingly Ineffective Eligibility Criteria**

The Supreme Court’s 1972 decision in *Furman v. Georgia* invalidated the death penalty as arbitrary and capricious as it was then practiced in the United States. In response, many states moved to create a list of aggravators that narrowed the death eligible pool in a modest and rational way.<sup>18</sup> Aggravators in a particular jurisdiction were usually relatively few in number. Most aggravators were drawn from the Model Penal Code, “having the imprimatur of the elite of the bar and of academic circles” and aiming at least to “sound lawlike” — a “list of rules and procedures,” articulating relatively objective circumstances, such as that the defendant simultaneously committed another murder.<sup>19</sup>

Legislatures seemed to take the narrowing mandates of the Supreme Court seriously.<sup>20</sup> Those aggravators “not aimed primarily at establishing legal respectability” often reflected a primary concern with preserving “the integrity of the public function of the states against violence aimed at disrupting them,” for example, by killing police officers or corrections employees.<sup>21</sup> The most problematic of the post-Furman aggravators, however, used sweeping language, such as that a killing be “heinous, atrocious, and cruel,” an ambiguous phrase that is “nothing less than an invitation for the jury to unleash its private feelings about the crime or criminal . . . .”<sup>22</sup> But achieving legal clarity and respectability and protecting the institutions of law enforcement was the first priority.<sup>23</sup>

Since the *Lowenfeld* decision in 1988, however, the Court has shown a willingness to validate a wider range of aggravating factors so long as they display a modicum of clarity.<sup>24</sup> Although the Court has occasionally found such clarity lacking, it has, for example, upheld Idaho’s use of the aggravating circumstance of exhibiting “utter disregard for human life” where the Idaho courts had “narrowly” construed the statute’s application as limited to “cold-blooded, pitiless slayers.”<sup>25</sup>

Although the Court still maintains that each statutory aggravating circumstance must provide a “principled basis” for distinguishing those meriting capital punishment from those who do not, in practice the “Court has never held an aggravating circumstance to be invalid on the substantive ground that it failed to select ‘the worst criminals or the criminals who commit the worst crimes.’”<sup>26</sup> Empirical studies reveal that 80-90 percent of the defendants who were eligible for death before *Furman* temporarily invalidated the death penalty would still be eligible for capital punishment today.<sup>27</sup> Some states, such as California and Illinois,<sup>28</sup> have had as many as 20 aggravating circumstances, leading the Illinois Commission on Capital Punishment (Ryan Commission) to observe that “[s]ome have suggested that due to the large number of eligibility factors, nearly every first-degree murder in Illinois could be eligible for the death penalty under one theory or another.”<sup>29</sup> The result has been what some commentators call the “deregulation of death.”<sup>30</sup> Furthermore, in such an era, the Court mandates no serious limitations on how a jury is to weigh aggravators against mitigators.<sup>31</sup> Explained one commentator, “The aggravators that the legislature writes may be the door into the inner house of death but, after *Lowenfeld*, they do not proscribe what goes on inside.”<sup>32</sup> This gap must be closed by a narrow and principled approach to selecting aggravating circumstances.

### **A Principled Basis for Selecting Aggravating Circumstances**

The era of deregulation has thus simply failed to achieve the goal originally articulated by the Court of narrowing death eligibility in a principled manner. The pre-*Lowenfeld* era did a better job than does the current regime. However, that regime had its own flaws, most notably that many of the aggravators focused on harms, other than the killing itself, that were not necessarily the deliberate choice of the offender or were only impliedly related to the offender’s character, and that too frequently stressed “behavioral facts over mental facts.”<sup>33</sup> The effect was that the law often failed to distinguish those “who deliberately do harm and those who fall into it.”<sup>34</sup> Thus, killing an additional person or inflicting suffering beyond that necessary for the killing, even where neither outcome was desired, might establish death eligibility.<sup>35</sup>

This focus on harm and behavior divorced from perversity of mental state reflects the aspiration for more objective criteria but cuts sentencing off from its roots in a morality that grades evil based on desire.<sup>36</sup> As Oliver Wendell Holmes explained, even a dog knows the difference between being tripped over and being kicked.<sup>37</sup> Moreover, most premeditated crimes occur between people who know each other, so a shift away from desire is biased toward stranger crimes.<sup>38</sup> Since African Americans are disproportionately involved in stranger crimes, this potentially worsens the disproportionate racial application of the death penalty.<sup>39</sup>

The original kinds of aggravators also reflected a shift from previous concerns with individualized justice and rehabilitation to a new regime. Aggravators now focused not on individuals, but rather on categories of offenders (for example, imprisoned convicts who kill). They focused not on reintegrating offenders into the community

but rather on managing efficiently the risks created by presumed classes of permanent criminals, and not on community priorities like reducing the general level of crime but rather on making the criminal justice system a processor of offenders.<sup>40</sup> Because a list of aggravators for jurors to consider seemed more abstract, jurors arguably were more inclined to distance themselves from the moral choice of enormous import with which they were faced.<sup>41</sup>

Rather than stemming only from sound penological policy, such as a broad and traditional sense of the public good, political imperatives appear to be reflected in the new generation of aggravators after Lowenfeld. We have seen legislators add aggravating circumstances to address the most high-profile risk of the day, such as a rise in car-jackings, drive-by shootings, and gang-related activities.<sup>42</sup> These are all, of course, reprehensible crimes, but legislatures have made them into aggravators without any evidence that injury rates were higher than for other crimes of violence or that these crimes were more widespread than other serious offenses.<sup>43</sup> Nor were there findings that adding these aggravators would improve public safety.<sup>44</sup> The worst of these crimes were in most cases already death eligible under other criteria, likely making these new criteria over-inclusive.<sup>45</sup>

An additional concern with this new generation of aggravators is that these crimes are often associated with the inner-city poor and fear of a random and violent death at their hands.<sup>46</sup> As one commentator explains:

Like the first generation of felony murder aggravators, the new generation is likely to encourage juries to accept the association between crimes and death-warranting dangerousness or depravity without independent moral judgment. But the new ones may be even more effective in this regard. Robbery and kidnapping are already easy to stretch around the facts of quite ordinary homicides. Aggravating factors for drive-by shootings, assault weapons, or gang activity target crimes that are really media hybrids of traditional serious crimes and certain stereotyped features, usually linked to minority populations. Lacking an objective foundation, they are likely to be even more plastic. For example, at a time when “gang” is widely used to define social life among the inner-city minority youth population, an aggravator for homicide in a gang activity context will be easy to apply to minority defendants.<sup>47</sup>

Yet another concern is aggravators that appear to be symbolic recognition of the worth of various, often politically powerful, groups. In Louisiana, for example, aggravators include murders done during “satanic rituals,” apparently because of religious groups’ fear of growing Satanism.<sup>48</sup> Elsewhere, emergency medical technicians, the elderly, the young, probation officers, pregnant women, school teachers, and cattle brand inspec-

tors have been added to lists of aggravators.<sup>49</sup> While the Committee does not comment on the relative merits of adding any of these groups, it is clear that these expansions depart from the original narrow purpose of aggravators to limit capital punishment to the worst crimes and worst offenders. They also increase the number of death eligible crimes far beyond what is warranted for an effective capital punishment system.

The flaws in the first wave of aggravating circumstance legislation and the later experience under “death deregulation” suggest a set of principles that should guide reform in this area:

- There should be fewer aggravating circumstances than is currently the case, and they should partly be drawn from the best features of the first wave of post-*Furman* death eligibility legislation;
- Persons with a demonstrated capacity to murder again should be incapacitated to protect public safety;
- Aggravators must be as clear as possible to guide and structure jury decision-making;
- Aggravators that protect the justice system’s performance are justified to enable law enforcement personnel to do their jobs effectively and to validate the public’s respect for the law;
- In addition to the above circumstances, only the fewest, most heinous and shocking first-degree murders, for which any lesser response would minimize the magnitude of the offense, should be considered aggravators; and
- Aggravators should seek to avoid racial or class bias.

These criteria implicate public safety and reinforce the most central of public norms, as opposed to protecting against private pain or enforcing deterrence. There is little support for the view that the death penalty deters crime, and this Committee is unconvinced by the few, flawed studies to the contrary.<sup>50</sup> This Committee concludes that these principles support the five eligibility criteria set forth in this recommendation.

### **The Recommended Limits on Eligibility for Capital Punishment**

- Murders of Peace Officers
- Murders of Any Person at a Correctional Institution

Police and other peace officers are at the forefront of criminal investigation and law enforcement. Their jobs are also dangerous ones. To do their jobs well, they must be assured that society greatly values their safety. Equally as important is the public harm when violence is directed at officers of the law. Assaults on such officers are assaults on the eyes and ears of the justice system. The highest expression of moral condemnation is needed where the authority of the law is so directly challenged.



Correctional officers are also exposed daily to danger as they enforce the law, especially because inmates are both a dangerous and a vulnerable population. In the view of some commentators, for those violent inmates already serving lengthy prison terms or a life sentence who pose a risk to other inmates, the death penalty may be the only viable punishment. At the same time, however, the difficulty of reliably proving guilt in many prison murder cases may make many of them appropriate cases for the “lingering doubt” instruction discussed in Recommendation 26 of this report.<sup>51</sup>

- Multiple Murders

A multiple murderer has by definition inflicted a greater social harm than has someone who has murdered one person in the same kind of incident. Although the loss to society from any unlawful killing is great, the death of many — as, for example, in the Oklahoma City bombing<sup>52</sup> — surely merits special condemnation. There are, of course, a wide range of murders between the loss of a single victim and the killing of masses of people. This Committee concludes that the death of two or more victims is a sufficiently greater evil than the death of one individual, and that a jury should have the option, given other case-specific circumstances, to consider capital punishment.

A repeat first-degree murderer’s new killing raises similar concerns, and also supports a belief that he or she will kill again. Society’s future safety thus weighs heavily in the balance.

However, this death eligibility factor is tightly linked to traditional justifications for heightened criminal responsibility. It is not enough that multiple victims die. The defendant must have desired that result, or have known that he or she would cause death or create a strong probability of death or great bodily harm to more than one individual. This embrace of a serious mental state requirement maintains the link between the potential imposition of the death penalty and the goal of limiting it to the worst crimes and offenders.

- Murders Involving Torture

Moral evil is undeserved harm done by one person against another, such as a fleeing felon’s knowingly running down a child who might delay the felon’s escape.<sup>53</sup> “Evil” is not necessarily a religious concept but also routinely plays a role in secular justifications for criminal responsibility.<sup>54</sup> It is a term that captures the ordinary person’s outrage when grave wrongs are done. It need not mean that a person is entirely, irredeemably evil; the term can condemn the nature of his or her acts or character aspects that are most reprehensible. Evil comes in different forms and degrees and, in a complex world, actions and persons are often likely to embody aspects of both good and evil.<sup>55</sup> But there is an



extreme kind of evil — one perhaps misleadingly called “pure evil” — that demarcates the zone of gravest wrongdoing.<sup>56</sup>

If capital punishment is truly to be reserved for the worst of the worst, we can offer society significant confidence that it is achieving that goal by limiting death eligibility as much as possible to cases involving pure evil. Executing someone for any lesser offense undermines this notion of evil. Ordinarily, only the truly horrific killing should merit death. In this way, we can promote the rational grading of moral responsibility required to avoid the arbitrary and capricious imposition of death.

Pure evil means deriving pleasure from another’s pain.<sup>57</sup> The purely evil killer is a sadist for whom pain is more than a special and total kind of domination. Severe pain can cause the sufferer to prefer death to life.<sup>58</sup> Even when this is not so, pain lessens life’s value. The sadist therefore succeeds in inverting the victim’s deepest values. This is a profound and heady power over another.<sup>59</sup> It debases another human being completely, affronts the very value of life itself, and fundamentally challenges the idea of equal respect for all human beings that is the cornerstone of American constitutionalism.<sup>60</sup> Nor, as defined by this Committee, is “torture” a vague term, for it requires infliction of extreme physical pain and doing so for a prolonged period of time while relishing the victim’s suffering, or taking pleasure in the victim’s debasement. This sort of extreme, unusual conduct is not beyond a jury’s ability to identify.

- Murders That Affect the Judicial System

This eligibility factor is justified by concerns analogous to those involved in murdering a peace officer. Efforts to obstruct the operation of the criminal justice system threaten the system’s security and legitimacy and merit the strongest of responses. The Ryan Commission, in embracing a similar aggravator, explained this point concisely:

The intention of the recommendation is . . . [that of] making a murder of anyone connected with the system, whether as a witness, juror, judge, prosecutor, defense attorney or investigator, eligible for the death penalty. This adjustment reflects an analysis of the eligibility factors from other states and advances the goal of insuring the integrity of the judicial system. Murders which seek to obstruct justice or impede the investigation or prosecution of a crime affect the underlying integrity of the system in a serious way. As important, for a defendant or suspect facing the prospect of a prison term for much or all of his life, a death sentence will often represent the only significant enhancement in punishment beyond that which the offender already faces.<sup>61</sup>

## **RECOMMENDATION 6: Felony Murder Should be Excluded as the Basis for Death Penalty Eligibility.**

The five eligibility factors in Recommendation 5, which are intended to be an exhaustive list of the only factors that may render a murderer eligible for capital punishment, do not include felony murder as a basis for imposing the death penalty. To ensure that the death penalty is reserved for the most culpable offenders and to make the imposition of the death penalty more proportional, jurisdictions that nevertheless choose to go beyond these five eligibility factors should still exclude from death eligibility those cases in which eligibility is based solely upon felony murder. Any jurisdiction that chooses to retain felony murder as a death penalty eligibility criterion should not permit using felony murder as an aggravating circumstance. (2005 Update.)

## **COMMENTARY**

### **Felony Murder as an Eligibility Factor**

This commentary has focused largely on explaining why the Committee chose to include the five eligibility criteria noted above and only those criteria. The widespread use of the felony murder doctrine in capital cases, and the special risks that the doctrine creates for achieving a fair system of capital punishment, however, require a separate discussion of why the Committee chose to exclude felony murder as an eligibility factor. Moreover, the flaws in that doctrine require a special caution against its use as an eligibility criterion for capital murder in any jurisdictions that might, despite the recommendations in this Report, choose to have more than the five eligibility criteria that this Committee recommends.

Used as a means of establishing guilt on a murder charge, the felony murder doctrine relieves the prosecution of its burden of proving that the defendant had a culpable mental state with respect to death. Rephrased, felony murder is a strict liability doctrine. Although the state must prove that the defendant had the mental state required for the underlying felony, no culpable mental state as to death — no showing of an intentional, reckless, or even negligent killing — is required. Using a felony murder theory, the prosecution may achieve a murder conviction if it establishes only (a) that a death occurred and (b) that the death occurred during the course of a felony in which the defendant participated. Although some jurisdictions impose some additional technical limitations that somewhat limit the felony murder rule's application, the doctrine remains one of strict liability primarily requiring proof of only these two elements. In many jurisdictions, these elements eliminate even the necessity of the prosecution's proving that the defendant caused the death.

The felony murder theory has been much criticized because it circumvents *mens rea* (state of mind) and causation requirements. Nevertheless, it remains an extensively used method for obtaining murder convictions. According to a recent article, it has been abolished by statute or judicial decision in only three states and remains in force in the others.<sup>62</sup> This Committee takes no position on the wisdom of retaining the felony murder rule as one means for obtaining a murder conviction.

However, the Committee does condemn using the strict liability felony murder doctrine as an eligibility criterion for the death penalty. The death penalty must be reserved for the “worst of the worst,” the most culpable of offenders, such as cold-blooded executioners or multiple murderers. As discussed above, limiting the death penalty better promotes the purpose of proportional punishment while reducing the risks of error.

Death penalty eligibility criteria must thus narrow the range of first-degree murder convictions that are potentially subject to the death penalty. The felony murder rule undermines this goal. As one commentator explains:

The felony murder rule disregards the normal rules of criminal culpability and provides homicide liability equally for both the deliberate rapist/killer and the robber whose victim dies of a heart attack, as well as for the robber’s accomplice who is absent from the scene of the crime.<sup>63</sup>

Indeed, in some jurisdictions, the felony murder rule can make the defendant guilty of murder when a law enforcement officer or victim mistakenly kills a third person or an accomplice during the felony or even when the defendant, while fleeing the felony, is involved in a traffic accident that results in death. The rule applies even when the felon extracts a promise from a co-felon to hurt no one, but the co-felon shoots the victim anyway. The rule equates the felon for whom a killing was unforeseeable with the cold-blooded murderer.<sup>64</sup>

Scott Turow, a member of this Committee and of the Illinois Commission on Capital Punishment, likewise explains the irrationality of using the felony murder rule as a death penalty eligibility criterion:

[O]ne of the original eligibility factors, felony-murder, has ballooned . . . . Prosecutors love felony-murder eligibility. For one thing, it provides an avenue to a capital sentence for a violent criminal with a long record whose crime might not otherwise qualify. It allows prosecutors to sentence defendants, rather than offenses. Beyond that, felony-murder is often easier to prove than other qualification factors. The evidence that a defendant was committing an armed robbery is far more clear-cut than whether he was attempting to torture his victim with a pistol-

whipping. Thus, a full 60 percent of the prisoners on Illinois' death row had arrived there thanks to felony-murder eligibility, albeit often in the company of more particular criteria.

Yet felony-murder always struck me as a logical mess. Why should a murder in the course of a rape be death-eligible, if the same defendant could rape a woman one day and murder her for laughs the next without facing death? Does timing really make the crime any graver? More important, felony-murder by its nature aims at crimes that started out with another purpose. Aren't long-contemplated murders more aggravated than murders committed on impulse . . . ?<sup>65</sup>

Although there is wide jurisdictional variation concerning the elements of the felony murder doctrine, its scope, and when it may serve as a death penalty eligibility criterion, at its core the doctrine remains one of strict liability that sweeps its net too widely. One study found that felony murder indictments were 40 percent of all first-degree (potentially death eligible) murder indictments nationwide.<sup>66</sup> According to this study, "[t]he case of felony murderers is [therefore] just too large to serve as a way to limit meaningfully the reach of the death penalty."<sup>67</sup>

Moreover, the application of the felony murder rule in capital cases likely has a racially disparate impact. In a study of Dade County, Florida, for example, although three-quarters of all first-degree murder indictments were intra-racial, 45 percent of felony murders were inter-racial, almost all involving white victims and black defendants.<sup>68</sup> Eighty-four percent of all Dade County's indictments against black defendants for murdering whites were under the felony murder rule.<sup>69</sup> Similar results have been obtained in other statistical studies, and some studies go further, demonstrating that a "black defendant who killed a white victim during a felony is the defendant most likely to receive the death penalty."<sup>70</sup>

The felony murder rule also promotes other irrational results. Thus someone who purposely kills in anger, but has not committed an additional, underlying felony, might not face the death penalty, while another who had no intention whatsoever to kill but does so accidentally during a felony, may nevertheless face death. Yet the former killing is surely more egregious than the latter.

The United States Supreme Court has held that the death penalty may constitutionally be imposed on felony murderers so long as two caveats are met: (a) the defendant was a major participant in the felony and (b) the defendant manifested at least "reckless indifference to human life."<sup>71</sup> However, this case-by-case analysis permits execution based on vague, highly subjective judgments about culpability, again creating a danger of overbroad, random, arbitrary, and capricious application of the death penalty. The large and ever-growing number of felonies that may be the predicate for a felony murder prosecu-

tion punishable by death creates a “statutory breadth [that] vests prosecutors with great discretion about whether to seek the death penalty, and experience seems to teach that uncabined discretion, exercised by . . . [many] different State’s Attorneys will inevitably lead to unfair results.”<sup>72</sup>

For reasons like these, this Committee originally recommended excluding from death eligibility “those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.” Upon reflection, however, the Committee concludes that even this limitation is insufficient. It is likely, according to leading commentators, that most felony murderers do intentionally kill.<sup>73</sup> A pickpocket might, in fear and panic, kill a resisting victim in the heat of passion — a reprehensible killing but one traditionally deemed second-degree murder (absent the felony murder rule) and thus not death eligible. The panicked killing is simply not as culpable as the cold-blooded, premeditated kind. Moreover, under the Committee’s original recommendation, even certain unintentional killers—such as those who are extremely reckless toward life while committing a felony—may be death eligible because they, and not an accomplice, performed the act causing death—that is, “committed the killing” themselves. Yet such recklessness on its own (apart from the felony murder rule) is likewise traditionally understood as insufficiently culpable to merit death. The Ryan Commission made a similar point:

Under this eligibility factor [killing “in the course of” a felony], all that is required for death eligibility is that the defendant personally participate (or be legally accountable for) conduct which he knows will cause death or which he should know will cause death, and that the activity is committed in the course of one of the enumerated felonies. This means that a defendant who robs a store, and who commits a single murder during the course of a robbery, can be sentenced to death even if it is a first offense and there is no substantial criminal record. While such a defendant should be subject to a serious punishment for the taking of a life, this type of offense differs substantially from a situation where the defendant has killed multiple times. Although making judgments which differentiate between murders may be difficult, it must be done to insure that the capital sentencing process sufficiently narrows the class of those eligible for the death penalty.<sup>74</sup>

Some killings during a felony may properly be death eligible, but other eligibility criteria are more likely to winnow the deserving wheat from the undeserving chaff than does the blunt instrument of the felony murder doctrine. The Committee’s earlier recommendation—a recommendation that might fairly be read as rejecting death eligibility only for certain types of felony murders—is thus too narrow in its scope. The Committee’s more broadly stated commentary to its original recommendation more accurately captures the Committee’s current position condemning all felony murder convictions as the sole basis for death eligibility:

[The felony murder rule] does not provide reliable guidance for the constitutionally mandated effort to reserve the death penalty for the most heinous crimes . . . . Such guidance is best provided by a categorical rule excluding [all] felony murder defendants from eligibility for capital punishment [on that ground alone]. Anything less than categorical exclusion provides too great an opportunity for the unconstitutionally overbroad, random, arbitrary, and capricious application of the death penalty.<sup>75</sup>

### **Felony Murder as an Aggravating Factor (the “Double Bump-Up”)**

The Committee recognizes that some jurisdictions may be reluctant to impose a categorical bar on death eligibility based solely upon felony murder. Such reluctance might stem from a concern that categorical rules can fail adequately to anticipate unusual cases, a hesitancy to change traditional procedures too abruptly, or the simple limitations of practical politics. The Committee believes that such concerns are unwarranted. The unusual felony murder killing that merits a death sentence would necessarily be one where another eligibility criterion is available. Strict liability standing alone — the core of the felony murder rule — never justifies a death sentence. Moreover, “traditions” that are blatantly unfair or reflect outmoded thinking about the purposes of punishment should not survive. A longstanding wrong is a wrong nonetheless. Finally, research suggests that community members who understand the vices and inefficiencies of the felony murder rule in this context will accept death eligibility limitations so that only the truly guilty, who are also the most heinous of offenders, are punished.<sup>76</sup>

Yet, should some jurisdictions disagree with this position, it is important to acknowledge that there is an alternative option that would still significantly improve current law. Not everyone who is death eligible must be sentenced to death. To the contrary, most states understand their constitutional mandate, as expressed in United States Supreme Court decisions, as specifying for the fact finder, whether a jury or the court, what aggravating circumstances (at least one of which must be present) make the death eligible also death-worthy.<sup>77</sup> Even then, the fact finder must decide whether mitigating circumstances, primarily the personal characteristics and history of the offender, warrant leniency, even in the face of the aggravating factors.<sup>78</sup> As one commentator has noted, “death eligibility is a relatively coarse-grained analysis designed to filter out the least heinous cases.”<sup>79</sup> Death eligibility therefore means only that “a death sentence is a permissible option” if death-worthiness is found.<sup>80</sup> But only if “the sentencer, after hearing all aggravating and mitigating evidence, imposes a death sentence, [has] the defendant...been found death-worthy.”<sup>81</sup> The unforeseen escalation of a felony into a killing is one central example of when death eligibility should not fairly mean a death sentence.<sup>82</sup> Many jurisdictions, however, use felony murder both as an eligibility criterion and as an aggravating factor. In effect, the felony murder doctrine provides a “double bump-up” — first, bumping a non-death eligible case up to

the level of death eligibility, and second, bumping up a death eligible case to one for which a death sentence may actually be imposed. The jury is not required to sentence a felony murderer to death, but it may choose to do so.

The double bump-up's conflating of death eligibility and death aggravation undermines the constitutional goal of limiting imposition of the death penalty to a narrow class of the most culpable offenders. No other death eligibility criterion automatically authorizes death imposition. Eligibility gets a felon past the death house door, but the switch should not be pulled without proof of an independent aggravating factor. Imposing on a strict liability doctrine — felony murder — the weight of both death eligibility and an aggravating circumstance is to ask it to carry a burden of establishing extreme culpability that it cannot and should not bear.

## **RECOMMENDATION 7: Persons with Severe Mental Disorders Should be Excluded from Death Penalty Eligibility. Jurisdictions Should Establish Procedures to Determine Mental Retardation.**

**Persons with severe mental disorders whose capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct, or to conform their conduct to the requirements of law, was significantly impaired at the time of the offense should be excluded from death eligibility. [0](2005 Update.)**

## **COMMENTARY**

### **Persons with Mental Retardation**

In *Atkins v. Virginia*, the Supreme Court found sufficient evidence of a national consensus against the execution of persons with mental retardation to justify a categorical rule prohibiting such executions.<sup>83</sup> Approximately 2 1/2 percent of the U.S. population has mental retardation, and there is no evidence that persons with mental retardation commit crimes more frequently than do those in the general population. Yet these individuals are believed to make up a substantial minority of those on death row.<sup>84</sup> Since the death penalty was reinstated in 1976, an estimated thirty-five people with mental retardation have been executed in the United States.<sup>85</sup> The Supreme Court having now held that such executions violate the Eighth Amendment's Cruel and Unusual Punishments Clause, it remains for every jurisdiction that employs the death penalty to ensure that no person with mental retardation will be mistakenly subjected to it.

The death penalty is meant to be reserved for the most morally culpable offenders. Culpability is defined as personal responsibility or moral guilt. The overwhelming number of persons with mental retardation do not fall into the "most morally culpable" category,



due to their impairment. Persons with mental retardation suffer from substantial disabilities affecting moral reasoning, cognitive functioning, control of impulsivity, and understanding of the basic relationship between cause and effect. These disabilities severely hamper their ability to act with the level of moral culpability that would justify imposition of a death sentence. These concerns are not likely to be given due consideration by juries in mitigation for a variety of reasons, including inadequate representation, lack of resources for expert testimony on the effects of mental retardation, jury fear of dangerousness, and jury misunderstanding of the true meaning of a life sentence.

The risk of executing defendants with mental retardation who do not possess the required level of moral culpability is especially high when the evidence of mental retardation is commingled with evidence of aggravating circumstances, and is only one factor taken into account in reaching a discretionary sentencing judgment. In light of these and other concerns, the Supreme Court has concluded that state statutes must exclude all defendants with mental retardation from eligibility for the death penalty to help ensure that all who are sentenced to death deserve such a sentence.<sup>86</sup>

Although *Atkins* bars death sentences for people with mental retardation, the Supreme Court declined to define mental retardation or to specify the procedures (e.g., the burden of proof) required for making these determinations. State statutes vary significantly in both respects. It is imperative that the states establish procedures that can assure a reliable adjudication on the issue of mental retardation, and the best way to do that is to require a pretrial determination by the judge.<sup>87</sup>

### **Persons with Severe Mental Disorders**

As noted above, the U.S. Supreme Court's decision in *Atkins v. Virginia* reflects a concern that the ordinary process of capital adjudication does not prevent persons with severely diminished responsibility due to mental retardation from being sentenced to death and thereby being punished in a manner grossly disproportionate to their culpability.<sup>88</sup> Capital sentencing practice now presents an unacceptable risk of executing defendants with mental retardation who lack a morally sufficient level of culpability to deserve the ultimate punishment. The remedy adopted by the Supreme Court in *Atkins* was to preclude death sentences for defendants diagnosed with mental retardation. This categorical remedy was based on the judgment that virtually all defendants with mental retardation lack the morally requisite capacities for capital punishment.

A systematic risk of disproportionate punishment also arises in cases involving defendants with severe mental illness. Even though defendants with mental illness are entitled to introduce mental health evidence in mitigation of sentence, commentators on capital sentencing have often observed that juries tend to devalue undisputed and strong evidence of diminished responsibility in the face of strong evidence in aggravation.<sup>89</sup>



Indeed, such evidence is often a double-edged sword, tending to show both impaired capacity as well as future dangerousness.<sup>90</sup>

As the Supreme Court observed in *Zant v. Stephens*, treating evidence of mental illness as an aggravating factor would violate the due process clause:

[In this case, Georgia did not attach] the “aggravating” label to . . . conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant’s mental illness. [citation omitted]<sup>91</sup> If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury’s decision to impose death be set aside.<sup>92</sup>

Similarly, one of the problems with the Texas capital sentencing statute that has been before the Court repeatedly is that juries were instructed for three decades to consider the aggravating force of the evidence (in proving future dangerousness) without being told to consider its potentially mitigating weight.<sup>93</sup>

Strong evidence of diminished responsibility due to mental illness should preclude a death sentence and should not be weighed against evidence in aggravation. The core rationale for precluding death sentences for defendants with mental retardation is equally applicable to defendants with severe mental illness. However, the purely diagnostic exclusion utilized in *Atkins* is not a plausible approach in dealing with mental illness. Even among persons with major mental disorders, such as schizophrenia, symptoms vary widely in severity, as does the impact of the disorder on the person’s behavior. Thus, a mere diagnosis of a major mental disorder does not identify a narrow class of cases in which a death sentence would virtually always be disproportionate to the offenders’ culpability. Instead, the category must be further narrowed to include only those defendants whose severe mental disorders are characterized by significant impairments of responsibility-related capacities.

The task of defining criteria of diminished responsibility must start with the criteria for the insanity defense — the goal is to specify a degree of impairment that significantly reduces responsibility even though it does not foreclose conviction and punishment. At a minimum, the existence of psychotic symptoms at the time of the offense (*i.e.*, delusions, hallucinations or other significant impairments of the defendant’s perception or understanding of reality or capacity for rational judgment) should preclude a death sentence because any offender who was so grossly disturbed lacked the requisite level of responsibility, even if the precise criteria required for a finding of legal insanity were not met. Beyond the clear-cut cases of psychotic symptoms, the most widely accepted formula for defining diminished responsibility is found in the capital sentencing provisions in the Model Penal Code. Section 210.6 (4)(g) includes among mitigating circumstances the following:

At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

This provision, which appears in the capital sentencing laws of a great majority of death penalty states, was designed to identify conditions of strong mitigation that should be balanced against aggravating circumstances. Because the task at hand is to identify an exclusionary criterion, the best approach is to tighten and narrow the Model Penal Code language to require a significant impairment of responsibility-related capacities resulting from severe mental disorder. Impairments associated with other disorders or with intoxication should not be given preclusive force, although they should continue to be taken into account in determining the suitability of a death sentence.

The proposed exclusionary provision can be accompanied by a sentence making it explicit that the class of eligible disorders does not include disorders manifested primarily by repeated criminal conduct or the acute effects of voluntary intoxication. It would then read:

Defendants shall 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 to appreciate the nature, consequences, or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct, or to conform their conduct to the requirements of 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.<sup>94</sup>

## **Chapter II Conclusion**

The death penalty for individuals and cases outside the categories described above creates an unacceptably high likelihood of singling out those who do not deserve this most serious and final punishment. At the same time, allowing executions in these cases does little to advance the goals of capital punishment.

As the Supreme Court has repeatedly emphasized since it permitted the reinstatement of capital punishment in *Gregg v. Georgia*, statutory schemes regulating the death penalty, in order to be constitutional, must guide the states so that the penalty is not meted out in an arbitrary and capricious manner, and so that it is reserved for the most heinous and serious crimes. The Committee's recommended limits on death penalty eligibility are necessary because the usual approach, which permits the jury to consider defendants' arguments in mitigation, fails to adequately address the serious risks, for certain categories of defendants, of error and arbitrary and capricious results.

Because these risks cannot be adequately addressed once these defendants are charged with a capital crime, guidance must come, in the first instance, in the form of statutory rules meaningfully narrowing the class of death eligible offenders. For persons with mental retardation or severe mental disorders, as with those who were juveniles at the time the crimes were committed, the integrity of the system is threatened by the defendants' difficulties in navigating the system and assisting in their own defense. Moreover, asking the jury to weigh the concerns set forth above against the severity of the defendant's crime and other factors does not sufficiently address the problem of arbitrariness.

The Committee's list of eligibility factors is short, offers structured guidelines to a jury, and avoids the ambiguities and doctrines (such as felony murder, as discussed above) most likely to reflect racial bias or worsen racial disparities. We recommend that legislators limit aggravators entirely to this list of factors to avoid the "significant burdens upon the criminal justice system" that have resulted "as prosecutors and courts [have] struggle[d] to fairly apply the ever evolving list of factors making a defendant eligible for the death penalty. The resulting capital prosecutions have over-taxed the resources of the criminal justice system. More important, the current system reflects a degree of arbitrariness"<sup>95</sup> and disproportion in who gets prosecuted for capital murder. As a consequence, the system suffers from otherwise avoidable inaccuracy, multiple appeals, and delays. Such a system works for no one — not the public, not the victims and their families, and not the defendants.

The members of this Committee hope that by eliminating the felony murder rule as a death eligibility criterion, excluding those with severe mental disorders from death eligibility, and adopting only the five eligibility factors set forth above, jurisdictions will restore a sense of rationality to the capital punishment system.

To the extent that the Committee's recommended limits on death penalty eligibility have not already been addressed by the Supreme Court, they are best addressed in advance, by statute. These recommendations are not intended to bar imposition of any sentence except death, and they contemplate that every state will offer the sentencing option of life imprisonment without parole.



# **CHAPTER III: EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)**

## **SUMMARY**

8. Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.
9. The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as “truth in sentencing.”

## **RECOMMENDATION 8: Ensure the Availability of a Life Sentence without Parole.**

**In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.**

## **COMMENTARY**

At sentencing in a capital case, whether the sentence is to be determined by the jury or the court, the option of a sentence of life in prison without the possibility of parole (LWOP) should be available. Although a minority of jurisdictions permit the court to decide the sentence, this recommendation will focus on the jury as the sentencing authority. The points made should be generally applicable to judicial sentencing, although the empirical research has involved jurors.

Many legislatures have recognized the merits of providing this appropriate sentencing option. Over the last decade, most jurisdictions have authorized a sentence of LWOP in capital cases. Indeed, today only three of the thirty-eight states that authorize the death penalty fail to provide the LWOP option. It should be available in all states and for all offenses for which a death sentence may be imposed.

### EDITOR'S NOTE

Since 2001, when *Mandatory Justice* was first published, the number of states that authorize the death penalty and do not provide the LWOP option has dropped to one—only New Mexico continues to impose the death penalty without the LWOP option.<sup>E1</sup>

Texas has just enacted a bill that gives juries in death penalty cases the option of sentencing a defendant to life without the possibility of parole. The bill prohibits the option of life with parole.<sup>E2</sup>

Because it acts on behalf of the community and makes the difficult judgment about the appropriate sentence to satisfy the goals of retribution, incapacitation, and deterrence, the jury should have the LWOP option available. Without that option, a sentence of death by the jury may be the consequence of a “false and forced choice” that is both an irrational and an erroneous response to its judgment about what justice demands and what constitutes an appropriate sentence in the case. The jury’s reasoned judgment may be that death is not appropriate, but absent the LWOP option, it may be the best of several bad alternatives.<sup>1</sup>

Empirical evidence demonstrates that the absence of the LWOP option produces pernicious results because juries fear that the availability of parole will subvert any non-death sentence they recommend. In the absence of the LWOP option, a desire to incapacitate the defendant can result in a death sentence to protect society from future potential dangerousness upon release, particularly for youthful defendants, even though LWOP would have better fit the jury’s reasoned judgment as to the correct sentence in the case. Indeed, when incapacitation is the jury’s goal, not having the option of LWOP pushes the jury into a decision to sentence the defendant to death by default because the sentence that the jury finds appropriate cannot be imposed.

While the impact of the absence of LWOP is less stark when retribution is the issue, jurors’ judgments about appropriate retribution may also require imprisonment for the perpetrator’s entire life. Here, too, the absence of LWOP requires that they impose a death sentence that, in their judgment, would otherwise be unnecessary and inappropriate. Artificially increasing the number of death sentences should not be a goal of any statutory system, but requiring jurors to make this “false and forced choice” can have

that effect. It effectively takes from the jury the opportunity to speak accurately and effectively as the conscience of the community and improperly tilts the balance in favor of a sentence that the jury may believe to be excessive.

Imposing death sentences is not an independent goal of our system, and coercing juries into imposing such a sentence should not be the design of any legislative scheme. Instead, appropriate sentences that meet the facts of the case and the demands of society, as determined by jury or judge, are the goal. In this light, it is notable that when Indiana, Georgia, and Virginia introduced LWOP during the past decade, the number of death sentences imposed declined sharply in each state.<sup>2</sup>

LWOP will also give the survivors finality at an earlier point than will a death sentence. Sentences of death are overturned with substantial frequency, and even when affirmed on appeal, they are not carried out for some years. Any reasonably foreseeable change in death penalty law, no matter how restrictive it is, will in all likelihood not eliminate delays and reversals because of errors in imposition of the death sentence. By contrast, except in the relatively rare situation that the conviction itself is reversed, LWOP sentences are virtually immune from attack on appeal, and therefore become final with greater certainty and speed than do sentences of death.

In enacting legislation that permits imposition of LWOP, the legislature should be attentive to a large body of empirical research that reveals societal skepticism that murderers, even capital murderers, will in fact serve long prison sentences. Actual sentencing practices demonstrate that such skepticism is unfounded, but we must confront this attitude, which seeps into juror expectations. To the extent possible, legislatures should remove all possible avenues for early release from the LWOP alternative. The executive's authority to pardon or commute sentences is generally constitutionally based, and typically may not be eliminated by legislation. However, all other possible avenues of early release should be eliminated so that juror skepticism can be reduced to the greatest extent possible.

Even more important, because juries operate under deeply ingrained misapprehensions that the time served on any non-death sentence will be relatively short, they should be provided with authoritative data on the time served by death eligible murderers not sentenced to death, and by persons sentenced to life without parole. (Such data, when provided to the jury, should help to dispel pernicious and powerful myths surrounding the true length of a life in prison sentence.) Speaking to and correcting these attitudes is at the base of our separate "truth in sentencing" recommendation.

## **RECOMMENDATION 9: The Court Should Explain the Meaning of a Life Sentence without Parole (Truth in Sentencing).**

**At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.**

### **COMMENTARY**

By far one of the most powerful influences on a capital sentencing jury's decision about whether the defendant should be sentenced to death or imprisonment is its perception of whether, if imprisonment is chosen, the defendant will be released from prison, and if so, how soon. Empirical data demonstrate that, in the absence of information on this issue, juries exhibit significant confusion about whether a sentence of life imprisonment without parole really means that the defendant will never be released. This confusion operates against the defendant. In both "life without parole" situations and all other sentencing situations, jurors significantly underestimate the amount of time defendants will remain in prison. Their mistaken beliefs about how long defendants will remain in prison lead them to impose death sentences in many cases in which they would opt for life sentences if they were better informed.<sup>3</sup>

Not only does confusion about sentencing options tend to increase the number of death sentences, it also exacerbates an already existing tilt toward imposition of death. Empirical evidence documents that jurors at the beginning of the penalty phase, and before hearing any penalty phase evidence at all, show a significant imbalance in favor of imposing a death sentence.<sup>4</sup>

Capital defendants must be permitted to counteract misconceptions that further exacerbate the tilt toward imposing death. In *Eddings v. Oklahoma*, the Supreme Court noted that the Eighth Amendment gives more latitude to the capital defendant than to the government, in that it permits the defendant to introduce unlimited mitigation evidence so that a jury can choose to be merciful for any reason or no reason at all.<sup>5</sup>

The jury's concern with the issue of sentencing options is entirely appropriate under current law. The Supreme Court has approved the jury's consideration, during the penalty phase, of the defendant's future dangerousness to society.<sup>6</sup> In addition, the question of the length or nature of a defendant's sentence is highly relevant to the jury's consideration of which punishment provides sufficient retribution under the particular circumstances before it.<sup>7</sup> In *Simmons v. South Carolina*, the Supreme Court recognized



that a jury that incorrectly believed that a defendant could be released on parole if not executed might premise its sentencing decision on a false choice.<sup>8</sup> The majority opinion addressed this problem only in the limited circumstances in which the prosecutor argued for a death sentence based on future dangerousness, holding that the due process clause required the jury to be informed of a defendant's parole ineligibility in such circumstances.<sup>9</sup>

In circumstances not covered by *Simmons* (those in which the prosecutor does not explicitly rest an argument on the defendant's future dangerousness), some states continue to bar jury instructions regarding parole in capital cases.<sup>10</sup> Even those that permit such instructions do not mandate them, and generally do not ensure that juries are provided with full and understandable information. Yet jurors are greatly concerned about and influenced by parole issues even in cases in which the prosecutor does not explicitly argue the defendant's dangerousness. Without accurate information on the issue, jurors simply tend to make unsupported and inaccurate assumptions, often based on misleading media portrayals or other unreliable sources.

There is no good reason to deny jurors accurate information on this germane and crucial issue. In the past, refusals to tell juries about parole have often been justified as a way of protecting defendants (on the assumption that juries may give greater sentences if they know about the possibility of parole). In the capital context, ignorance of parole not only generally does not protect defendants, but it also increases their chances of being sentenced to death based on a false choice. Many states provide such information in non-capital cases, and there is no evidence that the task is unduly difficult. Capital juries have a constitutional duty to make a reasoned moral decision on whether a death sentence is appropriate; this decision must be unencumbered by ignorance and supported by information sufficient and relevant for reliable and rational decision making.<sup>11</sup> Full disclosure on the available parole options will help them discharge this duty. However, statements that tend to relieve jurors of their sense of responsibility for their verdict will instead deflect the jury from its duty.<sup>12</sup>

Similarly, statements involving speculative or highly unlikely sentencing outcomes, such as grants of clemency, will defeat the purpose of properly and accurately educating the jury.



## CHAPTER IV:

# SAFEGUARDING RACIAL FAIRNESS

### SUMMARY

10. All jurisdictions that impose the death penalty should create mechanisms to help ensure that the death penalty is not imposed in a racially discriminatory manner.

### RECOMMENDATION 10: Jurisdictions Should Implement Comprehensive Programs to Safeguard Racial Fairness.

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component — perhaps the most important—is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision making process.

### COMMENTARY

While the precise facts are in dispute, what cannot be disputed is that racial disparities and the potential for racial discrimination hang over our nation's capital punishment system and raise questions about its fairness. On the one hand, we have the 1990 report of the independent General Accounting Office that consistently found racial disparities in study after study of the death penalty in various jurisdictions. On the other hand, we have the Supreme Court's decision in *McCleskey v. Kemp*<sup>1</sup> that found statistics from a study conducted by Professor David Baldus (used to demonstrate the operation of racial discrimination in Georgia's system) insufficient to prove a constitutional claim of inten-

tional discrimination against McCleskey. Yet the Baldus study did show that statewide racial disparities in sentencing could not plausibly be explained by any of more than 200 legally relevant variables, and that systemic racial bias cannot be addressed adequately on a case-by-case basis. To some, the certainty of racial discrimination is the most obvious reason that our nation's capital punishment system is inherently flawed, indeed, illegitimate. To others, racial discrimination is either an unproven feature of the capital punishment system or a feature that could be corrected by the odd remedy, that no one supports, of executing more defendants who killed African Americans.

We believe the problem is both serious and obvious from the point of view of the public and its growing lack of confidence in the fairness of the death penalty system, as indicated by numerous recent polls. For example, a September 2000 poll showed that 64 percent of Americans supported a moratorium on executions until the issue of the fairness of capital punishment could be resolved, while a June 2000 poll indicated that 80 percent of the public believed that an innocent person has been executed in the United States in the past five years.<sup>2</sup> If executions are to be part of our justice system, they must be undertaken in an even-handed fashion. Moreover, the public must be assured that race is never the deciding factor in who will live and who will die.

#### EDITOR'S NOTE

Updated polling results and statistics regarding public opinion about the death penalty are available at the Death Penalty Information Center's website, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

While we believe the problem is of unmistakable importance, we acknowledge that a recommendation that sets forth a single remedy to this complex problem is not in view. Instead, we recommend vigilance and experimentation. Specifically, we recommend two general approaches to guide this experimentation in combating the possibility of racial discrimination. Our federal system, with its often noted "laboratory" aspects, holds promise for developing and confirming effective solutions.

The first, and we believe the most important, of these remedial steps is the rigorous gathering of data on the operation of the jurisdiction's capital punishment system and the role or potential role of racial discrimination in it. The country, led by the United States Department of Justice and a number of state governments, is engaged in a similar process with regard to the racial profiling of motorists. We do not wish to dictate what data each jurisdiction should gather; many of the required elements of data-gathering are clear. How one gets at and ferrets out racial discrimination takes skill, judgment, and know-how. Each jurisdiction should assemble its best team of experts, to include prosecutors, defense counsel, and neutral experts. The goal is the best and most complete data possible, and, ultimately, the elimination of the specter of possible racial discrimination.

Thus, breadth of expertise and neutrality should be guides to developing research teams and their protocols. The work of such teams in New York and New Jersey are promising guides to how such data-gathering systems should be developed.

For those untutored in criminal justice studies, the call for the gathering of data may seem unnecessary. However, issues of race often are not obvious and are outside the record. The race of a motorist stopped on a highway is not part of the police report if no arrest was made. The race of the jurors dismissed by prosecutors and defense counsel are not shown on the record unless a specific effort is made. The race of defendants whose cases are chosen or not chosen for capital punishment throughout a state and across jurisdictions does not pop up on a computer screen upon a simple request for information. All of this information will exist only because of a call that it be collected, and, in most situations, it will be unavailable unless specific steps are taken for its collection. We cannot eliminate racial discrimination unless we have detailed data, particularly in the modern day when it most likely operates at an unconscious rather than a purposeful level.

Once the data are gathered, jurisdictions should carefully consider and act on the results. If the data show no evidence of racial disparities, then the public can place greater confidence in the fairness and integrity of the jurisdiction's death penalty mechanisms. Conversely, if the data support a conclusion or demonstrate a high likelihood that racial discrimination is affecting the operation of the death penalty system, the legislature should consider enacting appropriate remedial measures.<sup>3</sup>

Our second general recommendation is that jurisdictions seek to ensure that racial minorities are part of every decision making process within the criminal justice system. For example, efforts should be redoubled, through vigorously enforcing *Batson v. Kentucky*<sup>4</sup> and through effective application of fair cross-section requirements to ensure that members of all races are part of grand juries (where grand juries exist) that indict and petit juries that decide guilt and punishment. Racially mixed defense teams are likely to appreciate aspects of the case that single-race teams will not, as are racially mixed prosecutorial teams. Those who decide which cases are to be prosecuted capitally should be racially diverse. Finally, although this cure is generally beyond the scope of any particular entity, a racially diverse judiciary is an important component of the public's perception of racial fairness in the death penalty system.

The process of safeguarding racial fairness in the application of the death penalty and assuring the public that the system operates without racial discrimination is admittedly very challenging. We do not claim that our proposals will accomplish these critical tasks, but we believe they are a reasonable place to begin. Moreover, we believe that it is critical to address the issues of racial neutrality, fairness, and public confidence that racial

discrimination plays no role in the decisions on who should live and who should die through capital punishment. These issues are among the most important confronting the death penalty system, and any set of meaningful reform efforts must confront these questions as forthrightly as possible.<sup>5</sup>

# CHAPTER V:

## ENSURING SYSTEMS FOR PROPORTIONALITY REVIEW

### SUMMARY

11. Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision making process.

### **RECOMMENDATION 11: States Should Implement Procedures to Ensure Proportionate Death Sentences.**

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

### COMMENTARY

The central concerns that inspired the Supreme Court to embark, in *Furman v. Georgia*,<sup>1</sup> on its effort to regulate capital cases were concerns about the arbitrary and unequal application of the death penalty, arising in part from vesting broad discretion in decision makers without providing sufficient guidelines. In *Gregg v. Georgia*,<sup>2</sup> the Court upheld an amended Georgia death penalty statute in large part because it provided for mandatory proportionality review. That is, it provided that the Supreme Court of Georgia

should compare each death sentence with sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. It emphasized the positive effect an appellate review containing a mandatory proportionality check would have on the faulty system, finding that it “serves as a check against the random or arbitrary imposition of the death penalty and substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.” Unfortunately, the Court, in its 1984 decision in *Pulley v. Harris*,<sup>3</sup> backed away from requiring proportionality review under the Eighth Amendment (although it emphasized that capital sentencing systems are still constitutionally required to provide checks on arbitrariness), and most states have ceased to perform it. We are now faced with state systems that vary vastly from one another, but most of which pose almost as great a risk of arbitrary, capricious, and discriminatory application as three decades ago, when the Court called for reform in *Furman v. Georgia*. Adopting some form of proportionality review would go a long way toward addressing this problem, which goes to the heart of the death penalty’s fairness and efficacy.

Proposing a system to ensure proportional sentencing is fraught with problems, as this Committee well recognizes. Such proposals may raise concerns about impeding the exercise of prosecutorial discretion, or about intruding on state prerogatives to shape and enforce local law enforcement priorities and values. The more basic problem is simply in finding the difficult balance between treating like cases alike and also treating each case individually. These are two often conflicting goals of the Supreme Court’s death penalty jurisprudence. Even in the face of these problems, the goal of eradicating arbitrary death sentencing is critically important to the constitutionality and the basic fairness of the death penalty, and should be undertaken in every state with a death penalty.

There are a number of possible ways to institute proportionality review, several of them currently in use in various states.

- One method is for the state supreme court to perform a review that compares the case to other cases in which the death penalty was imposed. For example, the New Jersey Supreme Court addresses the question of whether the penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime.
- Another way, which some commentators, including the National Center for State Courts, have argued is more effective, is for the state supreme court to compare each case, not just with other cases in which the death penalty has been imposed, but with the entire pool of death eligible cases, including those in which the death penalty was not sought. New York, for example, has directed its highest court to develop a comprehensive database of information for all cases involving indictment for first-degree murder and has directed the clerk of the trial court to fill out



a capital case data report in each first-degree murder case, to facilitate such comparisons. Comparison of each case to the pool of all death eligible cases is also the method employed in Georgia and Washington.

- A third approach, advocated by Ninth Circuit Court of Appeals judge Alex Kozinski, among others, would be for states to make a concerted effort to narrow by statute the universe of death eligible cases to those that are especially heinous, premeditated, and unmitigated. Too often, it has been politically expedient for states to keep adding to the list of categories of cases in which the death penalty may be imposed, arguably well beyond those sorts of cases for which the penalty was originally intended. The wide availability of a death-sentencing option leaves too much opportunity for arbitrariness in charging and sentencing.

States may well develop additional approaches, suited to their own particular priorities, circumstances, and resources. What is crucial is that each state develop an effective method, designed to address and, in the best of circumstances, eradicate arbitrary and discriminatory imposition of death sentences.<sup>4</sup>



# **CHAPTER VI: PROTECTING AGAINST WRONGFUL CONVICTIONS AND SENTENCES**

## **SUMMARY**

### **EXCULPATORY AND NEWLY DISCOVERED EVIDENCE; CREDIBLE CLAIMS OF INNOCENCE**

12. Legislation should provide that, notwithstanding any procedural bars or time limitations, exculpatory DNA evidence may be presented at a hearing to determine whether a conviction or death sentence was wrongful, and if so, that any erroneous conviction or sentence be vacated.
13. Where the results of post-conviction DNA testing excludes the defendant or are inconsistent with the prosecution's theory, prosecutors should promptly consent to vacate the conviction, and should not retry (or threaten to retry) the defendant unless convinced that compelling evidence remains of the defendant's guilt beyond a reasonable doubt. (2005 Update.)
14. All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

15. Capital defendants who establish a credible claim of innocence should have access to post-conviction relief, even after all avenues for relief have been exhausted and regardless of whether there is any other legal bar to the claim of factual error. (2005 Update.)

#### **LEARNING FROM WRONGFUL CONVICTIONS AND SENTENCES AND AVOIDING FUTURE WRONGFUL CONVICTIONS AND SENTENCES**

16. All jurisdictions should a) review capital cases in which defendants were exonerated, to identify the causes of the error and to correct systemic flaws, b) adequately fund Capital Case Innocence Projects, c) establish a Capital Case Early Warning Coordinating Council to identify systemic flaws in an effort to avert mistaken convictions before they happen, and d) fund efforts to increase sensitivity to innocence issues in capital cases among students, the police, judges, and the American public. (2005 Update.)

#### **DNA EVIDENCE**

17. DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.
18. Government officials should promptly and readily consent to DNA testing on biological evidence from criminal investigations that remains in their custody. The state should also make evidence available for DNA testing in cases in which defendants convicted of capital crimes have already been executed and post-mortem DNA testing may be probative of guilt or innocence. (2005 Update.)
19. If the government fails to submit DNA profiles from the defendant's or a related case to DNA databanks, the defendant should have the right to petition a court for, and that court should have the power to issue, an order that the government submit the profiles to those databanks. (2005 Update.)

#### **FORENSIC LABORATORIES**

20. The testimony of a prosecution forensic examiner not associated with an accredited forensics laboratory should be excluded from evidence. (2005 Update.)
21. Laboratories should be accredited only when they meet stringent scientific standards. (2005 Update.)
22. Forensics laboratories should audit all death penalty cases when there is reason to believe that an examiner engaged in forensic fraud or an egregious act of forensic negligence in any case (whether capital or not) during the examiner's professional career. (2005 Update.)

**VIDEOTAPING AND RECORDING OF CUSTODIAL INTERROGATIONS**

23. Custodial interrogations of a suspect in a homicide case should be videotaped or digitally video recorded whenever practicable. Recordings should include the entire custodial interrogation process. Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established. Where no recording is practicable, any statements made by the homicide suspect should later be repeated to the suspect and his or her comments recorded. Only a substantial violation of these rules requires suppression at trial of a resulting statement. (2005 Update.)

**EXCULPATORY AND NEWLY DISCOVERED EVIDENCE; CREDIBLE CLAIMS OF INNOCENCE****RECOMMENDATION 12: The Presentation of Exculpatory DNA Evidence Should be Allowed Notwithstanding Procedural Bars.**

If exculpatory evidence is produced by DNA testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

**RECOMMENDATION 13: Prosecutors Should Consent to Vacating a Conviction and/or Sentence When DNA Testing Excludes the Defendant or When the Result is Inconsistent with the Government's Prosecution Theory.**

Where post-conviction DNA testing is performed and excludes the defendant, or otherwise yields a result that is inconsistent with the theory under which he or she was prosecuted, convicted, or sentenced, prosecutors should promptly and readily consent to vacate the conviction and/or sentence. In such cases, prosecutors should neither threaten to retry nor commence retrial proceedings against the defendant, unless, notwithstanding the exculpatory DNA test results, there remains highly credible evidence of the defendant's guilt beyond a reasonable doubt. (2005 Update.)

**RECOMMENDATION 14: Procedural Barriers to the Introduction of Newly Discovered Exculpatory Evidence Should be Lifted.**

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

## **RECOMMENDATION 15: Post-Conviction Review in Cases of Credible Claims of Innocence Should be Provided.**

**Post-conviction relief should be available to review the cases of all capital defendants who establish a credible claim of innocence, even after all traditional appellate and post-conviction avenues have been exhausted and regardless of whether there is any other legal bar to the claim of factual error. (2005 Update.)**

### **EDITOR'S NOTE**

Dramatic advances in the ability to test biological evidence, even since Mandatory Justice was first issued in 2001, underlie the merging of the Committee's original and new recommendations regarding restrictions on the courts' ability to consider newly discovered or newly developed evidence of a wrongful conviction or sentence. The inability to introduce DNA evidence has prompted several bills in state legislatures and in Congress to address this problem. It is important to understand, however, that DNA evidence is only one type of newly discovered evidence that can undermine the reliability of a capital verdict. Thus, while Recommendations 12 and 13 address DNA evidence, Recommendations 14 and 15 are directed to non-biological evidence that supports a claim of innocence or a wrongful conviction or sentence.

## **COMMENTARY (RECOMMENDATIONS 12-15)**

### **Recommendations 12-15 Overview**

The criminal justice system should take note of and learn an appropriate level of humility from the large number of cases where innocence has been proven. Criminal trials and the ensuing convictions have unmistakably been shown to be fallible, even when our criminal justice system operates in good faith and apparent good order. Innocence and unjust conviction are real possibilities, and, with due regard to the interest of finality, the system should be open to additional demonstrations of its errors when those errors stem from the most basic denials of justice — substantive errors in the conviction and sentencing of defendants, including errors in cases that, unless corrected, would have resulted in wrongfully taking a human being's life. In plain English, current law permits a defendant who is innocent of a crime or unworthy of a death sentence to be convicted and sentenced to death, with no opportunity to introduce newly discovered evidence that could change the verdict in the case.<sup>1</sup>

Some commentators have argued that the law has been developing in exactly the wrong direction, encouraging the proliferation of procedural arguments but failing to provide adequate means of raising the central questions of wrongful conviction and sentence, and thus of the ultimate fairness and justice of the outcome.<sup>2</sup>

Ironically, the increasing technicality of *habeas corpus* and other avenues for reviewing a death sentence has not made it any easier to address the central question our justice system should ask in such cases: whether the defendant was wrongly convicted or wrongly sentenced to death. Finding a forum in which to raise a claim of innocence based on newly discovered evidence is often difficult or impossible.<sup>3</sup> Nor does federal *habeas corpus* provide a reliable forum for defendants who were unable to raise their claims in state court. Such claims are very difficult to raise unless coupled with an independent claim of constitutional error.

The increasingly convoluted, technical, and time-consuming process of appealing a death sentence understandably concerns members of the public, lawyers, and scholars alike. The experience with DNA has further demonstrated the inadequacy of our legal procedures for dealing properly with newly developed evidence of innocence. The public's awareness of this defect in our current procedures has only been heightened by the growing use of DNA evidence to exonerate death row inmates, the recent series of exonerations of over a dozen death row inmates in Illinois, and rules like Virginia's "21-day rule," which until recently barred introduction of evidence discovered 21 days or more after the final court decision in a criminal case.<sup>4</sup>

In its 2005-2006 Term, the Supreme Court may address these concerns. In *House v. Bell*,<sup>5</sup> the Court will consider whether Mr. House's new DNA evidence meets the standard required by current law: whether it is more likely than not that no reasonable juror would have convicted him if the evidence had been available at trial. The Court will also consider what standard is required to establish a claim of actual innocence.<sup>6</sup>

### **Eliminating Procedural Bars**

Even under the best of circumstances, new and exculpatory evidence may come to light late in the process. In the Rolando Cruz case in Illinois, for example, it took years before it became clear that another man had confessed to the murder for which Cruz was on death row, and that investigators had perjured themselves when claiming that Cruz himself had confessed.<sup>7</sup> Confessions by the actual perpetrator, other physical evidence, new eyewitnesses, and recantations by existing eyewitnesses are just some of the types of evidence that can materialize late in the process, despite the due diligence of the defense. Ordinary rules regarding time limitations on introduction of newly discovered evidence and for the treatment of evidence showing a wrongful conviction or death sentence are also inadequate to deal with evidence of innocence based on DNA testing. This new type of evidence is based on analysis or re-analysis of evidence that has long been known to exist. Current law does not readily allow, long after trial, admissions of new discoveries of exculpatory evidence based on the development of new scientific tests. It also does not easily accommodate showings of innocence unless the failure to make such proof at trial was the result of some procedural restriction. Existing law is perhaps attuned to the

fear that human witnesses can invent new stories and that their lies are difficult to detect or to distinguish from long-delayed disclosures of the truth. A new scientific examination of existing evidence that can be conclusive is highly unusual, if not entirely unprecedented, in modern law. Not only must the law permit the introduction of new DNA evidence showing innocence, but it must also authorize the court to order a new trial or new sentencing if the defendant shows that the conviction or sentence was erroneous.

It is crucial for each capital defendant to have the opportunity to introduce relevant newly discovered evidence bearing on his or her guilt or sentence. Jurisdictions may certainly impose a requirement that the evidence be introduced within a specified time period after it is discovered, as well as require a showing that it could not have been discovered earlier with due diligence. However, statutes of limitations should not bar introduction of such evidence, whenever it is discovered, if the evidence would more likely than not change the verdict or if it would undermine confidence in the reliability of the sentence. The “more likely than not” standard for introduction of evidence bearing on the verdict strikes an appropriate balance between the interests in preserving the finality of the verdict and in ensuring that convictions are accurate and just. The “undermine confidence in the reliability of the sentence” standard for introduction of evidence bearing on the capital sentence is identical to the standard employed by *Strickland v. Washington*,<sup>8</sup> for determining prejudice arising from ineffective assistance of counsel. It recognizes that due to the many complex variables that affect capital sentencing, it would be unworkable to require a defendant to demonstrate that newly discovered evidence, however relevant and exculpatory, would be likely to change a capital sentence. As current practice under these standards has shown, they are likely to permit introduction of otherwise time-barred evidence only rarely, when the probative value of the evidence clearly outweighs the interest in finality.

To be effective, statutes must create clear exceptions within existing procedural frameworks for such evidence. The statutes must permit the introduction of the new evidence despite otherwise disqualifying time limitations and other procedural bars. Specifically, such a proceeding should not be considered as a petition under 28 U.S.C. §§ 2254-55, or under the Anti-Terrorism and Effective Death Penalty Act. Considering it as such a petition would raise the problem that, ordinarily, successor petitions are barred from being considered, or, if the petition were allowed despite being considered a successor petition, would create the potential problem of fostering new exceptions to the general rule barring such petitions.

Each state has a different set of rules and procedures regarding time limits for introducing new evidence. General reforms should be enacted to expand time limitations to permit introduction of evidence of innocence, and to authorize a new trial and a new sentencing hearing, where the evidence establishes that the conviction or death sentence was erroneous.



## LEARNING FROM WRONGFUL CONVICTIONS AND SENTENCES AND AVOIDING FUTURE WRONGFUL CONVICTIONS AND SENTENCES

### RECOMMENDATION 16: Procedures for Systemic Review of Exonerations and for Avoiding Future Errors Should be Established.

- Jurisdictions should provide mechanisms for the review of capital cases in which defendants were exonerated, for the purpose of identifying the causes of the error and for correcting systemic flaws affecting the accuracy, fairness, and integrity of the capital punishment system.
- Jurisdictions should adequately fund the creation (where they do not exist) and operation of Capital Case Innocence Projects.
- Each jurisdiction should establish a Capital Case Early Warning Coordinating Council to identify on an ongoing basis systemic flaws that, once corrected, should help in an effort to avert mistaken convictions before they happen.
- Jurisdictions should also adequately fund efforts to increase sensitivity to innocence issues in capital cases in high schools, colleges, law schools, police academies, judicial training programs, and among the broader American public. (2005 Update.)

## COMMENTARY

### Recommendation 16 Overview

A panoply of constitutional protections is available to those accused of a crime, including protections against compelled self-incrimination, ineffective assistance of counsel, and other fundamentally unfair procedures.<sup>9</sup> The judiciary is charged with safeguarding these rights both at and before trial.<sup>10</sup> Nevertheless, a significant number of mistaken convictions of the innocent has recently been documented.<sup>11</sup> Furthermore, empirical research suggests that the causes of these errors were systemic ones, rather than unusual circumstances.<sup>12</sup>

Even the revelation of these errors, however, has not radically changed judicial and other criminal justice system practices. Additionally, it is reasonable to believe that the judiciary — which is best equipped for case-by-case adjudication — is ill-equipped to tackle systemic reform on its own. At the same time, procedures are needed to aid the courts in bringing systemic insights and new scientific research to bear in achieving accuracy in individual cases and in correcting error. Accordingly, as several other common law countries have recognized,<sup>13</sup> some extrajudicial mechanism is needed to press for constantly improving future procedures while offering fair redress to those unjustly

convicted today. Although adjudication of individual claims must ultimately be made by the courts, or by chief executives through their pardon or clemency authority, administrative and other solutions are needed to better identify individual case errors while simultaneously building a better criminal justice system to come.

### **The Nature of the Wrongful Convictions Problem**

Americans' confidence in the accuracy of their criminal justice system has recently been shaken as a "continuing stream of high-profile cases of wrongful conviction floods the newspapers."<sup>14</sup> DNA technology's rise has accounted for a significant number of these exonerations. As of October 2000, there had been 76 DNA exonerations in the United States, 54 of which happened in just the preceding four years; that number had risen to 142 by February of 2004 and 159 by July of 2005.<sup>15</sup> Fourteen of these exonerations were in capital cases; 116 death row inmates in total were exonerated by July 2005.<sup>16</sup> Yet biological evidence is available in only a small number of cases, suggesting a potentially much larger number of mistakes. In a criminal justice system as large as ours — with 2.2 million arrests in the United States for index crimes alone (essentially street crimes and certain thefts) in the year 2000 — an error rate of even one half of one percent translates into 7,500 wrongful convictions for index crimes each year.<sup>17</sup> Moreover, for each mistake, a wrongdoer remains free to victimize the community further. As law professors Barry Scheck and Peter Neufeld have recounted in the DNA context:

All wrongly convicted people take the lash of punishment for someone else's crime; that is the very definition of their predicament. Far too often, they are surrogates for serial criminals and killers, as in California, where Kevin Green carried the weight for a crime by Gerald Parker, who for twenty years stood unprosecuted for five murders. In Oklahoma, Robert Miller was condemned to die for murdering and raping two elderly women before DNA testing put a man named Ronnie Lott in their houses, as well as in the homes of several other women who survived his rapes . . . .

Even if a pattern of crimes can't be tagged to a known criminal, prompt testing will prevent the lengthy detention of innocent suspects and immediately put the police back to the task of finding the real perpetrator.<sup>18</sup>

The problem of wrongful convictions has become so significant that it has received tremendous recent attention in television shows, novels, and news magazines.<sup>19</sup> Committee member and best-selling author Scott Turow's latest book, *Reversible Errors*, explores an inmate apparently in just such a position, ensnared in a deeply flawed justice system. A successful play, *The Exonerated*, recounts the true tales of innocent individuals who spent years battling for their lives on death row. National news magazines, such as *Time* and *Newsweek*, have run extensive stories about the causes of wrongful convictions,

stories prompted by new evidence calling into question the reliability of the convictions of several young men — some of whom spent more than a decade in prison — for the brutal rape of a woman in New York City in the infamous “Central Park Jogger” case.<sup>20</sup> That case prompted similar stories on national nightly news programs and television news magazines, like Ted Koppel’s *Nightline*.

It is death penalty litigation that has brought the wrongful convictions problem to light, although the problem is not limited to such litigation.<sup>21</sup> Thus, as of February 2004, all or nearly all of the DNA exonerations were of inmates awaiting execution.<sup>22</sup> While DNA evidence is not available in most capital cases (nor, indeed, most non-capital cases),<sup>23</sup> the systemic flaws revealed by the DNA cases have made the public and politicians more open to other sorts of proof of innocence.<sup>24</sup> Most notably, the notoriety of several capital wrongful conviction cases led Illinois’ then-Governor George H. Ryan to declare a moratorium on capital punishment in that state as of January 31, 2000.<sup>25</sup> In one of his last acts as Governor, in January 2003 he commuted the death sentences of 167 people to life in prison.<sup>26</sup> Ryan concluded that the capital punishment system was “haunted by the demons of error.”<sup>27</sup>

In 1997, three years before Governor Ryan declared a moratorium in Illinois, the American Bar Association urged the country to adopt a moratorium on the death penalty. Following the ABA’s and Illinois’ lead, other states launched their own actions: Maryland’s Governor, Parris Glendening, declared a moratorium (lifted when Governor Robert Ehrlich took office in 2003), and other states launched studies of their capital punishment procedures.<sup>28</sup> The president of the ABA from 2001-2002 began her term by calling for a nationwide moratorium on executions “until fairness can be assured.”<sup>29</sup>

These actions have had a clear impact on public opinion. By July 2000, 94 percent of those surveyed in a Harris poll agreed that “even innocent people are sometimes convicted of murder.” In this same poll, when persons were asked, “For every one hundred people convicted of murder, how many would you guess are actually innocent?”, the average estimate was 13.<sup>30</sup>

Perhaps precisely because so much is at stake, the causes of error are most prevalent in death penalty cases. A variety of experts have noted that in such cases, community and media pressure for police to arrest suspects is significant. Fear of the death penalty may lead even the innocent to plea bargain to save their lives. More thorough, professional factual investigation and mastery of complex legal issues are required, yet underpaid appointed counsel often lack the resources, training, and motivation to rise adequately to the challenge. Police zeal to catch the wrongdoer can lead to speed and sloppiness that taint the reliability of an investigation, for example, by an officer’s inadvertent introduction of suggestion into a hastily designed lineup.<sup>31</sup> The chances

of error thus become greatest precisely when the costs of a mistake — executing an innocent person — are highest.

Despite recent revelations of error, the causes of errors in capital cases are unlikely to dissipate quickly. In our overcrowded, under funded criminal justice system, guarding against people's fear for their physical safety has become more important than protecting them against the actual, objective risks of their suffering harm.<sup>32</sup> Moreover, these errors have taken place under the judiciary's eye, suggesting that even a watchful and informed judiciary — that has no power to appropriate funds — cannot alone do the job. Furthermore, as an ABA Committee on Innocence and the Integrity of the Criminal Justice System has explained, "it is unlikely that any refinements in the police and prosecutor practices, improved rules at trial, or better defense representation will ever completely eliminate convictions of all who are factually innocent."<sup>33</sup> The ABA report continues: "Many perceive a need to go beyond individual exonerations and establish a permanent complementary institutional procedure for those who claim factual innocence after a trial has come to the contrary conclusion."<sup>34</sup>

Other nations and various localities have offered three broad types of solutions. The first sort provides extra-judicial procedures for examining individual cases; the second sort uses individual cases as a springboard for investigating and correcting systemic flaws; and the third sort seeks to make reform a constant process spurred on by a vigilant institutional watchdog organization.<sup>35</sup> This Committee takes no position on the details of a solution appropriate for each jurisdiction. It does, however, strongly urge that the appropriate authorities immediately adopt a Capital Case Early Warning Coordinating Council or a similar institutional mechanism drawing on all three broad types of solutions as necessary for addressing the multifaceted problem of wrongful convictions.

### **The British Criminal Case Review Commission**

The British model ensures that the door is open to relief for those claiming factual innocence. Its approach has neither flooded the courts with cases nor given undue attention to frivolous claims.

The Criminal Cases Review Commission (CCRC), created in 1997, is an independent body charged with "investigating suspected miscarriages of criminal justice in England, Wales, and Northern Ireland."<sup>36</sup> The CCRC's mandate is to review applications by convicted defendants claiming factual innocence, where there is a "real possibility that the conviction, verdict, finding, or sentence would not be upheld were the reference to be made."<sup>37</sup> The real possibility test is met only "because of an argument, or evidence, not raised in the proceedings..." or under "exceptional circumstances."<sup>38</sup> "Exceptional circumstances" includes "legal incompetence, a mistaken tactical decision, or failure to appreciate its full significance."<sup>39</sup>

Applicants usually proceed without counsel, although they are entitled to up to ten hours of legal assistance to prepare an application.<sup>40</sup> Staff may conduct independent investigations and if it sees little likelihood of success, it passes the case on with a recommendation for a “short form of review.”<sup>41</sup> More thorough attention is given for cases the staff determines present more plausible grounds for relief.

If a case manager and commission member then conclude that the “real possibility” test has been met, they present the case to three Commissioners. The Commission may appoint an outside investigating officer or expert to conduct further investigation and can do fieldwork on its own.<sup>42</sup>

If warranted, the Commission will then refer the case to the Court of Appeals. A legal aid lawyer will then be appointed, and the CCRC will withdraw.<sup>43</sup> Unlike in the United States, the appellate court may consider new evidence when it is expedient and there is a reasonable explanation for its not having been offered at trial.<sup>44</sup> Fewer than 5 percent of the 800-900 cases annually screened by the CCRC are referred for review, with the Court of Appeals quashing the convictions in about 70 percent of these referred cases.<sup>45</sup>

### **Canadian Study Commissions**

Canadians go one step further than the British, under longstanding legislation authorizing the appointment of Public Inquiry Commissions (“PICs”). These PICs are independent non-governmental investigating bodies created to investigate the causes of a particular mistaken conviction. Although the British system seeks only to rectify individual injustices, PICs use individual cases as a springboard for thorough investigation of systemic reforms meant to prevent additional, future mistakes.<sup>46</sup>

Two infamous cases have brought attention to the PIC system. The first involved Guy Paul Morin, convicted for the 1984 murder of a nine-year-old girl. Morin was ultimately exonerated by DNA testing in 1995.<sup>47</sup> The Province of Ontario ordered “an unprecedented top-to-bottom examination of its criminal justice system,”<sup>48</sup> and appointed a commission charged with determining the causes of error in the case, recommending ways to avoid future mistakes, and educating the community about the criminal justice system and its flaws.<sup>49</sup> The Commission held 146 days of hearings with 120 witnesses and extensive document review. It published a 1400 page report with 119 recommendations for change<sup>50</sup> in areas including forensic science, police investigation procedures, training of prosecution and defense counsel, jury instructions, and the rules for appellate and post conviction review.<sup>51</sup> But the Morin inquiry became best known for its damning conclusions about the use of jailhouse informants, and its far-reaching recommendations for screening informants, limiting inducements to them, ensuring full disclosure to the defense of their background and of any deals made by them, and instructing juries on the unreliability of informant testimony:<sup>52</sup>

The systemic evidence emanating from Canada, Great Britain, Australia and the United States demonstrated that the dangers associated with the jailhouse informants were not unique to the Morin case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false, self-serving evidence given by such informants.<sup>53</sup>

The second infamous Canadian case involved the wrongful conviction of Thomas Sophonow after three trials for the 1981 strangulation murder of a 16-year old girl. Thirteen years later, the Police Service declared his innocence, announcing that another suspect had been identified.<sup>54</sup> The Manitoba government appointed a Commission of Inquiry similar to that in the Morin case. The Commission's Report included:

recommendations for the videotaping of all police interrogations of suspects to guard against coerced or disputed confessions, recommendations for improved eyewitness identification procedures along with jury instructions on the frailty of eyewitness identification evidence, and severe restrictions on the use of jailhouse informants.<sup>55</sup>

The Canadian PIC system has two advantages over the British CCRC. First, it focuses on systemic improvements. Second, because each PIC is a temporary creation, no new, potentially expensive, and politically controversial standing governmental bureaucracy is established. However, Canada relies on traditional mechanisms (the courts and political pressure brought to bear on the Executive) for identifying injustices in individual cases. As the Canadian, British, and American experiences reveal, the courts and the political system too often fail to identify and correct individual cases in which the innocent have been convicted. The CCRC thus has one powerful advantage over Canadian PICs: the existence of an administrative body focused solely on ensuring justice not for the system as a whole, but for the wronged individuals. An ideal institutional mechanism would combine the best features of both the British CCRC and the Canadian PICs, aiding individuals already harmed by the system while working to avert future harm by improving the system itself.

### **Innocence Commissions and Their Cousins**

Law professors Barry Scheck and Peter Neufeld urge that the United States form "Innocence Commissions" that would combine the strengths of the British CCRC in attaining individualized justice with the Canadian PICs' emphasis on systemic reform. Innocence Commissions would, however, be standing independent bodies devoted to both identifying and correcting the causes of wrongful convictions and maintaining pressure for continual systemic improvement.<sup>56</sup>



The Innocence Commission idea is modeled after the National Transportation Safety Board (“NTSB”). The NTSB can, at its own discretion, form a “special board of inquiry” following “an accident involv[ing] a substantial question about public safety” and may “do anything necessary to conduct an investigation.”<sup>57</sup> Investigating committees may issue subpoenas, compel sworn testimony, order forensic tests, and even bring civil actions in federal court against any party obstructing an investigation. Once an investigation is complete, the NTSB delivers a report to the Secretary of Transportation that includes both a factual record and a set of reform recommendations, and the Secretary must respond within 90 days of receiving the report, publicly declaring that the NTSB recommendations should be adopted in whole, in part, or not at all.<sup>58</sup> The findings and recommendations cannot, however, be used as the basis for civil or criminal liability, although the supporting factual record may be a source of evidence in such proceedings.<sup>59</sup>

Scheck and Neufeld draw on the NTSB process to identify six features necessary for innocence commissions:

- They should be standing committees with discretion to investigate any wrongful conviction and recommend whatever policy reforms they see fit;
- They must be able to order reasonable and necessary investigative services, including forensic testing, autopsies, and other research services;
- They should be able to subpoena documents, compel testimony, and bring civil actions against any person or entity obstructing any investigation.
- To avoid political pressures, their findings and recommendations should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the commission can be made available to the public;
- They should be transparent, publicly accountable bodies, composed of diverse, respected members of the criminal justice community and the public; and
- They should be required to file public reports on their findings and recommendations, and the relevant branch of government to which these reports are submitted should issue a formal written response to the recommendations within a fixed period of time.<sup>60</sup>

Professor Michael Saks has proposed a less independent, less elaborate but otherwise similar process, in which the Supreme Court would appoint one or more people to conduct an inquiry into the causes of wrongful convictions, making a written report including findings and recommendations.<sup>61</sup>

Governors, attorneys general, and legislatures have the power to appoint such commissions, and state supreme courts can do so pursuant to their inherent supervisory powers. Several states, most notably Illinois and Maryland, have appointed temporary commissions to study causes of error and unfairness in the administration of the

death penalty.<sup>62</sup> But these Commissions are time-limited, subject to political pressures over their creation and findings, and lacking in the continuing transparency and vigilance needed to promote implementation of recommendations and to monitor for the need for future ones.

The American Bar Association's Ad Hoc Committee on Innocence and the Integrity of the Criminal Justice System, on the other hand, has complained that even the NTSB model is reactive rather than proactive, waiting until there is a fire to investigate rather than confiscating the matches before the conflagration begins. The ABA Committee therefore recommends that jurisdictions consider creating ongoing councils that include "the major stakeholders in the criminal justice system to identify and suggest policy in problem areas."<sup>63</sup> This approach is modeled on one used in connection with sentencing policy for female offenders. With the assistance of the National Institute of Corrections, "[r]epresentatives from local government, the public defender, state's attorney, sheriff, judges, probation officers and service providers were included in an effort to improve policy and services concerning female offenders."<sup>64</sup> The ABA Committee would include similar groups in an erroneous convictions panel, while also adding representatives of law enforcement, forensics labs, the jury commissioner, and the public.<sup>65</sup> The ABA Committee has elaborated upon additional functions of such "early warning system" panels or committees:

Committees could address general as well as specific issues. For example, if public defenders were hearing complaints that seemed to focus on particular officers, judges, or prosecutors, these could be given to the appropriate representative for their own investigation or serve as a general impetus for better training in particular areas. Similarly, complaints about slowness of forensic results might reveal priority questions regarding processing of different categories of cases. Given a world of limited stakeholders, if all of the major stakeholders agreed that more resources were necessary for a particular purpose or agency, this cross-agency collaboration of unlikely allies might prove more credible in efforts to obtain the necessary resources. Jurisdictions could determine how often to meet, but the value of such bodies begins to decrease if they meet too frequently or infrequently.<sup>66</sup>

Georgia has established a similar panel, the Criminal Justice Coordinating Council, designed to "serve as a statewide body providing leadership to coordinate, intensify, and make more effective the components of the criminal justice system at all levels of government."<sup>67</sup> New Mexico's Criminal and Juvenile Justice Coordinating Council likewise seeks to provide recommendations and assistance "from a coordinated cross-agency perspective to the three branches of government and interested citizens so they have the resources they need to make policy decisions that benefit the criminal and



juvenile justice systems.”<sup>68</sup> The District of Columbia’s Criminal Justice Coordinating Council also serves:

as the forum for identifying issues and their solutions, proposing actions, and facilitating cooperation that will improve public safety and the related criminal and juvenile justice services for the District of Columbia residents, visitors, victims, and offenders. The CJCC draws upon local and federal agencies and individuals to develop recommendations and strategies for accomplishing this mission. Our guiding principles are creative collaboration, community involvement, and effective resource utilization. We are committed to developing targeted funding strategies and comprehensive management information through integrated information technology systems and social science research in order to achieve our goal.<sup>69</sup>

The ABA committee rightly recommends that where such coordinating councils already exist, their mandates should be clarified specifically to include issues of fairness, integrity, and accuracy so that “these bodies do not simply function as promoting the efficient processing of defendants, without any real policy mission” and that the “innocence function should clearly be a specific mission requiring additional resources and a permanent structure, rather than be treated as simply another task assigned to a pre-existing group.”<sup>70</sup>

Even if both NTSB-style commissions and early warning system coordinating councils are established in each jurisdiction, other institutions exist that can work with them toward the common goal of monitoring governmental errors and abuses. Many jurisdictions, for example, have Innocence Projects, usually associated with university law or journalism schools, in which students and practicing attorneys investigate wrongful conviction claims, represent those with credible innocence claims, and develop initiatives to raise public awareness and create and implement systemic solutions. Although these Innocence Projects initially focused on DNA exonerations, they are starting, and should continue, to expand their mission to include numerous other ways to identify and correct wrongful convictions. Most rely on volunteers or academic credit and lack adequate funding. Many jurisdictions have no such project. These Projects should become adequately funded, integral parts of the criminal justice system to ensure citizen monitoring of actual and potential abuses.<sup>71</sup>

Citizen monitoring can be promoted by expanding public education on the problem of convicting the innocent. High school and college courses should address these issues, police officers should be trained in identifying them, and lawyers must know how to uncover and cure existing or impending errors. Law schools in particular might establish courses, as some are starting to do, focusing on the causes of, and cures for, wrongful convictions and on educating the public and the legal profession about the problem.<sup>72</sup>

### **Recommendation 16 Conclusion**

The problem of wrongful convictions extends well beyond death penalty cases. Nevertheless, this Committee's mandate is limited to such cases. Furthermore, this Committee leaves the details of implementing our proposals to individual jurisdictions, each of which will face unique resource, political, and other challenges. Accordingly, the Committee recommends that every jurisdiction create a mechanism for reviewing individual claims of wrongful convictions in capital cases, for recommending systemic changes to avoid future errors in such cases, for monitoring and consistently improving the accuracy and fairness of the administration of the death penalty, for creating and adequately funding death penalty innocence projects, and for educating the public, the legal profession, and law enforcement about the wrongful convictions problem.

## **DNA EVIDENCE**

### **RECOMMENDATION 17: The Government Should Preserve and Use DNA Evidence to Establish Innocence or Avoid an Unjust Execution.**

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent.

## **COMMENTARY**

Over the past two decades, DNA testing has been developed and substantial advances in its sophistication and effectiveness have occurred. This technology now frequently makes possible the effective testing of biological materials that were left at crime scenes, as well as comparison with the accused or convicted defendant's DNA. The evidence produced can be extraordinarily powerful in either incriminating or exculpating the suspected or convicted defendant. Sometimes the results of such testing are decisive. The effort to use DNA evidence effectively to prove guilt and to establish innocence should be continued along lines set out in the DNA Identification Act of 1994 and related legislation.

Prior to the mid-1990s, DNA testing was not widely available, and, as a result, biological materials relevant to guilt or innocence were not tested for use at trial. Subsequent examination of cases using this new forensic technique has resulted in the exoneration of more than one hundred and twenty innocent men and women of the crimes for which they had been convicted. In at least nineteen of these cases, the defendant had been sentenced to death but had not yet been executed. In more than twenty-five of the cases, the tests resulted in the identification of another individual as the true perpetrator of the offense. In addition, recent advances in DNA testing technology may now produce usable evidence where no results could be obtained with earlier methods. Even in those instances where earlier technology provided some results, new technology may generate substantially more powerful and probative evidence.

In most jurisdictions, the legal structure is not adequate to take proper advantage of the advances in scientific testing of evidence. Legislation should be enacted to cure a number of deficiencies in the legal structure.

First, legislation should require the preservation of biological samples in all pending death penalty cases, and should require testing upon defense requests in cases that have not yet been tried. In some instances, the failure of current law to mandate preservation has resulted in the tragic destruction of potentially critical evidence, typically without any meaningful remedy. To help ensure access to justice, jurisdictions should immediately enact legislation requiring the preservation of all existing biological samples until affected defendants can be notified and given an opportunity to exercise their statutory rights.

Second, the legislation should, in appropriate circumstances, grant a convicted defendant the right to secure testing. A showing by the defendant that the results of the test would be relevant to the correctness of the determination of guilt or the sentence of death should be sufficient to secure testing. Testing should be available where the results would bear only on the correctness of the death sentence and should not be restricted to circumstances where actual innocence is alleged. Similarly, testing should not be restricted to cases where exclusion of the evidence would necessarily exonerate the defendant; a showing that the results would be relevant or helpful to establishing an erroneous conviction or sentence should be sufficient.

DNA testing should be made available if testing was not conducted or not available at the time of trial. Moreover, if DNA testing has previously been conducted, new testing should be ordered if advances in DNA technology present a reasonable possibility that new exculpatory evidence may now be produced.

Jurisdictions have a legitimate interest in ensuring the fairness of testing and the integrity and, to the extent possible, the preservation of biological samples. They can accordingly impose restrictions and requirements on the laboratories used and the testing mechanisms employed to satisfy these legitimate concerns.

Third, because the vast majority of those sentenced to death are indigent, legislation should provide for public financing of testing when such testing is shown to be appropriate. Likewise, it should provide for appointment of counsel for defendants seeking testing, if the defendant is not already represented by counsel and is indigent.

Details about the operation of these statutes should be left to individual jurisdictions. Despite the advances of science, certainty in the outcome sometimes will be unclear because the interpretation of the relationship between the biological evidence and the crime is problematic. However, the development of DNA testing has given us a unique view into the inaccuracies of the determinations of guilt in a sizeable number of cases that have moved through our criminal justice system and have passed reviews by juries and appellate judges. The easiest part of the lesson of DNA should be creating procedures to right the wrongs that can be documented.

Moreover, experience with DNA testing technology and its revelations of error should demonstrate to the criminal justice system the imperative to establish systems to preserve physical evidence, where reasonable prospects exist that subsequent scientific advances may draw new evidentiary significance from it.

### **RECOMMENDATION 18: The Government Should Consent to Preserve, Inspect, and Test Biological Evidence.**

All government officials should promptly and readily consent to preservation, inspection, and DNA testing of biological evidence in their custody that is reasonably likely to aid in identifying the true perpetrator(s) of a criminal offense. Such consent should be freely given, without requiring the individual seeking DNA testing to engage in protracted litigation, in the pre-trial, trial, and post-conviction phases of criminal proceedings. This obligation should also extend to cases in which capital defendants have been executed, given the public's strong and continued interest in ensuring the accuracy of the criminal justice system, and the lack of any interest by the state in barring DNA testing once a death sentence has been meted out. (2005 Update.)

### **RECOMMENDATION 19: The Government Should be Required to Submit DNA Profiles to DNA Databanks in Certain Cases.**

If law enforcement agencies fail to submit to a state or federal DNA databank (1) unidentified DNA profiles obtained from evidence in a defendant's case, and/or (2) unidentified DNA profiles from cases that reasonably appear to be related to the of-

fense for which another defendant was convicted, the defendant should have the right to petition a court for, and the court shall have the right to issue, an order requiring the state to submit such profiles to state and federal DNA databanks for comparison purposes. (2005 Update.)

## COMMENTARY (RECOMMENDATIONS 18-19)

The use of sophisticated DNA technology to analyze forensic evidence has truly revolutionized our nation's justice system and has continued to do so ever since the Committee issued its recommendations on this issue in 2001. In little more than a decade, it has become the foremost technique for conclusively identifying — and excluding — criminal suspects in cases where biological material (such as blood, saliva, skin, semen or hair) is left at a crime scene.<sup>73</sup> The advent of DNA databanks has allowed law enforcement officials to solve thousands of “cold cases,” some of them decades old and with no other leads or suspects before the DNA “hit” pointed to the perpetrator.<sup>74</sup> And the use of DNA in the post-conviction context has, to date, led to the exoneration of more than 150 innocent individuals who had been wrongfully convicted of murder, rape, and other serious offenses — which, in turn, has sparked national debate about the underlying causes of wrongful convictions and what can be done to remedy them.<sup>75</sup>

In the words of former Attorney General John Ashcroft, DNA is “nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent.”<sup>76</sup> Many prosecutors and other government officials have embraced this new technology across the board — readily consenting to DNA testing in cases where it can prove (or disprove) a defendant's claim of innocence, and taking immediate steps to rectify a wrongful prosecution or conviction if the test results are exculpatory. They have recognized that giving defendants broad access to DNA testing significantly advances two important purposes of our nation's justice system: (1) conclusively exonerating the innocent of crimes they did not commit, and (2) through DNA databanks and other methods, apprehending the real perpetrators of violent offenses before they have the opportunity to commit new ones. This largely shared view among prosecutors and defense lawyers, and liberals and conservatives, has resulted in a wave of new laws expressly granting convicted persons a right of access to DNA evidence, with more than 35 states enacting such laws in the last decade.<sup>77</sup>

Yet a small but troubling number of prosecutors and other officials have resisted this trend. Particularly in the post-conviction context, where DNA testing often involves reexamination of convictions that were obtained a decade or more ago (*i.e.*, at a time when DNA testing, or the advanced method of testing sought, was unavailable), some officials have vigorously opposed giving defendants access to biological evidence for DNA testing, even where the evidence clearly came from (and can thus identify) the

true perpetrator.<sup>78</sup> Bruce Godschalk of Pennsylvania, for example, was convicted of two brutal rapes that occurred in the same apartment complex in 1986. At the time of his conviction, DNA testing was unavailable to determine whether the perpetrator's semen, recovered from both victims immediately after the attacks, was his. Yet the prosecutors refused to consent to Godschalk's request for DNA testing on that evidence when he first sought it in 1995, or even to confirm whether the evidence still existed — forcing him to spend *seven years* litigating his motion for access to the evidence in both state and federal courts. Godschalk was ultimately exonerated of both offenses by court-ordered DNA testing that excluded him as the source of the rapist's DNA in 2002, after serving a total of fifteen years in prison for these crimes. Tragically, the prosecutors' refusal to consent to testing in Godschalk's case nearly doubled the time this innocent man spent behind bars, during which time his mother passed away so she was unable to witness his exoneration and release.<sup>79</sup>

It has become increasingly clear, moreover, that denying defendants broad access to DNA testing — whether pre-trial, at trial, or post-conviction — not only harms those innocent persons who face wrongful imprisonment or, worse, execution, it also jeopardizes public safety. The same DNA test results that exclude a defendant can also identify and apprehend the real perpetrator — by comparing the crime scene DNA profile to that of a known alternate suspect, or tying it to a convicted felon (or related unsolved crime) through a “hit” in the national CODIS databank system. Where officials delay or deny access to DNA evidence, however, the real perpetrator may well be at large and free to commit more crimes. Just a few such examples include the following:

- In Florida, a series of DNA tests conducted in 2000 and 2001 proved that neither Jerry Frank Townsend (an individual with mental retardation who falsely confessed to 7 rapes and murders while in police custody, then pled guilty to avoid the death penalty) nor Frank Lee Smith (who was sentenced to death for a 1985 rape-murder of a child, and died on death row while fighting to obtain a DNA test on the evidence) committed the crimes for which they were convicted. The profiles from those cases instead pointed to Eddie Lee Mosley, a serial offender who committed not only these crimes, but who may have also been responsible for more than fifty other rapes and murders during that time.<sup>80</sup>
- In Arizona, Ray Krone became the 100<sup>th</sup> innocent person exonerated from death row in April 2002, after DNA tests conducted on traces of saliva from a murder victim's bite mark not only excluded Krone, but also led to a CODIS hit on the real perpetrator. That man — a convicted pedophile named Kenneth Phillips — had assaulted a 7-year-old girl twenty days after committing the murder for which Krone was wrongfully convicted.<sup>81</sup>



- In California, DNA from a series of unsolved rapes and murders committed by the unknown “Bedroom Basher” in the late 1970s was entered into the databank in 1996. An immediate “hit” led police to the real perpetrator, Gerald Parker, who confessed not only to these crimes, but also to the 1979 murder of a woman named Diana Green — whose husband, Kevin, a former Marine, had been convicted and remained in prison for the crime. After DNA from the case was tested and found to be consistent with Parker’s, Kevin Green was exonerated and freed in 1996.<sup>82</sup>
- In 1992, Kirk Bloodsworth of Maryland became the first inmate sentenced to death in the U.S. to be exonerated by DNA testing. While conceding at that time that his conviction for the rape-murder of a child should be vacated based on DNA tests excluding him from semen found on her clothing, the prosecutors in that case refused to admit that he was “innocent” of the crime. It was not until a decade later, when Bloodsworth’s attorneys finally convinced the state to enter DNA from the case into CODIS, that the real perpetrator was identified, and the prosecutors apologized to Mr. Bloodsworth for his ordeal.<sup>83</sup>

Similarly, DNA testing conducted during active criminal investigations and pretrial proceedings has shown an unprecedented ability to exonerate those erroneously identified as prime suspects — which both prevents a wrongful conviction from occurring, and allows law enforcement to renew their search for the offender.<sup>84</sup>

Clearly, then — given the unquestioned reliability of DNA technology, and its ability to conclusively identify/exclude a defendant decades after the crime has occurred — the benefits of providing defendants broad access to DNA evidence should trump traditional concerns about “finality” that might otherwise prevent such cases from being reexamined. Indeed, as victims and others have noted, “finality” is meaningless if the wrong person has been convicted of the crime and the real perpetrator remains at large; and where DNA may resolve the issue, those interests work in favor of such testing.<sup>85</sup>

This is particularly so in cases seeking DNA testing on evidence after a defendant has been executed. While the executed defendant will, of course, no longer be able to directly benefit from exculpatory test results, the most common rationale for limiting post-conviction proceedings in death penalty cases — preventing delay in carrying out a legitimate death sentence — is no longer present post-execution. Yet the public’s interests in monitoring the accuracy of the justice system, and ensuring that the true perpetrator does not remain at large, remain strong, while the government no longer holds any legitimate interest in denying access to DNA evidence.<sup>86</sup>

In recent years, there have also been rare, but nonetheless troubling, reports of failures by government officials to acknowledge and act upon exculpatory DNA test results.

These include refusals to vacate convictions or charges even after DNA test results conclusively exclude a defendant, or are otherwise wholly inconsistent with the theory under which the defendant was prosecuted — whether by citing legal technicalities to bar the DNA results from being introduced in court, or by propounding a new theory of guilt that cannot be squared with the DNA evidence.<sup>87</sup> It is a prosecutor’s obligation not merely to charge and convict, but also to seek the truth and do justice. All law enforcement officials should fully reassess criminal convictions in light of new DNA evidence — and should seek to uphold such a conviction not merely because they can, but only if they truly believe that the evidence proves the defendant’s guilt beyond a reasonable doubt.<sup>88</sup>

Finally, yet another disturbing phenomenon is the all too frequent failure by law enforcement officials to renew old criminal investigations after a defendant’s conviction has been vacated — even taking the simple step of putting DNA profiles into state and federal databanks.<sup>89</sup> While the courts rightly have little power to direct the course of a criminal investigation, the public’s interest in identifying the true perpetrator (and the defendant’s interest in decisively “clearing his or her name”) justify limited intervention in cases where DNA is probative of guilt or innocence. Thus, where the government fails to do so on its own, defendants who have obtained exculpatory DNA test results should have the right to seek a court order requiring the submission of scientifically valid DNA profiles into CODIS. Similarly, in cases where other crimes may reasonably be related to the conviction at issue (*i.e.*, those that have a similar *modus operandi* or are thought to be the work of a serial offender), defendants should have a right to petition the court for, and the court shall have the authority to issue, an order that DNA testing be conducted on biological material from those offenses, and that those profiles should be entered into CODIS for comparison purposes.

## FORENSIC LABORATORIES

### **RECOMMENDATION 20: The Testimony of Forensic Examiners Not Associated with Accredited Laboratories Should be Excluded.**

Testimony from a forensics examiner offered by the prosecution in capital cases should be excluded from evidence when the examiner is not associated with an accredited forensics laboratory. (2005 Update.)

### **RECOMMENDATION 21: Accreditation of Laboratories Should be Limited.**

Accreditation should be permitted only for laboratories that:

- employ certified technicians
- do not release results based on insufficiently validated techniques;



- articulate and enforce written standard protocols; and
- require examiner proficiency testing in the particular technique in question. (2005 Update.)

## COMMENTARY (RECOMMENDATIONS 20-21)

### Recommendations 20-21 Overview: The Nature of the Expert Testimony Problem

Expert testimony plays an increasingly large role in the trial of criminal cases. Forensic pathology, fingerprint analysis, drug testing, firearms identifications (“ballistics”), questioned document examination, and DNA testing are but a few of the techniques used in modern criminal trials. Yet,

[i]n the courtroom, the introduction of scientific evidence is replete with hazards. There is always the question of whether the jurors — and in some instances even the judge — are able to comprehend it, and the more formidable question of how seriously that theory’s application is treated by the forensic community. In recent years, the testimony of handwriting analysts has been called into doubt, and even more critically, the infallibility of fingerprint identification, once considered the very soul of absolute certainty, has become suspect.<sup>90</sup>

Growing concerns about “junk science” and its potential undue impact on the fact finder led the United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>91</sup> to require that all scientific theories and techniques be shown to be “relevant and reliable” before they can be admitted into evidence. *Daubert* required trial courts to consider at least five factors in gauging reliability: (1) whether the theory and technique are testable, have been tested, and have survived such testing; (2) whether they have also survived peer review and the gauntlet of the publication process; (3) whether their potential error rate is known; (4) whether there are authoritative standards controlling the technique’s operation; and (5) whether the principle or technique has attained “widespread acceptance.”<sup>92</sup>

The Supreme Court has made clear that *all* expert testimony, scientific or not, novel or not, must be subjected to “exacting standards of reliability”<sup>93</sup> under *Daubert*<sup>94</sup> though this may require modification of the reliability factors articulated in *Daubert* to fit the particular technique and expert discipline.<sup>95</sup> Even jurisdictions that have retained the older *Frye* test — which preceded *Daubert* and required “general acceptance” of a novel scientific technique in the relevant field — have often done so in the stated belief that *Frye* offers greater protection for defendants than does *Daubert*.<sup>96</sup> Whether under this “reinvigorated” *Frye* test,<sup>97</sup> or under *Daubert*, therefore, “scientific proof is being scrutinized more closely than ever before.”<sup>98</sup>

The need for such scrutiny is particularly great because of the now “widespread awareness” that in a significant number of cases doubtful scientific techniques have contributed to wrongful convictions.<sup>99</sup> Among the flawed techniques used have been “hair comparison analysis,” “dog scent lineup identifications,” bite mark comparison, and hypnotic recall.<sup>100</sup> Indeed, the recent exonerations of the defendants in the Central Park Jogger Case in New York City were but the latest in a string of wrongful convictions stemming in part from reliance on faulty “scientific” methods.<sup>101</sup> These sorts of concerns led the Florida Supreme Court, in reinvigorating its version of the *Frye* test, to comment:

In order to preserve the integrity of the criminal justice system in Florida, particularly in the face of rising nationwide criticism of forensic evidence in general, our state courts — both trial and appellate — must apply the *Frye* test in a prudent manner to cull scientific fiction from scientific fact. Any doubt as to admissibility under *Frye* should be resolved in a manner that minimizes the chance of wrongful conviction, especially in a capital case.<sup>102</sup>

Even where scientific methods and techniques are proven reliable, however, those techniques might not be properly applied to the facts of a particular case, because standard lab procedures are inadequate, lab technicians are sloppy or incompetent, or outright fraud is committed.<sup>103</sup> Laboratories have lost critical evidence and misreported results.<sup>104</sup> They have performed poorly in numerous proficiency studies.<sup>105</sup> Under funding, lack of adequately qualified personnel, overwork, and the failure to follow sound procedures all contribute to error.<sup>106</sup> Thus, for example, although DNA typing is a reliable technology, sloppy procedures still lead to erroneous results because “the analysts who use these techniques are fallible human beings who are sometimes overworked and under trained.”<sup>107</sup> Scientific techniques are only valid if proper procedures are followed.<sup>108</sup> One commentator summarized the problem of laboratory sloppiness this way:

Wholly apart from the problems associated with fraud, the trustworthiness of forensic science is also impaired by problems of innocent error, sloppiness, exaggeration, and bias. Even the most respected labs, with presumably rigorous safeguards, still experience problems of inadvertent mislabeling or switching of samples, loss of evidence, misreading of results, mistaken recording of data, and mis-transcribing of results.

Responsible scientists will honestly, if reluctantly, concede the history of inadvertent error in their labs. Because of the number of errors that are experienced by the most respected independent labs, and because it is impossible to estimate the number of inadvertent errors that are never caught or corrected, it is safe to assume that inadvertent error permeates the entire system and can have profoundly tragic results.<sup>109</sup>

Recognizing the importance of the problem of misapplication of even valid scientific insights and techniques, Congress recently amended Federal Rule of Evidence 702 to require that principles and methods be shown to have been reliably applied “to the facts of the case.”<sup>110</sup> The studies of laboratory error show the critical importance of the spirit of this amendment.<sup>111</sup>

Fraud, too, is a significant source of error. One of the most infamous of the fraud cases involved forensic scientist Fred Zain, who testified in courts in West Virginia, Texas, Delaware, Florida, Hawaii, Kentucky, Nebraska, New Mexico, Ohio, Pennsylvania, and Virginia.<sup>112</sup> Zain was a “forensic superstar,” who found “flecks of blood and smudges of semen where his colleagues found nothing.”<sup>113</sup> He “also possessed phenomenal lab techniques — a unique ability to detect genetic markers in crime scene stains that turned otherwise hopeless cases into prosecution dreams.”<sup>114</sup> Zain’s magic turned out, however, to be what most magic is — illusion and deception involving massive fraud.<sup>115</sup> A judicial report summarized the wide array of Zain’s fraudulent acts:

(1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches; (4) reporting that multiple items of evidence have been tested, when only a single item had been tested, (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with a victim; and (11) reporting scientifically impossible or improbable results.<sup>116</sup>

Concerns about Zain’s work led the West Virginia Supreme Court in 1993 to appoint a retired judge to preside over a Special Investigation into Zain’s analyses.<sup>117</sup> As part of that investigation,

Independent experts selected by the American Academy of Crime Laboratory Directors (ASCLD) reviewed the raw data from the lab — the original records of the actual test results — and compared that data to the written reports prepared by Fred Zain. The ASCLD experts then compared the raw data to Fred Zain’s trial testimony. The ASCLD team reached a startling conclusion. In virtually every case where there was sufficient evidence to review, the ASCLD experts found fraud.<sup>118</sup>

Indeed, “[t]wo of Fred Zain’s assistants testified that they observed Zain faking data — recording results when the actual tests failed to produce any result at all — in nearly

100 instances.”<sup>119</sup> Yet, concluded the investigators, the assistants’ complaints to their supervisors were ignored.<sup>120</sup>

Other forensics “experts” in Oklahoma and Montana have generated similar concerns.<sup>121</sup> In Oklahoma, attention focused on Joyce Gilchrist, a forensic chemist who had worked on over 1500 felony cases in more than twenty years with the Oklahoma City Police Department (“OCPD”).<sup>122</sup> Gilchrist was also given the task in 1987 of setting up an OCPD DNA laboratory. The Innocence Project at Cardozo Law School, relying on later DNA tests, eventually proved “that Gilchrist and other Oklahoma police chemists had mistakenly matched evidentiary hairs to defendants in several murder and rape cases that led to wrongful convictions, including those of three death row inmates.”<sup>123</sup> In one of these cases, DNA testing also subsequently identified the true killer.<sup>124</sup>

The Innocence Project was not alone in its interest in Gilchrist’s work, for various justice system actors had long worried about and complained about it.<sup>125</sup> In April 2001, an FBI report revealed that its own investigation of Gilchrist’s work in eight different cases demonstrated that she had misidentified hairs in six of the cases and fibers in one other. Two weeks later, another damning document was made public: a January 16, 2001 memorandum by OCPD laboratory services division head, Captain Byron Boshell, concluded on the basis of an audit that he had ordered that “Gilchrist had severely mismanaged the OCPD crime lab and DNA project and was directly responsible for evidence having been lost, destroyed, contaminated, or mishandled.”<sup>126</sup> The audit revealed that Gilchrist was poorly trained, prosecution-prone, refused to submit her casework to peer review, ordered evidence destroyed without having approval to do so, lost or destroyed case files for several years, exposed evidence to mold and degradation, and misled investigators as to her actions.<sup>127</sup> According to Major Garold Spencer of the OCPD, “In every case where something was found wrong with something Joyce did, she had other people or other reasons why it happened. In many cases, the people that she would blame were either long retired or dead. It was amazing how her reasoning would center around things you couldn’t verify.”<sup>128</sup> Only a careful examination of Gilchrist’s laboratory notes, trial testimony, and physical evidence revealed her massive fraud and negligence.<sup>129</sup>

Fraud by other examiners in individual cases (rather than, as with Zain and Gilchrist, in a pattern consistent across many cases) has been uncovered “in crime labs throughout the country.”<sup>130</sup> Most recently, an independent investigator appointed to examine problems in the Houston Police Department Crime Laboratory identified longstanding inadequate political and internal support for the lab, inadequate resources, ineffective management, inadequate quality control and quality assurance procedures, and isolation of the lab, and especially the DNA section, from scrutiny internally and by the forensic science community. In particular, because management failed to repair a leaky roof, Tropical Storm Allison flooded the lab,

and biological evidence was soaked and probably contaminated. The investigator found four incidents of dry-labbing by two separate drug section analysts. Officials believed that any effort to attain accreditation would fail in light of these problems, and there was no outside inspection of the lab until 2002.<sup>131</sup> These events resulted in calls for a death penalty moratorium from, among others, Houston's Chief of Police and the chair of the Senate Criminal Justice Committee.

Both lab sloppiness and fraud, like the honest and careful application of unreliable techniques, have significantly contributed to wrongful convictions.<sup>132</sup> Barry Scheck and his co-authors, in their study of DNA exonerations of the wrongly convicted, concluded that one-third of these cases involved "tainted or fraudulent science."<sup>133</sup> Many of these mistakes occurred in death penalty cases.<sup>134</sup> For example, in December 2004, the *Chicago Tribune* reported on the case of Cameron Willingham, executed in 2004 in Texas for setting a 1991 fire that killed his three daughters. Prominent arson experts who recently examined the evidence have concluded that the state's experts, who testified that arson had occurred, were relying on flawed scientific assumptions and techniques, and that the fire may well have been accidental. Even one of the original prosecution investigators agreed that their conclusions were based on outdated assumptions.<sup>135</sup>

Mistaken or fraudulent expert testimony can itself bias a jury's verdict.<sup>136</sup> But it can also distort non-expert testimony. The William Harris case illustrates the point. There, the victim "unhesitatingly" identified the defendant at trial, then expressing "no doubt" in the accuracy of her identification of Harris as her sexual assailant.<sup>137</sup> The Deputy Sheriff likewise testified that the victim expressed absolute certainty at a lineup that Harris was the offender: "She had no doubt in her mind. It was probably the most dramatic sort of identification I had ever seen."<sup>138</sup> Yet, in the long-concealed original police report, the victim was described as eliminating Harris from a photo spread. The report noted, the "[v]ictim said she knew him and it wasn't him."<sup>139</sup> Why had the victim changed her mind between the photo spread and the lineup? The apparent answer included the sharing of faulty, indeed fraudulent, "scientific" evidence with the non-scientific witnesses, including the victim and the investigating deputies.<sup>140</sup> There is reason to believe that similar tainting of non-scientific testimony by scientific error or fraud is not uncommon.<sup>141</sup> Yet it can be difficult to prove such contamination, allowing prosecutors to argue that a conviction based partly on erroneous expert testimony should not be reversed because the error was "harmless" given overwhelming "independent" evidence of guilt.<sup>142</sup> Given the irreversibility of the sentence, these concerns should be paid particular heed in death penalty cases.

Despite the recent amendments to the Federal Rules of Evidence, trial judges and alert trial counsel cannot alone cure these forensic evidence problems. Pretrial discovery concerning expert testimony is sharply truncated in many jurisdictions, especially

given the complexity of the issues.<sup>143</sup> Laboratory reports are often incomplete, expert testimony summaries cursory, and expert depositions nonexistent, providing limited fodder for cross-examination.<sup>144</sup> Moreover, both prosecutors and defense counsel are so overworked and under funded as to make it impractical for them to challenge laboratory results in every case. It is, therefore, critical to correct the errors at their source: the police labs themselves.

### **Mandating Police Laboratory Accreditation Procedures**

Although this country significantly regulates clinical laboratories — the kind that aid in medical diagnoses — our state and national systems for regulating the quality of crime laboratories are extraordinarily weak.<sup>145</sup> Indeed, less than a handful of states require forensic laboratory accreditation.<sup>146</sup> One commentator has thus complained: “At present, forensic science is virtually unregulated — with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row.”<sup>147</sup> More recently, Judge Jack B. Weinstein has urged that “[a]ccreditation of laboratories presenting research in courts would provide a minimum standard for gauging the credibility of the research and testimony offered.”<sup>148</sup> Outside the realm of DNA testing, however (and only sporadically even in that context),<sup>149</sup> calls for forensic crime lab regulation have generally not been heeded, much less calls for mandatory crime lab accreditation.

A voluntary accreditation system is in place, however, in a significant number of laboratories. The American Society of Crime Laboratory Directors (ASCLAD) has accredited over 240 forensic laboratories. Some courts have considered such accreditation significant in determining whether to exclude certain forensics evidence at trial, or whether the weight of the evidence should be diminished.<sup>150</sup>

Voluntary accreditation by organizations such as the National Forensic Science Technology Center, a compliance-accrediting body of the International Organization for Standardization (ISO), the National Association of Medical Examiners (NAME), which accredits Coroner and Medical Examiner Offices, and the American Board of Forensic Toxicology, which accredits toxicology laboratories, are inadequate guarantees of quality, according to the President of the prestigious American Academy of Forensic Sciences, who has questioned the reluctance of forensic laboratories and individuals to become accredited or certified.<sup>151</sup>

Stringent mandatory accreditation programs would do much to improve the quality of forensic science. First, accrediting authority visits to, and inspection of, laboratories for compliance with accrediting can help to discourage sloppy or fraudulent conduct. Second, the need for accreditation will encourage laboratory management to be more vigilant about systems to guard against such misbehavior. Third, accrediting agency



supervision may mean that where misconduct occurs, it will likely be discovered and punished faster and more frequently. Fourth, any serious accreditation process requires some program of proficiency testing.<sup>152</sup>

Blind testing, in which either the person being tested or the one administering the test knows the correct result, is likely to avoid tainting test results and to raise the chances of uncovering flaws not just in the procedures followed but in the trustworthiness of the underlying scientific principles and techniques in the first place. For example, if an examiner is asked to determine whether sample hair matches hair taken from a suspect, only the test designers should know which hair is a match and which is not. Examiners in many laboratories now also routinely offer inconsistent opinions with high error rates, calling into question the reliability and validity of the hair comparison technique itself. Blind testing can be costly and difficult, but it offers greater assurance than do some alternatives, such as regular external case audits combined with enforced quality assurance guidelines.<sup>153</sup> These alternatives might be appropriate in other contexts, but not in capital cases.

Correspondingly, laboratories' accreditation standards should prohibit forensics labs from letting their results from inadequately scientifically supported techniques be used in death penalty cases.<sup>154</sup> The Supreme Court's decision in *Daubert* specified a number of factors to be considered in determining the reliability of scientific evidence. In particular, said the Court, "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from all other fields of human inquiry."<sup>155</sup> Techniques that have not been subjected to and survived such testing by neutral bodies are thus suspect. Similarly, the Court emphasized the importance of an opportunity for open criticism and debate about the wisdom of scientific theories and techniques within qualified communities:

[S]ubmission to the scrutiny of the scientific community is a component of good "science," in part because it increases the likelihood that substantive flaws in methodology will be detected. The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.<sup>156</sup>

Although the *Daubert* Court considered testing and peer review to be only "factors" in the admissibility decision, their centrality to determining the trustworthiness of scientific and other expert techniques would seem to demand their presence whenever use of such techniques may condemn a person to death. One leading commentator has argued that some significant degree of flaws in expert methodologies should be tolerated

because often the only alternative is even less reliable eyewitness testimony.<sup>157</sup> Whatever wisdom this observation may hold in other cases, it is unwise counsel in death penalty cases. The *cumulative* effect of flawed eyewitness testimony and flawed forensics may be what persuades a jury beyond a reasonable doubt and sends an individual to the death chamber. Moreover, as discussed earlier, flawed forensics can themselves taint eyewitness identifications. These are unacceptable risks when execution is an option. Indeed, the degree of the risk is revealed both by the mistaken convictions in death cases in which bad forensics played a role and by the many inadequately tested forensic techniques routinely making their way into the criminal courtroom.<sup>158</sup> Independent entities, like the National Academy of Sciences, have conducted reviews on voice prints, DNA, the polygraph, and bullet comparison lead analysis and provide a model for the sort of study that should be required.<sup>159</sup>

The courts alone are an inadequate safeguard. The *Daubert* test itself is multi-factored and governed by a standard of appellate review extraordinarily deferential to trial court decisions, promoting inconsistent holdings and undermining the incentive *Daubert* advocates hoped the decision would create for rigorous screening of flawed expert techniques.<sup>160</sup> Furthermore, according to one expert, lower courts have in practice generally applied *Daubert* to favor free admissibility of prosecution forensic experts while excluding defense experts.<sup>161</sup> Preventing the use of flawed data through safeguards at the source is needed.

A truly rigorous mandatory accreditation program for forensic laboratories would include a mandatory certification procedure for individual examiners. Current certification programs, where they exist, are often lax.<sup>162</sup> The American Academy of Forensic Sciences Forensic Specialties Accreditation Board has begun to accredit certifying organizations. Any sound certification program would require “demanding written examinations, proficiency testing, continuing education, recertification procedures, an ethical code, and effective disciplinary procedures . . .”<sup>163</sup> If it makes sense to accredit labs as organizations to ensure the quality of their work, it makes equal sense to certify the quality of their individual employees and to make the laboratories’ continued accreditation contingent on adequate efforts to ensure such certification.

Finally, accreditation can help to promote the formulation of standard technical procedures and of systems to ensure compliance with those procedures. It might be said that “any laboratory without such [standard] protocols cannot be called a ‘scientific’ laboratory.”<sup>164</sup> Indeed,

[a]ll ASCLAD/LAB accredited laboratories must maintain written copies of appropriate technical procedures. These protocols include descriptions of sample preparation methods, controls, standards, and calibration procedures, as well as discussions of precautions, sources of possible error, and literature reference. A



representative number of laboratory reports are subjected to peer review to ensure that the conclusions of the examiners are reasonable and within the constraints of scientific knowledge. This technical review assures that laboratory protocols are being utilized. All new technical procedures must be scientifically validated before being used in casework.<sup>165</sup>

For all these reasons, this Committee recommends that forensics laboratories generating results to be used in death penalty cases be subject to stringent accreditation requirements, including mandating that such labs employ only certified technicians and examiners, do not release in capital cases the results of insufficiently scientifically validated techniques, articulate and enforce written standard protocols, and require proficiency testing. Courts should exclude prosecution forensics evidence in death penalty cases where the source laboratories have not been so accredited.

## **RECOMMENDATION 22: Forensic Laboratories Should be Audited in Cases of Egregious Negligence or Fraud.**

**Every forensics laboratory should have in place a procedure for triggering an audit of all death penalty cases handled by any of its examiners when there is reason to believe that the examiner has engaged in an egregious act of forensic negligence or in any act of forensic fraud in any case (whether capital or not) that the examiner handled during his or her professional career. (2005 Update.)**

## **COMMENTARY**

There is good reason to believe that at least some laboratory technicians engage in repeated instances of negligence or misrepresentation. As the cases of Fred Zain and Joyce Gilchrist, discussed above, illustrate, this conduct can do substantial damage. According to one commentator, “with depressing regularity, respected forensic scientists will concede their own knowledge of instances of ‘dry-labbing’ — faking of data by former colleagues and employees that they have encountered in their own careers.”<sup>166</sup> Most recently, as noted above, the independent investigation of the Houston crime lab revealed several cases of “dry-labbing” and other questionable practices.<sup>167</sup> Other offenders have included medical examiners who distort autopsy results in murder cases; a North Carolina footprint expert who faked results in cases throughout North America during a ten-year career; and an FBI technician who manipulated test results to prove the guilt of any suspect whom he discovered to be African-American.<sup>168</sup> Given these revelations, and “[b]ecause it is safe to assume that most of the forensic science fraud that occurs goes undetected, the amount of fraud that has been revealed bears disturbing implications for any estimate of the amount of fraud that passes without notice.”<sup>169</sup> The implications for death penalty prosecutions relying on forensic sciences are particularly unsettling.

Career criminal units in large metropolitan prosecutors' offices focus resources on a small cadre of repeat offenders who account for a disproportionate share of the number and severity of local crimes. The larger time and financial investments made in catching repeaters are thought to more than justify the added out-of-pocket expense. By a similar logic, focusing additional resources on repeat forensics offenders, whether they err by design, incompetence, or inattention, promises ample payoffs in reducing wrongful convictions and increasing the accuracy of the system. It is for this reason that the Committee recommends audits of *all* death penalty cases handled by forensics examiners who prove to have been fraudulent or egregiously negligent in any case of any sort (whether death eligible or not). Such an audit would reveal whether a particular examiner is indeed a repeat offender, creating reason to question the truth and reliability of his or her testimony in every case.

This recommendation stresses an audit of particular examiners, as opposed to the more common audits of organizations. Auditors collect, verify, and disseminate information to promote organizational honesty, efficiency, and effectiveness.<sup>170</sup> There are many types of audits, including compliance audits to ensure the consistency of organizational behavior with legal standards, and operational audits, which study a unit of an organization to measure both its effectiveness and efficiency in meeting its goals and responsibilities.<sup>171</sup> Both sorts of audits of police crime labs can and have been done.<sup>172</sup>

Conducting such organizational audits is a daunting task. Those types of audits will be time-limited, not covering an organization's entire history. Moreover, auditing all relevant organizational information is often prohibitively costly. Most audits of large organizations therefore engage in statistical sampling believed to be representative of wider operations.<sup>173</sup> Furthermore, audits are done periodically, during which time ongoing errors or deception may go undetected.

Identifying repeat forensics offenders requires something more: a complete audit of *every* death penalty case handled by a forensics examiner for whom plausible, credible evidence has suggested that he or she has engaged in even one act of fraud or other deception or one egregious act of negligence in the course of performing his or her professional duties. The costs of an error — executing an innocent person — are too great to accept anything less. At the same time, such an error means that the true wrongdoer who has committed the most egregious of criminal acts against society — acts meriting the death penalty — goes free, a similarly unacceptable cost.

The cases of Fred Zain, Joyce Gilchrist, and the Houston crime lab demonstrate why such audits are essential. Diligent defense counsel and innocence projects may uncover plausible evidence of examiner wrongdoing in some individual cases. Because only death penalty cases would be examined pursuant to this recommendation, and, even

then, only where there is credible evidence of a problem forensic analyst, the financial, time, and opportunity costs of the audit are low relative to the potential gains.<sup>174</sup> The risk that an examiner may be a repeat problem makes the desirability of a thorough audit even greater. Only a thorough audit of all death penalty cases handled by such examiners, triggered by what the lawyers or others have discovered about particular cases, can reveal the full extent of the systemic harms done by these examiners.

Though this Committee does not recommend any particular mechanism for implementing examiner audits, and leaves such details to each individual organization, the need for such a mechanism is clear. The Zains and the Gilchrists of the forensics world must do no more harm to the innocent, nor continue to aid the guilty in escaping justice.

## **VIDEOTAPING AND RECORDING OF CUSTODIAL INTERROGATIONS**

### **RECOMMENDATION 23: Interrogations of Homicide Suspects Should be Videotaped or Digitally Video Recorded Whenever Practicable.**

- When a recording is made of a custodial interrogation, the original recording shall promptly be downloaded and maintained by procedures adequate to prevent tampering and to maintain a proper chain of custody.
- Only in the unusual case will it be impracticable to videotape or digitally video record a custodial interrogation when it occurs at a police facility or other place of detention.
- Recording should include not merely the statement made by the suspect after custodial interrogation, but the entire custodial interrogation process.
- Where videotaping or digital video recording is impracticable, some alternative uniform method for accurately recording the entire custodial interrogation process, such as by audiotaping, should be established.
- Police investigators should carry audiotape recorders for use when conducting custodial interrogations of suspects in homicide cases outside the police station or in other locations where video recording is impracticable, and all such interviews should be audiotaped.
- Where neither visual nor audio recording is practicable, any statements made by the homicide suspect should at a later time be repeated to the suspect on videotape or by digital video recording and his or her comments recorded.
- Whenever only an audio recording is made, the state shall bear the burden of proving by a preponderance of the evidence, at any pre-trial hearing or at trial, that videotaping or digital video recording of the entire custodial interrogation

process was impracticable. If there had not even been an audio recording made, the state shall further bear the burden of proving by a preponderance of the evidence that audio recording or some other uniform method of complete and accurate recording was impracticable.

- IVideo or audio recording of the entire custodial interrogation process does not require the suspect's permission.
- I Only a substantial violation of these rules requires suppression of a resulting statement at trial. Any violation of these rules shall be presumed substantial unless the state proves the opposite by a preponderance of the evidence.
- I A violation in all cases shall be deemed substantial if one or more of the following paragraphs is applicable:
  - The violation was gross, willful, and prejudicial to the accused. A violation shall be deemed willful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it. A violation shall also be deemed willful if it was caused by a police department's failure adequately to train its officers and other relevant personnel or by its failure adequately to provide officers and other relevant personnel with properly maintained and adequate equipment to comply with this recommendation.
  - The violation was of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement, such as where the accused waives his or her right to videotaping because police contributed to the accused's belief that an untaped oral statement could not be used at trial.
  - The violation created a significant risk that an incriminating statement may have been untrue, such as may happen where the secrecy of the interrogation process encourages police to use interrogation methods that create a significant risk of false confessions in a department with a proven record of using such flawed methods.
- In determining whether a violation not covered by the previous conditions is substantial, the court shall consider all the circumstances including:
  - the extent of deviation from lawful conduct, for example, by videotaping only a small portion of the interrogation process (major deviation) versus videotaping most, but not all, of the process (minor deviation);
  - the extent to which the violation was willful;
  - the extent to which exclusion will tend to prevent violations of this recommendation;
  - whether there is a generally effective system of administrative or other sanctions that makes it less important that exclusion be used to deter such violations in the future;

- the extent to which the violation prejudiced the defendant's ability to support a motion to exclude a confession, or to defend himself or herself in the proceeding in which the statement is sought to be offered in evidence against the defendant.
- whether the violation made it particularly difficult to prove the use of coercive investigation techniques where adequate alternative forms of corroborating evidence are unavailable and a defendant has made out a *prima facie* case of coercion.
- Whenever there is a failure for any reason to videotape or audiotape any portion of, or all of, the entire custodial interrogation process, and the statement was not otherwise suppressed, a defendant shall be entitled, upon request, to a cautionary jury instruction, appropriately tailored to the individual case, noting that failure; permitting the jury to give it such weight as the jury feels that it deserves; and further permitting the jury to use it as the basis for finding that the statement was either not made or was made involuntarily. (2005 Update.)

## COMMENTARY

### The Benefits of Videotaping

Numerous jurisdictions nationwide have now employed videotaping of confessions, and have concluded that the practice promotes effective law enforcement, increases respect for and understanding of police practices, lessens costs such as retrials, and increases the accuracy of criminal proceedings.

Thomas Sullivan, Co-Chair of the Illinois Commission on Capital Punishment and this country's leading expert on videotaping of interrogations, has conducted extensive research on this practice, contacting over 350 law enforcement agencies located in 38 states that record full interrogations. According to Sullivan, "[m]ost record in all serious felony investigations," and the positive results of recording are clear:

The use of recording devices, even when known to the suspect, does not impede officers from obtaining confessions and admissions from guilty suspects . . . . Police are not called upon to paraphrase statements or try later to describe suspects' words, actions, and attitudes. Instead, viewers and listeners see and/or hear precisely what was said and done, including whether suspects were forthcoming or evasive, changed their versions of events, and appeared sincere and innocent or deceitful and guilty.

Experience shows that recordings dramatically reduce the number of defense motions to suppress statements and confessions . . . . Officers are spared from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations. Trial and appellate judges, who repeatedly have been forced

to listen to the prosecution and defense present conflicting versions of what took place during unrecorded custodial questioning, also favor recordings.

. . . . An electronic record made in the station interview room is law enforcement's version of instant replay.

Jurors are coming to expect recordings when questioning takes place in police station interview rooms. When no recordings are made, defense lawyers are quick to argue that unfavorable inferences should be drawn.

Most costs come from the front end, and they diminish once the equipment and facilities are in place and training has been given to detectives. In contrast, savings continue so long as electronic recording continues.<sup>175</sup>

Other prophylactic methods have proved ineffective in achieving these goals. One reason that *Miranda* rights and the Due Process Clauses are relatively ineffective is that courts and legislatures have paid inadequate attention to promoting the accuracy of the suppression court's fact-finding.<sup>176</sup> As noted above, police and criminal defendants may tell very different stories about what happened in the interrogation room, raising difficult credibility questions. Moreover, a suppression judge cannot hear the interrogating officers' tone of voice, see the suspect's face during questioning, or feel the sense of sustained pressure from hour-upon-hour of incommunicado interrogation. Videotaping or similar recording of an entire interrogation is one solution to this problem and offers a number of collateral benefits:

Videotaping police interrogation of suspects protects against the admission of false confessions for at least four reasons. First, it provides the means by which courts can monitor interrogation practices and thereby enforce the other safeguards [such as the giving of *Miranda* warnings and the prohibition against coercive questioning techniques]. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard device accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.<sup>177</sup>

Video recording encourages police to continue investigating until they find the true perpetrator, thus enhancing public safety. Videos can also be used to improve the training of officers in proper interrogation techniques, further reducing the risks of error. All these benefits accrue, however, only if *all* interrogation efforts in a case are taped, not

merely the ultimate confession, as the *New York Times* explained in an article about the Central Park Jogger case:

By the time five teenage suspects gave the videotaped confessions that helped convict them in the 1989 rape of the Central Park jogger, they had been through hours of unrecorded interrogation . . . [T]he exoneration of the young men begs for reforming the way suspects are lead [*sic*] to rehearsed statements of guilt.

According to the Innocence Project at the Cardozo School of Law at Yeshiva University, 23 percent of the people who are exonerated after conviction turn out to have falsely confessed to the crime. Many of these confessions were taped and played as compelling evidence to a jury. As the jogger case and other reversals demonstrate, innocent people can be led into confessions. Their questioners — wittingly or not — also often provide them with details that would seem to be known only to the real criminal.<sup>178</sup>

### **Causes of False Confessions**

According to Thomas Sullivan, the number of false confessions is very small, and the number of those false confessions that are the result of police coercion or other misconduct is much smaller. Mr. Sullivan believes, and this Committee agrees, that the vast majority of police officers act in good faith and according to the law.

Academic literature does, however, describe many instances in which innocent persons have confessed to crimes that they did not commit.<sup>179</sup> Those confessions routinely result in convictions because of the dramatic impact at trial of a suspect who seemingly openly admits guilt to the police. Indeed, one research team concluded that “placing a confession before a jury is tantamount to an instruction to convict . . . .”<sup>180</sup> Estimates of the extent to which false confessions contribute to wrongful convictions vary, with some estimates attributing close to one fourth of all convictions of the innocent partly to false confessions.<sup>181</sup>

The sorts of interrogation tactics likely to result in false confessions probably occur most often in the investigation of high profile crimes, especially of potential death penalty cases.<sup>182</sup> In such cases, police have both more time to investigate and face greater pressure to make an arrest.<sup>183</sup> One of the most conservative early estimates concluded that a police-induced false confession contributed to *at least* one out of every ten wrongful convictions in potential capital cases.<sup>184</sup> The current figure is likely far higher given the modern estimates that flawed confessions play a role in nearly one fourth of all wrongful convictions.



Even when the police do not use psychological trickery or high-pressure tactics, isolated suspects facing lengthy interrogations can feel compelled to confess. Indeed, such compulsion has been documented in far less frightening circumstances than interrogation by police in a criminal case. Law professor Cass R. Sunstein explains:

Consider the possibility of false confessions. An understanding of compliance suggests that the risk of false confessions is quite serious.

An illuminating experiment . . . establishes the point. Subjects were told to do some work on a computer; they were also told not to press the “Alt” key, because if they did so the computer would crash. No subject pressed that key. But at a certain moment, the computer crashed anyway, and subjects were accused by the experimenter of having pressed the “Alt” key. Subjects were then asked to confess to the mistake, with the punishment being a call from the experiment’s principal experimenter. Nearly 70 percent of subjects falsely confessed! When confronted with made-up evidence — a false witness claiming to have seen the subject press the key — over 90 percent of subjects confessed.<sup>185</sup>

In a real life criminal case, of course, the consequences of confession are far greater, and “supportive subcommunities — family members, friends, even lawyers - often provide protection against false confessions.”<sup>186</sup> Indeed, the experimental research demonstrates that such support can be a powerful counterforce to the compulsion of authority figures such as the police.<sup>187</sup> Nevertheless, interrogations often take place with suspects isolated from both lawyers and intimates. There is good reason to believe that significant numbers of ordinary people under such circumstances “can be led to agree that they have engaged in misconduct, even serious misconduct, when they are entirely innocent.”<sup>188</sup>

Empirical studies of false confessions in serious cases are consistent with this conclusion.<sup>189</sup> Those studies reveal that the risk of the innocent confessing is highest for those most vulnerable to suggestion or where deceptive or manipulative interrogation techniques are used. For example, confessions by individuals with mental retardation or similar disabilities or by juveniles (as noted in Chapter II), and those stemming from lengthy interrogations, threats of punishment or promises of leniency, threats of adverse consequences to a friend or loved one, or from police misrepresentations about the nature and quantity of the evidence of the suspect’s criminal involvement, all raise significant risks of false acknowledgements of guilt.<sup>190</sup>

*Miranda v. Arizona*<sup>191</sup> acknowledges the risk of compelled confessions in “custodial interrogations” — those of a suspect held “incommunicado” in a “police-dominated atmosphere.” Accordingly, *Miranda* creates a right to counsel during such interrogations and mandates that police warn suspects of their rights to counsel and to silence. Sus-



pects routinely waive these rights, however, with a significant body of empirical research demonstrating that police have developed a wide range of effective tactics for encouraging *Miranda* waivers.<sup>192</sup> In one commentator's words, *Miranda* warnings have become weak rote recitations, "mere piece[s] of station house furniture."<sup>193</sup>

Nor do the Fifth and Fourteenth Amendment Due Process Clauses, prohibiting admission at trial of "involuntary" confessions obtained by the police, currently offer much protection. Those clauses, as recently understood by most courts, set a low standard of voluntariness turning on a case-by-case weighing of a wide range of circumstances concerning what tactics the police use and how able the individual suspect was to resist those tactics.<sup>194</sup> Moreover, a finding of a valid waiver of *Miranda* rights generally automatically renders the confessions voluntary in the eyes of most judges.<sup>195</sup>

### **The Relative Costs of Videotaping**

Opponents of videotaping worry about its expense, in both out-of-pocket costs, such as purchasing and storing videotape, and its cost in terms of officer time and energy. New York Police Commissioner Raymond Kelly cautions that costs might be particularly acute in very large cities: "With 220,000 to 250,000 arrests each year," he has said, "[t]he logistics of it are mind-boggling for an agency of this size."<sup>196</sup> Others complain that small departments will be particularly stressed because of their minimal staffing and funding. All these opponents worry too that videotaping is just not feasible under certain circumstances, for example, when information must be quickly obtained from a suspect at a crime scene to prevent further harm, when officers (especially in rural areas) cannot easily reach a location where a camera is available, or when suspects blurt out confessions without prompting. Several commentators worry as well that videotaping will discourage even guilty suspects from confessing and that juries will be offended by perfectly legal questioning techniques involving some permissible forms of police officer deception. Videotaping many hours of interrogation also arguably imposes an onerous burden on the judicial process because prosecutors, defense counsel, and judges must spend enormous amounts of time reviewing the tapes. Finally, the suppression remedy, opponents say, will mean loss of too many valid confessions where there is a purely technical error such as a small portion of the entire interrogation process that escaped taping, or if an officer simply mistakenly fails to tape the interrogation at all or found it too hard to do so despite the officer's diligent efforts.<sup>197</sup>

The out-of-pocket costs of video recording are often far less, however, than the financial costs of not recording, including lengthy suppression motions, large damage judgments by the wrongly convicted, expensive investigations into alleged police abuses, and re-trying cases where there is other credible evidence of guilt but the confession is seriously tainted. State and federal funding efforts can help to reduce

the burden on both small and large departments alike. The declining cost of digital video recording methods, which store images on a computer, can also eliminate the expense of storing videotapes.

### **Jurisdictional Experience**

Experience in localities that have used videotaping also demonstrates that, though police may sometimes have a brief adjustment period, they readily learn how to interrogate effectively without hampering the willingness of suspects to talk. These jurisdictions have demonstrated that, in police facilities or other places of detention, video recording can also be undertaken without the suspect's knowledge and that videotaping reduces costs to the state by discouraging lengthy "fishing expedition" cross-examinations and frivolous suppression motions. For reasons like these, the jurisdictions that have used videotaping uniformly praise the procedure.

In Minnesota, where many agencies had reservations about a videotaping mandate imposed there by judicial decision, law enforcement now enthusiastically embraces the process.<sup>198</sup> Amy Klobuchar, the lead prosecutor in Minnesota's Hennepin County, explains: "There was concern that it would wreak havoc on the interrogation process, and it turns out that the opposite is true."<sup>199</sup> Ms. Klobuchar continues: "Cops and prosecutors have found it to be very useful in obtaining convictions and warding off claims of police brutality."<sup>200</sup> She also sees no negative impact on jury attitudes toward police tactics: "Our lawyers have them explain what the rules are, and the juries understand. We think it's helped to build up the credibility of the police."<sup>201</sup>

Likewise, the Sheriff of Kankakee County, Illinois, in testimony before an Illinois House Task Force, explained, "The biggest apprehension was that we would lose a lot of confessions . . . [W]e've never lost a motion to suppress since we've started video interviewing. So it's an excellent tool. I encourage you to use it."<sup>202</sup> Jim Ryan, while serving as Illinois Attorney General, wrote:

Police agencies that are already using videotape in Illinois report almost uniformly agreeable results, finding that videotaping provides the most accurate method of proving what was said, defeats claims of coercion or confusion and increases professionalism by allowing peer review of, and training in, methods of questioning after interviews are completed. Videotaping also clearly protects the rights of suspects as well.<sup>203</sup>

Governor Ryan's Capital Punishment Commission Report recommended videotaping in homicide cases, and the Illinois legislature recently passed a statute requiring such videotaping.<sup>204</sup> This Committee's recommendation indeed draws significantly, but not entirely, from the Ryan Commission effort, although that effort did not address the rem-

edy question, as the Committee does. Maine, New Mexico and the District of Columbia have also enacted laws requiring recording.<sup>205</sup> Courts in Alaska, Minnesota and Wisconsin have also imposed recording requirements.<sup>206</sup> In Massachusetts, the Supreme Judicial Court ordered that courts give juries a special instruction when interrogations are unrecorded.<sup>207</sup> To avoid the instruction, the Massachusetts State Police Department has drafted a policy statement recommending that the police should electronically record all custodial interrogations whenever possible.<sup>208</sup> The highest court in New Jersey ordered a commission to study the issue. The report, issued April 15, 2005, concluded that confessions should be recorded but that the court might not have the power to issue such an order. The commission recommended that courts instruct juries about any failure to record. This instruction is even more stringent than the one ordered by the Massachusetts court.<sup>209</sup>

Other police departments that have embraced video, or at least audio, recording of interrogations include Denver, Boulder, Colorado Springs, and Ft. Collins, Colorado; San Diego County, California; many Connecticut police departments; Broward County and Floral Springs, Florida; Prince George's County, Maryland; Las Cruces, New Mexico; Aberdeen Sheriff, South Dakota; and Austin, Texas.<sup>210</sup> The House of Delegates of the American Bar Association was so impressed by this positive experience that in 2004 it adopted a resolution urging law enforcement agencies to videotape the entirety of custodial interrogations or, where impractical, to audiotape them.<sup>211</sup>

### **Cost-Reduction, Suppressing Confessions in Court and Jury Instructions**

Under this Committee's recommendation, moreover, videotaping, and thus the cost of doing so, is limited to homicide cases because of their potential to unfold into death penalty cases. Furthermore, the Committee recognizes that video recording is sometimes impracticable either because of cost or because of the unavailability of ready access to video equipment. Where that is so, the Committee recommends using next-best recording methods, starting with audio recording. Clear guidance is also given to officers about when to record because that obligation applies to any "custodial interrogation," a familiar term since the Supreme Court used it in *Miranda v Arizona* in 1966.

Suppressing a confession that is not videotaped is, in this Committee's view, sometimes a necessary remedy. Without that remedy, officers will have little incentive to comply with a mandate to videotape. Nevertheless, suppression should not always or automatically be the result when the videotaping requirement is violated. For example, if the violation was accidental and only a small portion of the interrogation process was not taped, and if there is no reason to believe that there is a significant risk that the interrogation was untrue, suppression would seem an extreme remedy. The ALI's Model Code of Pre-Arrest Procedure, which the Committee adopts virtually verbatim, uses a multi-factor balancing test for determining whether to suppress confessions that are not

videotaped where practicable. Under that test, suppression is reserved for “substantial” violations. Substantiality is automatically shown by a violation that is “gross, willful, and prejudicial to the accused,” or likely to lead the accused to misunderstand his or her rights and influence the decision to make a statement, or creates a significant risk that the accused’s statement is false. In all other situations, substantiality is determined by weighing all the circumstances, including the likely deterrent effect of suppression, the degree of willfulness, and the availability of effective alternative administrative remedies. This test provides one helpful way to promote police compliance without unduly burdening the justice system.

However, this Committee has altered the wording of the original ALI Code to promote greater clarity, rather than to effect any significant change in substance, and to fill gaps in that Code. In particular, because videotaping of the entire interrogation process in homicide cases should be the norm, this Committee has placed on the state the burden of proving by a preponderance of the evidence that videotaping, or, where applicable, next-best recording methods such as audiotaping, were impracticable, and that suppression is not an appropriate remedy in an individual case. These are matters about which the ALI Code is silent.<sup>212</sup> Moreover, this recommendation expressly states that a police department’s failure to provide its officers and other personnel with adequate training and properly maintained equipment (such as videocameras or audiocassette recorders) constitutes a willful violation of this recommendation, even if the individual officer acted in good faith.<sup>213</sup> Any contrary position would permit the exception to swallow the rule. On the other hand, if equipment malfunctions despite proper maintenance and training, that malfunction would not alone render the violation willful.

Furthermore, because any failure to tape inherently prejudices a defendant’s ability to litigate a suppression motion, this Committee’s recommendation adds to the ALI Code a cautionary instruction to the jury, when the statement is not otherwise suppressed, to consider the failure to videotape in deciding whether a confession was made or, if made, whether it was voluntary. This instruction should be available even when the police are not at fault, that is, even when taping the entire custodial interrogation process was indeed impracticable, because, regardless of the care or good faith of the state, the absence of taping creates an undue risk of error in the fact finding process.<sup>214</sup> Of course, such an instruction may need to be tailored to the facts of an individual case. For example, if there is evidence from which a reasonable jury might conclude that the police willfully violated the taping rule to hide details of the interrogation process, a stronger instruction might be needed. Correspondingly, if only a small portion of the process was not taped and there is evidence from which a reasonable jury might conclude that this failure was inadvertent, and no specific evidence has been offered of inappropriate interrogation tactics occurring during the taping gap, a jury might also be instructed to take those matters into account in determining the weight of the failure to tape completely.

In short, especially in the death penalty context, the benefits of video and digital recording of the entire interrogation process far outweigh its costs and will help to promote fairness, accuracy, public safety, and public confidence in the system of justice.<sup>215</sup>



# **CHAPTER VII: DUTY OF JUDGE AND ROLE OF JURY**

## **SUMMARY**

24. Appellate courts reviewing capital convictions for sufficiency of the evidence should reverse if a reasonable jury could not have found guilt beyond a reasonable doubt. (2005 Update.)
25. If a jury imposes a life sentence, the judge in the case should not be allowed to “override” the jury’s recommendation and replace it with a sentence of death.
26. The judge in a death penalty trial should instruct the jury that if any juror has a lingering doubt about the defendant’s guilt, that doubt may be considered as a “mitigating” circumstance that weighs against a death sentence.
27. The judge in a death penalty trial must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.

## **RECOMMENDATION 24: Courts Should Apply a More Stringent Standard for Appellate Review of Evidentiary Sufficiency.**

The current standard for appellate review of evidentiary sufficiency in criminal cases is inappropriate in capital cases. It should be replaced with a standard requiring reversal if a reasonable jury could not have found guilt beyond a reasonable doubt. (2005 Update.)

## COMMENTARY

The degree to which appellate courts defer to lower court decisions in capital cases varies according to the standard of review that they apply. Appellate courts are typically extremely deferential to the decisions of a jury in a criminal case. Rather than applying a *de novo* standard of review (in which the appellate court overturns the lower court's decision if it would not have reached the same result) or the standard of review widely used in civil cases (whether a reasonable jury could have reached the same result), in criminal cases "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>1</sup> This standard, derived from the Supreme Court's decision in *Jackson v. Virginia*, traditionally is justified in part by the presumption that the jury occupies the best position from which to weigh facts and evaluate the credibility of witnesses, and in part by fears that aggressive appellate review might erode the constitutional right to a jury trial. The *Jackson* standard applies as a matter of due process when a criminal defendant appeals a conviction on the ground that the jury's verdict was not supported by proof beyond a reasonable doubt. The majority opinion states that:

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt . . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law.<sup>2</sup>

Even though the *Jackson* "mere rationality" standard of review is based on due process concerns, it describes only what is *minimally* necessary to meet the constitutional requirement that the prosecution prove all elements of a crime beyond a reasonable doubt. A less deferential standard would still protect the jury's role, while at the same time ensuring the defendant's fundamental constitutional rights.

Because *Jackson* defines only a minimum, courts are free to go beyond it to safeguard the integrity of their processes. They should do so. The *Jackson* standard has been criticized for protecting defendants only against irrational decisions, and not wrong ones.<sup>3</sup> Jon O.



Newman, distinguished chief judge of the United States Court of Appeals for the Second Circuit, stated in a well-founded criticism: “The adoption of this novel standard was flawed at the outset.”<sup>4</sup> In the context of capital procedures, which “overproduce” erroneous convictions, the *Jackson* standard of review is even more troubling.<sup>5</sup>

The Supreme Court itself has recognized that “death is different,” and that some procedures should be modified to reflect that reality.<sup>6</sup> Less deference on appeal would likely reduce the number of wrongful convictions in capital cases. As committee member Scott Turow has noted, capital cases—with their heightened emotions and complexity—present unique impediments to accurate jury findings:

[T]he factor that is the greatest snare for the innocent is the nature of the cases themselves . . . , because it is these extreme and repellent crimes that provoke the highest emotions—anger, especially, even outrage—that in turn make rational deliberation problematic for investigators, prosecutors, judges, and juries . . . .

The standard for review of juries’ fact-finding decisions in these highly emotional cases should not be the same as in a case in which the defendant is accused of stealing candy from a five and dime. Currently, however, appellate courts are asked in both kinds of cases to assess whether *any* rational jury could have reached this conclusion (the standard itself emphasizing the word “any”), and they must take all evidence “in the light most favorable to the verdict,” meaning that they must draw all inferences from the evidence and resolve all credibility questions in a way that supports the jury’s decision. An appellate judge may not set a verdict aside despite the judge’s nagging doubts about an unsavory state witness or the unlikelihood of the prosecutor’s theory about motive.<sup>7</sup>

Whether such deference is suitable in some non-capital cases (a question beyond this Committee’s purview), it is not appropriate in capital cases.<sup>8</sup> A more meaningful standard of review would not only enable appellate judges to correct jury mistakes, it would also “encourage individual responsibility [for capital decisions] among appellate judges,” an outcome that would enhance the “moral foundation for capital punishment.”<sup>9</sup>

Many available formulas exist to replace the *Jackson v. Virginia* standard in capital cases. We recommend that in capital cases, courts adopt a standard that is already widely used in civil cases: appellate courts should “review sufficiency [of evidence] determinations in criminal cases by the more traditional ‘reasonable jury’ test . . . a test that asks only whether a reasonable jury could find guilt beyond a reasonable doubt.”<sup>10</sup> This standard represents more than just a semantic change from the *Jackson* standard. As Judge Newman explained, this is “the traditional test for determining sufficiency of evidence—namely, whether the law’s ubiquitous reasonable person, in this case a reasonable jury, could find the matter proven by the requisite degree of persuasion, in this case beyond a

reasonable doubt.” By contrast, the *Jackson* standard “shifts the emphasis away from the reasonable jury and conjures up the image of an endless number of random reasonable juries, risking creating the misleading impression that just one of these juries need be persuaded beyond a reasonable doubt.”<sup>11</sup>

## **RECOMMENDATION 25: Judges Should be Prohibited from Overriding a Jury’s Recommendation of a Life Sentence to Impose a Sentence of Death.**

**Judicial override of a jury’s recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury’s recommendation of death.**

### **COMMENTARY**

Although the Supreme Court has determined that judicial override of a jury’s recommendation that the defendant not be sentenced to death is constitutional,<sup>12</sup> the jury is uniquely equipped to make the judgments that are understood to be critical to the imposition of the death sentence. The jury, which is comprised of members, and serves as the representative, of the community, is best positioned to “express the conscience of the community on the ultimate question of life or death.”<sup>13</sup> It can properly express the community’s outrage, indicating by its sentencing recommendation that the perpetrator has lost his or her moral entitlement to live. Because the decision whether to impose death remains substantially a moral decision despite efforts to impose legal precision on it, a jury determination is particularly appropriate. The jury, as opposed to a single government official, may be most likely to avoid the danger of an excessive response to the always horrible act of intentional homicide.<sup>14</sup> Indeed, in states where judges are elected and subjected to tough-on-crime politics that typically equate electoral success with unwavering support for the death penalty, juries may be the voice of reasoned moderation.

Of the thirty-eight states that have the death penalty, only four — Alabama, Delaware, Florida, and Indiana — continue to permit judicial override of jury recommendations. Supporters cite two justifications for permitting judicial override of jury recommendations: ensuring consistency in sentencing and correcting sentence recommendations by juries that are excessively harsh or based on emotion or desires for vengeance. In those states that have employed judicial override extensively, there is no evidence that consistency in results has been achieved. More troubling, the predominant use of jury override, although differing among states, has been for courts to impose death after juries recommend a life sentence. In Florida and Alabama, the vast

majority of overrides have been to impose death, an outcome that has occurred over 165 times in Florida and over sixty-five times in Alabama. In Indiana, although slightly favoring death, judicial overrides have been almost equally split between death and life in prison. Delaware's experience is unique in that overrides have been used only to reduce death sentences to life in prison.

While the reasons that judges have predominantly overridden life sentences to impose death cannot be clearly established, the apparent cause is clear: it is political survival. When judges in states that elect their trial judges have the power to override jury sentences in capital punishment cases to impose either life or death, that discretionary judgment provides a ready focus for political pressures. It appears to result primarily in an inclination to impose death.

Consistent with the practice in Delaware, asymmetry in judicial authority to override a jury determination is appropriate. The American experience with the death penalty demonstrates that no rule of law *requires* the imposition of the death penalty on any set of facts. Thus, a determination by the jury to impose death will often be appropriate under the facts but will never be required as a matter of law. On the other hand, the imposition of death may, in some instances, not only be inappropriate but also be legally or morally improper, may be disproportionate or excessive, or may simply be contrary to the weight of the evidence. Thus, states may appropriately authorize their trial courts to correct juries' sentencing recommendations of death, when the court judges such a sentence to be excessive, at the same time that they prohibit those same trial courts from overriding a jury recommendation of life imprisonment to impose death.

This recommendation does not speak to states that entrust death penalty sentencing to judges in the first instance. For reasons discussed above, the wisdom of having such a structure may be questioned, given the reality of judicial electoral politics. However, a death sentence that results from a judge overriding a jury determination that the accused should live is far, far more difficult to justify under the values of our system than is an initial determination, entrusted to the judiciary, that the appropriate sentence is death.

## EDITOR'S NOTE

In light of a series of recent U.S. Supreme Court cases, including *Apprendi v. New Jersey*<sup>E1</sup>, *Ring v. Arizona*,<sup>E2</sup> *Blakely v. Washington*,<sup>E3</sup> *U.S. v. Booker*,<sup>E4</sup> and *U.S. v. Fanfan*,<sup>E5</sup> in which the Court found that certain sentencing practices violate the Sixth Amendment's right to a jury trial, the constitutionality of judicial overrides is now in doubt. As Justice Sandra Day O'Connor predicted in *Ring*, that decision would render the sentencing systems in Alabama, Delaware, Florida, and Indiana vulnerable to challenge because of their "hybrid" systems in

## EDITOR'S NOTE (CONTINUED)

which “the jury renders an advisory verdict but the judge makes the ultimate sentencing determination . . . .”<sup>E6</sup> It seems likely that the validity of the practice will be decided in the courts rather than the legislatures. No matter what the courts decide, the Committee continues to object as a matter of policy to the practice of judicial overrides.

## RECOMMENATION 26: Trial Judges Should Instruct Juries on Lingering (Residual) Doubt.

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: “If you have any lingering doubt as to the defendant’s guilt of the crime or any element of the crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant.”

## COMMENTARY

In *Lockhart v. McCree*, the Supreme Court recognized that jurors who vote to convict may nevertheless entertain “residual doubts” about the defendant’s guilt that would “bend them to decide against the death penalty.”<sup>15</sup> Residual doubt is defined as any remaining or lingering doubt a jury has concerning the defendant’s guilt, despite having been satisfied beyond a reasonable doubt. Jurors who are confident enough of the defendant’s guilt to convict may still conclude that their level of confidence falls short of the complete moral certainty needed to take a person’s life. The reasonable doubt standard permits a conviction despite the presence of genuine doubts, or the absence of absolute certainty, about the defendant’s guilt of the crime. Given the irrevocable nature of the penalty of death, a decision to impose the penalty requires a greater degree of reliability than is required for imposition of other penalties.<sup>16</sup> Jurors should not vote for the death penalty if they entertain doubts as to the defendant’s factual guilt. Yet many jurors will be unaware of the continuing relevance of their doubts about guilt, in the absence of a jury instruction informing them.

In *Franklin v. Lynaugh*, a plurality of the Supreme Court ruled that the Eighth Amendment does not mandate the giving of a residual doubt instruction.<sup>17</sup> As one commentator observed, however, a majority of the members of the Court found that “regardless of whether residual doubt is an Eighth Amendment right, there was no violation in [the particular] case because Texas had not interfered with the defendant’s ability to argue the issue to the jury.”<sup>18</sup> In the wake of the decision, several states have barred, through judicial decision, the giving of a residual doubt instruction, and in other states the is-

sue is dealt with inconsistently.<sup>19</sup> This recommendation addresses the issue left open in *Franklin v. Lynaugh* by making it clear that states should not bar the giving of residual doubt instructions. It also goes further and, as a matter of common sense and fundamental fairness, encourages states to adopt rules mandating the giving of such instructions in cases in which the presiding judge deems them appropriate. The recommendation contemplates that the universe of such cases will be quite small, since in most cases that proceed to the capital sentencing phase, jurors will not maintain any doubt of the defendant's guilt of the crime charged.

### EDITOR'S NOTE

While *Franklin v. Lynaugh*,<sup>E7</sup> held that a defendant did not have a constitutional right to have the judge instruct the jury that it should consider any lingering, or residual, doubt about guilt when deciding on a sentence, the Court's opinion did not address the question of whether the defendant has the right to present such evidence to the jury in the first place. The Court has now agreed to decide this question in *Oregon v. Guzek*,<sup>E8</sup> which will be heard in the Court's 2005-2006 Term.

## RECOMMENDATION 27: Judges Should Ensure That Capital Sentencing Juries Understand Their Obligations to Consider Mitigating Factors.

Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. In light of empirical evidence documenting serious juror confusion on the nature of the jury's obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury's hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to consider the defendant's mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.

The judge's obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to

**think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.**

## COMMENTARY

Empirical evidence shows that capital sentencing juries often labor under significant misapprehensions about the nature and scope of their obligation at the penalty phase. Research indicates that many jurors wrongly approach the sentencing decision in the same manner as they do the guilt decision, that is, without fully understanding that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. This confusion can make it significantly more likely that these juries will sentence a defendant to death than it would have been had they understood their obligations more clearly. Standard (pattern) jury instructions that give jurors complex criteria, including lists of aggravating and mitigating factors, often leave jurors with the erroneous impression that their moral duty will be discharged if they simply tally up the number of aggravating and mitigating factors and weigh them against each other.<sup>20</sup>

Juries often do not understand that they are not confined to considering enumerated aggravating factors, but may also consider non-enumerated and non-statutory mitigating factors. Indeed, juries are often seriously confused about what mitigation is and how it must be proved.<sup>21</sup> Moreover, they often believe that the factors can be weighed or tallied according to a pre-existing formula,<sup>22</sup> whereas in fact they must be considered in light of each juror's ultimate duty to decide whether the particular defendant, in light of all the circumstances before the jury, deserves to die.<sup>23</sup> These erroneous beliefs tend to tilt juries toward a death sentence for a variety of reasons. First, enumerated aggravating factors tend numerically to outnumber enumerated mitigating factors. Secondly, any attempt to weigh these factors is difficult and misguided because the factors are not comparable, and because such an attempt obscures the true issue: whether the jurors conclude in light of all the evidence that the defendant deserves to die. Finally, the statutes encourage jurors to rely on the appearance of mathematical certainty rather than exercise their own judgment and take responsibility for its consequences.<sup>24</sup>

The Supreme Court has upheld standard (pattern) jury instructions that, as has been empirically demonstrated, are apt to give jurors incorrect impressions about their duties.<sup>25</sup> Such decisions should not relieve capital sentencing judges of their duty to ensure that the instructions given in their courts are as clear and accurate as possible. For example, Professor Jordan Steiker suggests the following instruction:

The death penalty, as opposed to other serious punishments such as life imprisonment, is reserved only for those defendants who deserve the penalty, and the moral judgment of whether death is deserved remains entirely with you. The determination whether death is deserved involves consideration of any factors that suggest whether the defendant is or is not among the small group of “worst” offenders; and in deciding whether the defendant deserves the death penalty, you are required to consider not only the circumstances surrounding the crime, but also aspects of the defendant’s character, background, and capabilities that bear on his culpability for the crime.<sup>26</sup>

Furthermore, judges often respond to jury requests for clarification of their obligations simply by referring the jurors back to reread the instructions. This practice, not surprisingly, is ineffective at clearing up juror confusion. Indeed, one study concluded that this practice increased the already strong likelihood that jurors would sentence the defendant to death based on misapprehension about their duties.<sup>27</sup> A judge confronted with juror confusion should take affirmative steps to dispel that confusion. Simple answers to jury questions, in plain English, can significantly improve the odds that jurors will decide on a sentence based on accurate understandings of the law. For example, Professors Steven Garvey, Sheri Lynn Johnson, and Paul Marcus found the following simple clarification to significantly improve juror comprehension:

Even if you find that the state has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.<sup>28</sup>

As to both the original instructions and the means of clarifying juror confusion, no one formula can ensure that juries understand their duties. The important point is that the judge should not assume, particularly in light of all the evidence to the contrary, that reliance on pattern jury instructions and refusal to clarify will be sufficient. Judges must stay constantly vigilant to ensure that they have adequately discharged their duty to guide jurors properly in the applicable law.





## CHAPTER VIII:

# ROLE OF PROSECUTORS

### SUMMARY

28. Prosecutors should provide “open-file discovery” to the defense in death penalty cases. Prosecutors’ offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies. Even if a jurisdiction does not adopt open-file discovery, it is especially critical in capital cases that the defense be given all favorable evidence (*Brady* material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies.
29. Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identifications and statements of informants and co-defendants) particularly subject to human error.
30. Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced.
31. All capital jurisdictions should establish a Charging Review Committee to review prosecutorial charging decisions in death eligible cases. Prosecutors in death eligible cases should be required to submit proposed capital and non-capital charges to the committee. The committee shall issue binding approval or disapproval of proposed capital charges, with an accompanying explanation. Each jurisdiction shall forbid prosecutors from filing a capital charge without the committee’s approval. (2005 Update.)

32. Foreign nationals who were not afforded rights to consular notification and access under the Vienna Convention on Consular Relations shall not be eligible for the death penalty. The chief law enforcement officer for each state with capital punishment and for the federal government shall ensure full compliance with the VCCR. An independent authority shall report regularly to the chief executive or legislature about compliance with the VCCR. (2005 Update.)

## **RECOMMENDATION 28: Prosecutors Should Provide Expanded Discovery and Ensure That Exculpatory Information is Provided to the Defense.**

Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety. Full “open-file” discovery should be required in capital cases. However, discovery of the prosecutor’s files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only when the prosecution clearly demonstrates that restrictions are required to protect witness’ safety, or shows similarly substantial threats to public safety. If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory (*Brady*) evidence to the defense. In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance; (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing; and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for *in camera* review to determine whether such evidence meets the *Brady* standards of helpfulness to the defense and materiality to outcome. When willful violations of *Brady* duties are found, meaningful sanctions should be imposed.

## **COMMENTARY**

### **Require Full Open-File Discovery in Death Cases**

Because, as the Supreme Court noted in *Gregg v. Georgia*,<sup>1</sup> “death is different,” discovery from the prosecution in death penalty cases should not be conducted as business-as-usual, which in criminal litigation typically means quite limited disclosure

of information. The extreme nature and finality of death provides a strong basis for treating discovery in death penalty cases differently than in ordinary criminal litigation. Restricting discovery effectively withholds disclosure of relevant information, creating the real risk that the truth will be hidden, and, as a result, increasing the likelihood of executing an innocent person. These considerations strongly support broad discovery in capital cases.

Criminal trials may be a competitive process filled with sharp practices and gamesmanship. Whether such practices are consistent with justice in ordinary cases may be debated; certainly, however, such practices should cease when the imposition of a death sentence is at stake. Society may feel justified in authorizing its representatives to skirt the line between playing the game rough and playing it fair when it comes to convicting those who are apparently guilty and making certain that they are confined and society is protected. Whether such practices are ever warranted, skirting the line with the potential of denying fair play cannot easily be justified when the issue is whether to execute rather than to imprison.

Expanding discovery in criminal cases has long been advocated by the American Bar Association and other groups supporting reform. Whatever the merits of such proposals across the full range of criminal litigation, the case for broad discovery is very strong — indeed imperative — in capital cases. In capital cases, avoiding the ultimate horror of executing an innocent person makes expanded discovery essential. The availability of more information will help the jury perform its task more accurately, and, undeniably, it will reduce the chances that the truth will be hidden and an innocent person will be executed. Full disclosure by the prosecution should be understood to be an aspect of the openness that we increasingly associate with good government. Moreover, such disclosures should not be feared, since jurisdictions such as Florida continue to be able to prosecute death penalty cases effectively while providing disclosures that are extraordinary by the standards employed in criminal prosecutions in many jurisdictions.<sup>2</sup>

Although involving unfamiliar practices that, in some jurisdictions, challenge accepted norms, we believe that the provision of full open-file discovery will be of great benefit to the prosecution in assuring the public of the fairness both of the process and of finality. It will eliminate most questions about whether all favorable information has been supplied, thus vastly decreasing the opportunity for litigation with the frequent resulting delays and reversals.

Accordingly, regardless of whether a particular jurisdiction provides open-file discovery in ordinary criminal litigation, discovery should be full and open in capital cases. If necessary, separate discovery statutes should be enacted to cover death penalty cases. In all jurisdictions, the rule in capital cases should be full, open-file discovery under which,

at an early stage, all documents, information, and materials available to the prosecution are automatically and routinely made available to the defense.

Allowing the defense to examine a prosecutor's file is of little benefit, however, if the information in the file is incomplete, either through inadvertence or intentional practice. Indeed, the fact that information available to investigative sources is not in the file may mislead and deceive the defense in an ostensibly open-file system. Accordingly, to make any open-file system meaningful and effective, investigators should be given the express duty to retain and organize all information and materials obtained during the investigation. The prosecutor should have the express responsibility of assembling all relevant information by requesting all agencies that participated in investigating the case or examining evidence to provide all relevant documents, information, and materials to the prosecutor for inclusion in the file. Practices of investigators and investigative agencies that encourage reports not to be prepared in written form to avoid disclosure should be explicitly prohibited, and instead, requirements that significant results and facts be made in writing and preserved should be enacted.

Limitations may be placed upon discovery from the prosecution for compelling interests, such as threats to witness safety. Consequently, even an open-file discovery system should provide opportunities for the granting of protective orders. However, to avoid routine erosion of the completeness of discovery, withholding information should require specific judicial approval. An exacting standard should be required before a protective order is granted. Such an order should not be granted unless withholding discovery is necessary to protect the safety of the witness, to protect other specified individuals, or to achieve similarly specific and compelling justifications in support of public safety.

We acknowledge that emergency situations and the unique problems of national security and protecting witnesses from threats of death or serious physical harm, which are most frequently encountered in terrorism and organized crime prosecutions, may require limited, tightly drawn exceptions to the ordinary practices of automatic required disclosure. Relief from those requirements should be solely by court order. These special situations are largely confined to federal prosecutions and will be very rarely encountered in typical death penalty litigation. Even in special situations, jurisdictions must have in place procedures that require contemporaneous recording of the prosecution's justification for departure from standard practice.

The reforms described above will constitute a major change in discovery practices in many jurisdictions. They will also require special efforts and procedures that entail costs to the system. Where general application of this new system would constitute the greatest change from the existing practice in criminal cases, the impact and costs can be dras-

tically limited by creating a separate discovery system that applies only to death penalty cases. The number of capital cases is relatively small in every jurisdiction, and they are already a special focus for the courts. As discussed above, creating a new system in death penalty cases is both manageable and clearly justifiable.

### **Disclose Exculpatory (Brady) Evidence**

Under long-standing Supreme Court authority, the Due Process Clauses of the Fifth and Fourteenth Amendments require the prosecution to provide the defense with all information helpful to the defense that is material to the determination of guilt or punishment. This information has come to be referred to as “*Brady*” material, after the Supreme Court case called *Brady v. Maryland*.<sup>3</sup> The Constitution is violated if the information is not disclosed, regardless of the bad or good faith of the prosecutor. Moreover, a violation occurs even where failure to disclose is not the direct responsibility of the prosecutor, and the information or evidence remains in the hands of police officials and never makes its way to the prosecutor.

Although causation is often difficult to determine, many — perhaps the majority — of the failures of the prosecution to provide Brady material are the result either of the prosecutor’s never seeing the exculpatory information or of the prosecutor’s seeing it but not recognizing its exculpatory nature. Moreover, these inadvertent failures to disclose are likely to be remedied more easily than are purposeful decisions to hide or destroy information that has been recognized to be exculpatory.

We suspect that a large number of the breakdowns in the system occur because of the failure of investigators outside the prosecutor’s office who have not been educated in, or pay insufficient attention to, their institutional duties to provide all potentially exculpatory information to the prosecution for its assessment under *Brady*. We believe that because of prosecutors’ legal and ethical training, they are uniquely equipped to assist investigative agencies in appreciating their responsibilities under *Brady*, and we encourage prosecutors to assume that role.

A program of public and institutional instruction has an important role in the success of this effort. Instruction will cover the benefits of full disclosure and the components and requirements of *Brady*. The message must be received by all law enforcement and investigative agencies of the importance of full and candid disclosure to the prosecution of all information potentially helpful to the defense.

Because of the paramount importance of fairness in death penalty cases, systems should be established to help minimize inadvertent failures to disclose. Such systems would have three components. First, the prosecutor should have an obligation to request delivery of all documents, information, and materials relevant to the case from every

agency that was involved in investigating the case or analyzing materials, and to require a response from these agencies. Failures to seek information, as well as failures to respond, would thus be eliminated or vastly reduced. Under such a system, information not secured would be more likely to be the result of purposeful misconduct, which we believe is rare.

Second, an accountable and named prosecutor or prosecutors should be charged with reviewing all the information received to determine whether it is exculpatory. Again, the opportunity for inadvertent failures to produce would be reduced since some responsible officer would be charged with conducting the review and would know that he or she may be held accountable for failures to disclose.

Third, if arguably exculpatory evidence is unearthed, it should be delivered either to the defense or to a neutral judicial officer, who would inspect it to determine whether disclosure is required. Prosecutors, who have determined on the basis of all available evidence that the defendant is guilty, are likely to have a difficult time viewing information as exculpatory. From the prosecutor's perspective, any exculpatory evidence must not be truly exculpatory, for otherwise the prosecution would be dismissed. In the prosecutor's mind, each piece of arguably exculpatory information must have some explanation consistent with guilt. Even a judicial officer may not understand the significance of evidence in the same way that an advocate for the defense would. However, the judge's neutral position should make somewhat easier any recognition that the information may be helpful to the defense.

While disclosure of all *Brady* information is important, a special responsibility exists where the prosecution creates such evidence through plea bargains and other inducements offered to accomplices or informants to secure their testimony. Jurisdictions should consider prohibiting vague and uncertain inducements, which are sometimes made in that apparently weaker form so that disclosure arguably can be avoided because not clearly required by the Constitution. In any case, all such inducements should be disclosed to the defense and should be admissible regardless of whether the inducement was offered directly by the prosecutor, by officials in other jurisdictions, or by law enforcement officials.<sup>4</sup> The prosecutor in charge of the case should be charged with a duty to gather information about possible deals with witnesses from all officials who have been in a position to offer such inducements.

Willful failures to disclose *Brady* material in death penalty cases are always wrong. While we trust such failures are relatively rare, they threaten the execution of the innocent. Jurisdictions should enact meaningful punishments that are effective and enforced when a court determines that a willful violation has occurred. The penalties should include monetary sanctions, demotions, and sanctions affecting professional licenses, where

appropriate. Based on past experience, it is very likely that courts will be reticent to find willful violations, and so the possibility of sanction should not concern prosecutors and law enforcement officials who fight very hard but fairly. The existence of the penalty is, however, potentially important to deter those who purposefully cross clear lines, particularly in capital cases where the consequence of a violation may be death.

## **RECOMMENDATION 29: Prosecutors Should Establish Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed.**

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

## **COMMENTARY**

Throughout time and without regard to political ideology, those knowledgeable about criminal prosecutions have worried about certain types of evidence that, due to human frailties, predictably will produce evidence of questionable validity.

One area of concern is with eyewitness identification, specifically stranger identification. History is replete with injustices that were the result of sincere but mistaken identifications.<sup>5</sup> Human perception and memory are fallible.

Another source of concern that has been recognized throughout our judicial history is the testimony of co-defendants, who frequently will shift blame in the self-interested quest to avoid the consequences of their own actions. Human nature often discourages individuals from acknowledging their unique responsibility for taking another's life when that acknowledgment might lead to their own execution. The normal human instinct in support of self-preservation is to shift blame and to name another as the truly reprehensible individual. And even where clear lies are not told, subtle shifts of role are extraordinarily likely among those facing the possibility of execution.

A third clear category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them



to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony.

In noting serious questions about the value of these three classes of evidence, we break no new ground. As noted earlier, their inherent weaknesses have been long recognized and the injustices caused by their use have been frequently documented. The real difficulty is in limiting the abuses without excessively hampering law enforcement in protecting society.

Categorically prohibiting prosecutors from using all such questionable evidence in criminal prosecutions is not justifiable. A single eyewitness may be correct; the co-defendant who first cooperates may, in fact, be the least guilty; and a jailhouse informant trusted by the defendant may have heard an accurate admission of guilt. The particularly high probability of erroneous evidence in these three circumstances is not sufficient reason to produce a rule excluding all such evidence in any criminal case.

Indeed, the difficulty of policing the evidence without excluding it is probably the major reason that reforms have not progressed in any of these three categories. The decision whether to seek the death penalty, with its awesome impact and finality, provides a unique mechanism for imposing a limited but necessary control on questionable evidence.

A prosecutor should never seek a conviction unless he or she is convinced by all the evidence that the defendant is guilty. If, after careful inspection and critical examination of all the evidence in the case, the prosecutor is morally certain of guilt, it would be a dereliction of duty to fail to prosecute. Such a decision to prosecute can, conceivably, depend critically on one of these classes of particularly questionable evidence. If the prosecutor still believes guilt is established to a moral certainty despite informed skepticism, the prosecutor should move forward to convict the defendant for the good of society. However, seeking the death penalty is and should be different.

In making this recommendation, we assume that jurisdictions will make the option of life without parole available.<sup>6</sup> With that sentencing option, community safety can be protected without seeking the death penalty. Not seeking death allows for the possibility that an error in the eyewitness's identification or the co-defendant's or jailhouse informant's testimony will ultimately be recognized. This correction of error may be admitted by the witness; may be established by independent evidence; or may result from the operation of human conscience, the progress of science, or pure luck. Execution needlessly prevents such errors from being corrected.



The Committee therefore recommends that prosecutors, employing appropriate skepticism, have the discretion to seek convictions based on any or all of these classes of questionable evidence, but that they create protocols or guidelines that constrain when to seek the death penalty. Unless independent evidence establishes the guilt or, where appropriate, the critical role of the defendant in the taking of human life, prosecutors should not seek the death penalty. What is sufficient independent corroboration will frequently be debatable. However, it is clear that corroboration should not be a *pro forma* requirement or structured to be too easily found. The reason a rigorous demand for corroboration can and should be imposed is that its absence will still mean that the defendant may be confined for the remainder of his or her life. By contrast, an easy decision that corroboration exists, when in fact independent proof is lacking, may mean that errors will only be unearthed after the defendant has been executed.

### **RECOMMENDATION 30: There Should be a Mandatory Period of Consultation Before Prosecutors Decide Whether to Commence a Death Penalty Prosecution.**

**Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.**

#### **COMMENTARY**

All murders are horrible crimes. As a result, a decision by the prosecution to seek the ultimate penalty — death — may very frequently appear the right response in the immediate aftermath of any murder. However, death penalty prosecutions should be undertaken only in the worst of murder cases. Moreover, the decision to prosecute capitally should, insofar as possible, be free of the pressure of media attention and political considerations.

Because of the horror and notoriety of many murders, a local prosecutor's public commitment that the case will be prosecuted capitally may seem to be the humane and correct response for the victim's family and friends and for a concerned public, particularly when the apparent perpetrator is quickly apprehended. Unfortunately, unwarranted commitments to seek the death penalty made during the immediate aftermath of the crime will be exceedingly difficult to retract unless the decision was entirely unwarranted.

The immediate reaction may, however, not be the appropriate one if significant factors are left out of the initial analysis and if important facts are not yet known. Haste to make and announce decisions to prosecute capitally can contribute to an erroneous decision on the question of guilt by limiting the scope of the investigation and putting pressure on investigative authorities to build a case rather than to investigate it.<sup>7</sup>

Rushing to judgment may even more frequently have a negative impact on making the appropriate decision whether to seek death, skewing a decision to prosecute capitally. Determining how a particular murder relates to others in the jurisdiction that were and were not prosecuted as death penalty cases requires careful analysis that is typically not possible on the basis of the factual details and other types of information available in the immediate aftermath of the crime. The decision to seek the death penalty should also be based on the characteristics of the offender as well as the crime, and information relating to the offender — particularly the salient features that might render the defendant's execution unwarranted — are often neither obvious nor quickly discovered. Moreover, the strength of the case and the certainty that the perpetrator is guilty should be a critical part of the analysis. However, many critical pieces of evidence, such as scientific analysis, will become available only over a period of weeks, not days. Such results may be critical to determining whether a realistic possibility of innocence is present. Evidence of guilt that is good enough to warrant prosecution may not be certain enough to justify the irrevocable act of executing the apparent offender. If made without careful consideration and full information, the decision to seek the death penalty may be unwise, and, once made, it may lead to a jury imposing a death sentence that is disproportionate.

For all these reasons, a period of time should be built into the charging process when analysis and consultation can take place. Obviously, there is nothing magic in any particular period of time. However, the 120-day period specified in the death penalty law of New York appears both reasonable and workable.<sup>8</sup>

This period when reflection and analysis takes place provides an opportunity for jurisdictions to develop consultative systems that will help to ensure that the most accurate and reasonable decision possible is made. As an important method of guaranteeing that the death penalty is reserved for the most heinous offenders, each jurisdiction should mandate or encourage a system of consultation to help ensure equal application of the laws across jurisdictions. For example, in New Jersey, the Supreme Court established a very promising proportionality review project, which supplements judicial precedent with a comprehensive database to determine how each death eligible case compares to all other cases in the relevant pool.<sup>9</sup>

Criminal cases are generally handled by locally elected officials who are given broad legal authority to determine who is to be prosecuted and for what offenses. Within the limits of the death penalty statutes and constitutional constraints, these officials also are invested with authority to determine when to seek the death penalty. We do not challenge existing legal structures that give such authority to local prosecutors. What we do recommend is that a consultation system be mandated for the decision to prosecute capitally where existing legal structures make such a requirement feasible, and that a system of consultation be encouraged where not mandated.

In either situation, local officials should consult with prosecutors in other locations and with other knowledgeable officials, such as the staff of the attorney general's office. Model procedures are available in a number of jurisdictions, including the federal system, where United States Attorneys are required to receive approval from the Attorney General before seeking a death sentence. Comparisons made in this consultation process regarding charging practices in other jurisdictions and the analysis of the facts of the case at hand by multiple prosecutors may provide important benefits in reducing disparities between regions and political divisions in seeking the death penalty. We recognize that this may be difficult in some jurisdictions, but there is value in not having greatly disparate approaches in different parts of the same state when dealing with the same set of facts. Alternatively, a body of retired prosecutors could be established to provide such consultation; such a body might do much to remove political concerns and competition from the process.

### **RECOMMENDATION 31: Jurisdictions Should Require a Mandatory Review of Prosecutorial Charging Decisions in Death Eligible Cases.**

- To ensure fairness in the application of the death penalty, each jurisdiction should establish a Charging Review Committee responsible for reviewing prosecutorial charging decisions in death eligible cases. The committee should be composed of sitting prosecutors and retired judges.
- The following procedures should be implemented with respect to each jurisdiction's Charging Review Committee:
- Prosecutors in all cases involving alleged death eligible conduct should be required to submit proposed charges, capital or non-capital, to the Charging Review Committee, accompanied by written statements explaining their charging rationales.
- The committee should be required to review these proposed charges and supporting statements of rationale, and to respond with appropriate comments and/or recommendations.
- In addition, in the subcategory of death eligible cases in which the prosecution proposes capital charges, the committee should be required to issue binding approval or disapproval of those capital charges and should expressly state its reasons for its decision.
- Each jurisdiction should expressly forbid prosecutors from filing capital charges without the approval of its Charging Review Committee. (2005 Update.)

### **COMMENTARY**

This Committee has identified several major factors that render the death penalty unacceptably unfair as currently applied. Chief among these are the lack of uniformity and the presence of bias (especially racial bias) in charging decisions.<sup>10</sup> In the states where

the vast majority of capital cases are adjudicated, this is so in large part because charging decisions are (a) decentralized (each prosecuting office deciding for itself when and where capital charges are appropriate), (b) discretionary (American tradition grants prosecutors virtually unrestrained discretion to make binding charging decisions), and (c) largely unreviewable by courts (separation of powers concerns traditionally produce judicial reluctance to review executive branch charging decisions). These attributes of American criminal justice are deeply imbedded, and they affect profoundly how the death penalty operates.

The lack of uniformity and presence of bias easily could be overcome if jurisdictions were to review and approve prosecutors' charging decisions in a centralized fashion. Centralized review of charges in all death eligible cases would permit jurisdictions to collect and analyze data about those cases. Data analysis would enable jurisdictions to track, among other things, the kinds of characteristics on which its prosecutors rely — legitimately and illegitimately — when deciding whether to charge death eligible conduct as a capital offense. Individual prosecutors could be provided with these data, enabling them to improve their charging decisions by seeking the death penalty only for the “worst of the worst” rather than for disadvantaged or disfavored classes of offenders. Moreover, a centralized mechanism requiring approval of all capital charges would help prosecutors avoid inadvertent bias and inconsistency in the most important decisions that they make.

Centralized review can be accomplished relatively easily. We propose that each jurisdiction create a Charging Review Committee to which, in all death eligible cases, prosecutors would be required to submit proposed charges and written explanations setting forth their charging rationales. In each case, the committee would respond with recommendations and commentary, but in cases in which capital charges are proposed, the committee's decisions whether to approve the charges would be binding.

To improve the workings of the Charging Review Committee, and to create a record of capital charging, the committee should report periodically to the jurisdiction's chief executive, legislative, and chief judicial officers. It might also report to the jurisdiction's Capital Case Early Warning Coordinating Council<sup>11</sup> or a similar body in order to provide data to assist that group in avoiding systemic flaws in the death penalty's operation.

The committee should be comprised of the following: the state's Attorney General, the president of the state's prosecutorial association, two district attorneys (head prosecutors at the county level)-one preferably from the county with the greatest number of capital cases, and a retired judge with extensive experience in criminal cases at the trial or appellate level. We leave to each jurisdiction decisions concerning lengths of service, decision making processes, confidentiality, opportunity for defense submissions, and so on.<sup>12</sup>

Our recommendation does not require centralized approval of plea offers in capital cases, because plea bargaining opportunities often arise in the last moments before (or during) trial. Nevertheless, jurisdictions should recognize that consistency and fairness in the application of the death penalty depends to a considerable extent on how prosecutors exercise their discretion while engaging in plea bargaining. For this reason, each jurisdiction's Capital Case Early Warning Coordinating Council or a similar body should be required to monitor guilty pleas in capital cases and create a database to enable review of these pleas.

We note that the concerns underlying our recommendation have been widely recognized, and a statewide review process has been urged on state legislators in several instances.<sup>13</sup> The federal system already requires that United States Attorneys receive written permission from the Attorney General before seeking the death penalty.<sup>14</sup>

### **RECOMMENDATION 32: The Vienna Convention on Consular Relations Should be Enforced.**

- **Every capital defendant who is a foreign national should be ineligible for the death penalty if not provided with consular rights under the Vienna Convention on Consular Relations (VCCR).**
- **Each entity with authority to impose or carry out the death penalty should impose on its attorney general (or another central law enforcement officer) the duty of ensuring full compliance with the VCCR.**
- **This duty should include training law enforcement actors about consular rights and monitoring adherence to those rights.**
- **An independent authority, such as an inspector general, should report regularly about compliance to the entity's chief executive or legislative body. (2005 Update.)**

### **COMMENTARY**

Article 36 of the Vienna Convention on Consular Relations (VCCR) requires that foreign nationals detained for any reason shall be notified “without delay” of their right to communicate with consular officers of their home country.<sup>15</sup> According to the International Court of Justice (ICJ), which authoritatively interprets the VCCR for purposes of the disputes brought before it, “without delay” means “as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.”<sup>16</sup> Article 36 also provides that if a detained national invokes consular rights, the “competent authorities of the receiving State shall, without delay, inform the consular post.”

The United States signed the VCCR, a multilateral treaty, without reservation in 1969. Under its terms, as well as those of the United States Constitution, the VCCR binds not only federal authorities, but also state and local government actors.<sup>17</sup> Indeed, as a treaty, the VCCR preempts state law, which “must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty.”<sup>18</sup> The VCCR is interpreted and enforced by the ICJ, and in disputes brought before it, the ICJ’s judgments are binding upon signatories to its accompanying optional protocol. On the same day that it signed the VCCR, the United States signed an Optional Protocol consenting to the ICJ’s binding jurisdiction over disputes under the VCCR.<sup>19</sup> As noted below, however, the United States announced its withdrawal from the Optional Protocol, though not the VCCR itself, on March 7, 2005. The multilateral nature of the VCCR ensures signatories that by upholding the rights of foreign nationals they will garner protection for their own traveling citizens. As the United States Department of State advises in a training manual directed to federal, state, and local law enforcement officers:

These are mutual obligations that also pertain to American citizens abroad. In general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national’s nearest consular officials so that they can provide whatever consular services they deem appropriate.<sup>20</sup>

While the extent of United States violations of the VCCR is unknown, in March 2004 the ICJ found that the United States violated the consular rights of 51 Mexican nationals.<sup>21</sup> The ICJ’s finding came in *Avena and Other Mexican Nationals (Mexico v. United States of America)*,<sup>22</sup> a case in which Mexico alleged that violations of Article 36 in this country are “commonplace,” and that Mexican consulates have identified “no fewer than 102 cases of Mexican nationals detained on serious criminal charges since 27 June 2001, none of which were notified of their Article 36 rights.”<sup>23</sup> Of the defendants highlighted in the case, thirty-six faced the death penalty, the others a lengthy prison term.

Based on the *Avena* decision, Governor Brad Perry of Oklahoma acknowledged that the ICJ’s decision was binding on his state and commuted the death sentence of Osbaldo Torres in May 2004.<sup>24</sup>

On December 10, 2004, the U.S. Supreme Court agreed to hear *Medellin v. Dretke*, regarding a Mexican national included in the *Avena* judgment<sup>25</sup> and oral arguments were scheduled for March 26, 2005. On February 28, 2005, President George W. Bush issued a memorandum requiring state courts to review the cases covered by the ICJ’s ruling in *Avena*.<sup>26</sup> On March 7, 2005, Secretary of State Condoleezza Rice informed U.N. Secretary General Kofi Annan that the United States was withdrawing from the Optional Proto-



col. Shortly before oral arguments, Mr. Medellin filed a *habeas corpus* petition in Texas. Based on these events, the Supreme Court on May 28, 2005 dismissed the *Medellin* case as improvidently granted.

It remains to be seen how the Texas courts will address Mr. Medellin's case, and whether the case will make its way back to the Supreme Court. If it does, the Court may once again be asked to consider the effect of an ICJ ruling on United States courts and whether the VCCR confers individually enforceable rights to consular access upon foreigners.<sup>27</sup>

Whatever the future of Mr. Medellin's case and the impact of the United States' withdrawal from the Optional Protocol, the *Avena* case and cases brought by other countries suggest disturbingly that death rows across the United States house foreign nationals whose consular rights were violated but who may never have received assistance from their consular officers.<sup>28</sup> For example, in *Avena* and other cases, consulates became aware of the defendants' situations only if they read media reports, were contacted by the defendants' family members, or performed checks of law enforcement arrest reports. Arrested foreign nationals rarely, if ever, invoke their consular rights without notification. As Justice Stevens noted in an earlier case, "It surely is reasonable to presume that most foreign nationals are unaware of the provisions of the Vienna Convention . . . . That is precisely why the Convention places the notice obligation on the governmental authorities."<sup>29</sup>

The policies underlying the VCCR are similar to those underlying the right to counsel guaranteed by the United States Constitution—protecting the legal rights of detainees and preventing their mistreatment. Although the ICJ has not required a showing of prejudice before adjudicating VCCR violations,<sup>30</sup> detainees stand to suffer considerable prejudice if they are denied consular rights. An obvious-and commonplace-prejudice takes place when detainees are interrogated and make inculpatory statements before they are given access to their consulates.<sup>31</sup> This prejudice is particularly significant in capital cases because confessions induced in the absence of legal assistance may lead to wrongful executions.

Even though the United States Constitution provides a right to counsel in capital cases, consular officers may be better suited than American law enforcement officials to communicate effectively with these individuals and secure counsel quickly. Moreover, consular officers may be better able to locate witnesses (especially those who live in the foreign country) who may be crucial at both the guilt and sentencing stages of a criminal trial, and provide experts and other investigation resources.

Various State Department communications have recognized the value of our consular officials having immediate access to our nationals in detention in another country, ar-

ranging for legal representation, and the like.<sup>32</sup> The *Foreign Affairs Manual*, for example, notes that “[p]rompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners.”<sup>33</sup>

Despite this country’s statements and policies, and despite the fact that the United States has admitted in federal court that violations have occurred, the United States has taken the position that foreign nationals whose VCCR rights have been violated have no legal remedy,<sup>34</sup> and, as noted above, it has now withdrawn from the Optional Protocol.

We believe, to the contrary, that there must be a remedy, and that the federal and state governments must be prohibited from seeking the death penalty in any case in which the Vienna Convention’s requirement of notification of consular rights is violated.

Furthermore, we believe that federal and state laws should emphasize that the term “without delay” requires notice *as soon as* law enforcement or other government officials realize, or have grounds to think, that an arrested person is a foreign national.<sup>35</sup>

We credit the efforts of a variety of federal and state law enforcement agencies that have created training manuals, web sites, and other materials to educate their employees about the VCCR.<sup>36</sup> Given continuing noncompliance, however, those jurisdictions with the death penalty should make greater efforts to educate and monitor law enforcement actors. More importantly, they should enact measures that provide meaningful incentives toward compliance. Each entity should impose responsibility for education and monitoring on its central legal authority—typically the attorney general — who should be required to report regularly about those activities and about rates of compliance with consular rights. These reports should be made to the entity’s chief executive or its legislative body.

In addition, states should create meaningful compliance incentives. These might include exclusionary rules barring the introduction of evidence obtained in the absence of consular notification. As noted above, and most importantly for the purposes of this Committee, *every state and the federal government* should enact legislation rendering foreign nationals ineligible for the death penalty if they are not provided their consular rights in a timely fashion under the VCCR. Death penalty ineligibility will not only encourage law enforcement authorities to comply with the VCCR, but it will also preserve the possibility of future relief for those foreign nationals. We note in this connection that in several ICJ cases filed against the United States, foreign nations complained that they discovered VCCR violations only years after their nationals were sentenced to death — a tragic state of affairs that can easily be avoided if states adopt the Committee’s proposed ineligibility rule.



# APPENDIX

## **STATEMENTS AND DISSENTS FROM *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001).**

**STATEMENT OF WILLIAM G. BROADDUS, Esq.**

**RECOMMENDATION 11: Each State Should Implement Procedures to Ensure Proportionate Death Sentences.**

I fully concur in the recommendations set forth in bold type pertaining to proportionality. While the Supreme Court of the United States has declined to include a proportionality review as a constitutional mandate, such a review is essential to obtain the objectives articulated in the recommendation.

My disagreement is with that portion of the comment which suggests that a proportionality review may be adequately carried out by comparing the case under review with other cases in which the death penalty was imposed. Such a limited review is inadequate and, in all likelihood, of little utility.

For example, in Virginia, the State Supreme Court, until recently, compared the case under review with the records of all capital murder convictions appealed to that Court. Because a very small number of the capital murder convictions in which life sentences were imposed were appealed to the Supreme Court, the pool for comparison was heavily weighted to cases in which the death penalty was handed down. Because there is such a wide range of factual circumstances in which the death penalty has been meted out in Virginia, such a comparison was of little utility. Conversely, there are a number of cases resulting in a conviction of capital murder in which a life sentence was given in which

the facts show that the murder was more “vile” and the defendant more likely to “future dangerousness” than in those cases in which the death penalty was handed down. In other words, a view of all capital murder convictions demonstrates that there is no rational way to distinguish those cases in which the death penalty is deemed appropriate from those in which a life sentence is given.

As an example, several years ago in Chesterfield County, four women were charged with the capital murder of a fifth woman. The facts surrounding the murder were vile. Because several of the victim’s personal effects were taken, thereby constituting a robbery, the prosecution sought convictions of capital murder. The four women were tried separately. The first three were convicted of capital murder, but given life sentences. The fourth, the only African American in the group, was convicted of capital murder and sentenced to death. All trials went to a jury. In the fourth case the judge set aside the death penalty, noting that he could not fairly impose the death penalty in one case when three co-defendants were given life. Hypothetically, change the order of trial. If the African American had been tried first, under Virginia’s stringent twenty-one day rule, the trial court would have lost jurisdiction and now have been able to set aside the death penalty. If the Supreme Court had limited its proportionality review only to cases in which the death penalty was imposed, there would be no basis for setting aside the death penalty for the African American because there are other cases in which robbery of a person and a murder have resulted in the death penalty.

The only way to accomplish the objectives set forth in the recommendation is to follow the suggestion of the National Center for State Courts that the pool of comparison be that of all death eligible cases.

On a second, perhaps more personal note, I observed that the text makes reference to one “who deserves the death penalty.” If that phraseology could be changed to something along the lines of “those who meet the requirements imposed for the death penalty,” I would certainly appreciate such a change. Personally, and I suspect that there are others on the Committee who share this view, I do not believe that anyone deserves the death penalty. That is born of a moral viewpoint and not of the law.

I have enjoyed my opportunity to participate on this Project and applaud the staff and other members of the Committee who have worked long and hard on this important undertaking.

**STATEMENT OF CARDINAL WILLIAM H. KEELER****CHAPTER II: Reserving Capital Punishment for the Most Heinous Offenses and Most Culpable Offenders.****EDITOR'S NOTE**

This statement refers to the recommendation regarding individuals with mental retardation in Chapter II of the original version of *Mandatory Justice*. As noted in that chapter, the United States Supreme Court held that such executions are unconstitutional in *Atkins v. Virginia*.

I congratulate the work of the blue-ribbon committee and staff for the Death Penalty Initiative. These recommendations contribute to the current national debate about the death penalty and, if implemented, will go a long way toward preventing wrongful convictions and the execution of innocent persons — a laudable goal irrespective of one's position on the death penalty.

I respectfully submit one additional comment on the Report.

While I agree with the Project's recommendation that persons with mental retardation not be subject to the death penalty, my reasons differ somewhat from those given by the Project. The United States Conference of Catholic Bishops joined by nearly a dozen other religious organizations, asked our nation's highest court in *McCarver v. North Carolina* to end the practice of executing persons with mental retardation. We believe, as stated in our *amicus* brief, that such executions violate contemporary standards of decency of American society and cannot be reconciled with the Eighth Amendment guarantee against cruel and unusual punishment. It is our hope that the Court will act to end this practice.

**DISSENT OF TIMOTHY LYNCH****RECOMMENDATION 10: Jurisdictions Should Implement Comprehensive Programs to Safeguard Racial Fairness.**

I dissent from this recommendation because I believe it is misguided. There is an important difference between racial prejudice and racial disparities. Racial prejudice is wrong and has no place in the American criminal justice system. Under our law, any capital defendant that can present evidence specific to his or her own case that would support an inference that racial considerations played a part in his or her sentence will have that sentence set aside. See *McCleskey v. Kemp*, 481 US 279 (1987). This is a proper and just principle.

Statistical racial disparities among capital defendants are another matter. The population of murderers (detected and undetected) in our multiracial society is not proportionally distributed across the various demographic groups. And there are a host of factors other than race that can influence the outcome of a trial and the defendant's ultimate sentence. Some of those other factors may be correlated with race thereby creating the misleading impression that racial discrimination is at work when it isn't. Indeed, the most notable study to be introduced into evidence, the "Baldus" study, tried to take in to account more than 200 variables that could have explained disparities in capital case sentencing. Collecting racial statistics and other initiatives designed to "correct" disparities will only produce work for lawyers and statisticians. The debate over the "proper" statistical methodology and "proper" legal remedies and procedures will be unending.

## **STATEMENT AND DISSENT FOR *Mandatory Justice: The Death Penalty Revisited*, 2005.**

### **STATEMENT OF THOMAS A. GOTTSCHALK**

I concur generally in the recommendations set forth in this Report, but as to many of the more specific implementing recommendations, I lack the expertise or experience to know how effective or necessary they may be. In this respect, I defer to the judgment of the other members of the project.

### **DISSENT OF BETH WILKINSON**

I enthusiastically join in the majority of the recommendations made by this Committee. However, I dissent in the following respects:

### **RECOMMENDATION 5: Death Penalty Eligibility Should be Limited to Five Factors. (2005 Update.)**

*The Identification of Eligibility Factors for Capital Punishment Should Be Left to Local Choice, Keeping in Mind the Need to Limit Them to Identifying the "Worst of the Worst":* I agree that we should limit capital prosecutions to the "worst of the worst" offenders, and that reliance on the felony murder doctrine should not alone render anyone eligible for capital punishment. I therefore enthusiastically support the Committee's original recommendation that persons convicted of felony murder who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty. However, I do not entirely agree with the Committee's further limitation of death penalty eligibility. In particular, I believe that the murder of government employees other than peace officers should render an individual eligible for the death penalty. But my dissent is premised on my belief that the identification of eligibility factors is such a difficult undertaking, and so subject to reasonable disagreement, that the appropriate balance in determining additional eligibility factors should be left to the individual jurisdiction.

Of course, in making this decision, jurisdictions should keep in mind the critical goal of limiting the death penalty to the worst of the worst.

**RECOMMENDATION 7: Persons with Severe Mental Disorders Should be Excluded from Death Penalty Eligibility. (2005 Update.)**

*Prohibiting execution in cases involving individuals with mental illness.* I supported the Committee's original recommendation regarding the exclusion of individuals with mental retardation from eligibility for the death penalty. I also support its new recommendation regarding implementation of the Supreme Court's 2002 decision in *Atkins v. Virginia*, in which the Court found that executing such individuals is unconstitutional. I do not, however, believe that we should recommend a similar exclusion for individuals with mental illness. I believe that mental illness should be a mitigating factor and that the decision about whether to charge people with mental illness with a capital crime should be left to local prosecutors, and that juries should decide whether to convict these individuals. Since prosecutors and juries are ably making these decisions now, we do not need a very general, but hard-and-fast, rule excluding these individuals.

**RECOMMENDATION 24: Courts Should Apply a More Stringent Standard for Appellate Review of Evidentiary Sufficiency. (2005 Update.)**

*Appellate Review of Evidentiary Sufficiency in Capital Cases:* I am not persuaded that exposure to a potentially greater punishment — death — in itself creates any greater risk of error by fact finders. Nor do I believe that the current standard has proven too vague or confusing to be useful to appellate courts. The current standard is supported by a long history and a resulting set of clarifying precedent. I do not support changing that standard.

**RECOMMENDATION 23: Interrogations of Homicide Suspects Should Be Videotaped or Digitally Video Recorded Whenever Practicable. (2005 Update.)**

*Presumptively Requiring Audiotaping, Rather Than Videotaping, of Interrogations Is Sufficient:* In my view, the goals of requiring police engaging in custodial interrogations in homicide cases to tape the entire interrogation process whenever practicable can effectively be achieved by audiotaping, rather than videotaping. I am concerned that, in particular, small departments with limited budgets may find it difficult to comply with a videotaping mandate. The recommendation's goals are laudable. These goals are to allow a court or fact finder to evaluate the voluntariness of a confession, minimize credibility disputes and frivolous suppression motions, fully inform the fact finder about the relevant events, and discourage excessive police zeal in interrogation. While videotaping interrogations may in some cases serve these goals more effectively, and while local departments may therefore choose to videotape, I would not mandate a presumption in favor of videotaping over audiotaping and would leave the decision to each locality. In this respect, therefore, I dissent. But in all other respects I applaud this recommendation.



# ENDNOTES

## BLACK LETTER RECOMMENDATIONS

1. American Bar Association, Criminal Justice Section Report, reprinted in 40 AMERICAN UNIVERSITY LAW REVIEW 1, 9 (1990).
2. *Id.* at 21.
3. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (December 1, 1987).

## CHAPTER I: ENSURE EFFECTIVE COUNSEL

1. *Strickland v. Washington*, 466 U.S. 668 (1984).
2. American Bar Association, Criminal Justice Section Report, reprinted in 40 AMERICAN UNIVERSITY LAW REVIEW 1, 69 (1990). [hereinafter ABA Criminal Justice Section Report].
3. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARVARD LAW REVIEW 355, 398 (1995).
4. ABA Criminal Justice Section Report, *supra* note 2 at 9.
5. See, e.g., Texas Civil Rights Project, *The Death Penalty in Texas: Due Process and Equal Justice...or Rush to Execution?*, The Seventh Annual Report on the State of Human Rights in Texas (Sept. 2000) (finding that fully a third of those recently executed were represented by lawyers who were later disbarred, suspended, or otherwise sanctioned).
6. ABA Criminal Justice Section Report, *supra* note 2 at 21.
7. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFFALO LAW REVIEW 329 (1995).
8. See, e.g., Alabama, which, sets an hourly rate of \$20 to \$40 and a maximum of \$2,000 per case, meaning that an attorney devoting 600 hours to pretrial preparation in Alabama would earn \$3.33 an hour. See also Tennessee, which sets an hourly rate of \$20 to \$30, and Mississippi, which imposes a \$1,000 cap per case. (These figures accurate as of 2001).

9. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* 47 (December 1, 1987)[hereinafter NLADA Standards].
10. *Id.*
11. *Id.*; ABA Criminal Justice Section Report, *supra* note 2.
12. NLADA Standards, *supra* note 9.
13. See, e.g., *State v. Davis*, 561 A.2d 1082, 1089 (N.J. 1989), in which the New Jersey Supreme Court held that competence in the capital context should be measured with reference to the special expertise required in capital cases.
14. *Strickland v. Washington*, 466 U.S. 668 (1984).
15. Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEORGETOWN JOURNAL ON FIGHTING POVERTY 3, 18 (1996).
16. See, e.g., *Funchess v. Wainwright*, 772 F.2d 683 (11th Cir. 1985). See also *Neal v. Puckett*, 239 F.3d 683 (5th Cir. 2001), in which the federal appeals court found that trial counsel for a death row inmate with mental retardation was ineffective for failing to present mitigation evidence and that the failure was prejudicial, but that the court would nevertheless defer to the state supreme court's interpretation of *Strickland* and uphold the sentence of death.
17. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
18. Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 UNIVERSITY OF ILLINOIS LAW REVIEW 323, 341 (1993).
19. *Id.* at 342.

## EDITOR'S NOTES FOR CHAPTER I

- E1. 125 S.Ct. 2456 (2005)
- E2. 539 U.S. 510 (2003)

## CHAPTER II: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS

1. See VICTOR STREIB, *DEATH PENALTY IN A NUTSHELL* 70 (2003) ("Statutes which make the death penalty mandatory for a certain crime have been held unconstitutional by the Supreme Court"). Traditionally, only first-degree murderers were eligible for death, though the death penalty has been added in a number of jurisdictions for a variety of other forms of murder that are "similar" to first-degree murder in that they also expose the offender to the risk of capital punishment. See *id.* at 66, 68.
2. See *id.* at 70.
3. See *id.* at 72 ("aggravating circumstances [must] be sufficiently clear...to be usable in distinguishing one murder case from another murder case in a principled manner . . .").
4. See *Gregg v. Georgia*, 428 U.S. 153 (1976).
5. See STREIB, *supra* note 1, at 72.
6. Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81, 81-86 (ed. Austin Sarat 1999).
7. See *id.* at 81, 83-85; David Givelber, *The New Law of Murder*, 69 INDIANA LAW JOURNAL 375, 391 (1994) (placing MPC factors as at the core of Gregg's analysis); AMERICAN LAW INSTITUTE, *MODEL PENAL CODE* §210.6 (1962).



8. See MICHAEL A. FOLEY, *ARBITRARY AND CAPRICIOUS: THE SUPREME COURT, THE CONSTITUTION, AND THE DEATH PENALTY* 189 (2003) (non-statutory aggravating circumstances barred from consideration in some states but permitted in others so long as at least one statutory aggravator is found first); Simon & Spaulding, *supra* note 6, at 84-85.
9. See Simon & Spaulding, *supra* note 6, at 83.
10. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
11. See STREIB, *supra* note 1, at 77.
12. See Simon & Spaulding, *supra* note 6, at 84 (“Texas, Virginia, and Oregon abandoned altogether the MPC form, but reinvented the aggravators as a series of five capital murder situations that limit eligibility for capital sentencing.”).
13. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).
14. See Simon & Spaulding, *supra* note 6, at 89 (critiquing *Zant* and other Supreme Court opinions for in practice abandoning aggravating circumstances’ “original purpose of policing the rationality of capital sentencing.”).
15. See *id.* at 85-86.
16. *Lowenfeld v. Phelps*, 484 U.S. 231 (1988).
17. *Id.* at 257 (Brennan, J., dissenting).
18. See Simon & Spaulding, *supra* note 6, at 84-87.
19. See *id.* at 84.
20. See *id.* at 84-85.
21. *Id.* at 85.
22. *Id.* at 85.
23. See *id.* at 85.
24. See *id.* at 86-87; STREIB, *supra* note 1, at 82.
25. *Arave v. Creech*, 507 U.S. 463, 471-74 (1993).
26. Simon & Spaulding, *supra* note 6, at 87.
27. See *id.* at 87.
28. See STREIB, *supra* note 1, at 81-82 (on California); Report of the Governor’s Commission on Capital Punishment (April 15, 2002); (on Illinois), [hereinafter Ryan Commission Report].
29. Ryan Commission Report; *supra* note 28, at 66.
30. See Robert Weisberg, *Deregulating Death*, SUPREME COURT REVIEW 1983, 305, 385 (1984).
31. See *id.* Simon & Spaulding, *supra* note 6, at 87.
32. *Id.* at 87.
33. See *id.* at 88.
34. See *id.* at 88.
35. See *id.* at 88.
36. See *id.* at 87-88.
37. See Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, 27 *Champion* 28 (August 2003) (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881) (“[E]ven a dog distinguishes between being stumbled over and being kicked.”).
38. See Simon & Spaulding, *supra* note 6, at 88.
39. See *id.* at 88.
40. See *id.* at 89.
41. See *id.* at 88 (“[A]ggravating factors do help structure decisionmaking, but in ways that work at cross-purposes to the original vision of ordered deliberation. Most importantly they may allow juries and judges to escape the traditional burden of judgment.”); see also Givelber, *supra* note 7, at 394.
42. See Simon & Spaulding, *supra* note 6, at 90, 97-98.

43. See *id.* at 97-98.
44. See *id.*
45. See *id.* at 98.
46. See *id.* at 97.
47. *Id.* at 100.
48. See *id.* at 97-98. The sponsoring legislator righteously declared his hope that this legislation would combat “satanic activity in central and southwest Louisiana.” *Satanic Ritual Bill Passes*, BATON ROUGE MORNING ADVOCATE, June 22, 1989, 10A. Because the legislation was linked to activities at abandoned military bases in an economy dependent upon the military, some critics saw the legislation as akin to activity that anthropologists identify as reflecting a belief in witchcraft. See Robert Shuler, *House Panel OKs Bill Banning Ritualistic Acts*, BATON ROUGE MORNING ADVOCATE, May 26, 1989, 12A.
49. See Simon & Spaulding, *supra* note 6, at 97-98.
50. A CRITICAL REVIEW OF NEW EVIDENCE, Testimony to the New York State Assembly Standing Committees on Codes, Judiciary, and Correction, Hearings on the Future of Capital Punishment in the State of New York, Dr. Jeffrey Fagan, Columbia Law School, January 21, 2005. See William C. Bailey & Ruth Peterson, *Capital Punishment and Deterrence: A Review of the Evidence and an Examination of Police Killings*, 50 JOURNAL OF SOCIAL ISSUES 53 (Summer 1994) (capital punishment is not a general deterrent to murder); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The View of the Experts*, 87 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (1996) (similar); Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 UNIVERSITY OF PITTSBURGH LAW REVIEW 321 (1999); Ryan Commission Report, *supra* note 28, at 69 (“While there have been some studies which claim to have found a deterrent effect . . . , the greater weight of the research finds no evidence that the death penalty is a measurable general deterrent to murder.”).
51. See Appendix for dissent of Beth Wilkinson.
52. See ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 224-35 (2d ed. 2003) (reciting facts of the Oklahoma City Bombing case in which Timothy McVeigh was convicted of bombing the Murrah Building of federal offices in Oklahoma City, killing 167 people).
53. See JOHN KEKES, FACING EVIL 3-4, 7-8 (1992).
54. See Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WISCONSIN WOMEN’S LAW JOURNAL 3, 52-58 (2000) (discussing the role of the concept of evil in secular justifications for the criminal law, as illustrated in the context of date rape).
55. See *id.* at 52-53.
56. See *id.* at 55-58 (discussing “pure evil”).
57. *Id.* at 55.
58. See COLIN MCGINN, ETHICS, EVIL, AND FICTION 77 (1997).
59. See *id.* at 76-78; Taslitz, *supra* note 54, at 57.
60. See DAVID A. J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW 38-62 (1998).
61. Ryan Commission Report, *supra* note 28, at 72.
62. See Jennifer DeCook Hatchett, *Kansas Felony Murder: Agency or Proximate Cause?*, 48 UNIVERSITY OF KANSAS LAW REVIEW 1047 (2002) (surveying statutes and cases in all 50 states).
63. Richard Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 BOSTON COLLEGE LAW REVIEW 1103, 1115-16 (1990).
64. See *id.*
65. SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY 68-69 (2003).

66. See ROSEN, *supra* note 63, at 1127-28.
67. *Id.* at 1128.
68. See *id.* at 1117-18.
69. See *id.*
70. *Id.* at 1118-19.
71. *Tison v. Arizona*, 481 U.S. 137 (1987).
72. TUROW, *supra* note 65, at 69.
73. See Rosen, *supra* note 63, at 1130-31.
74. Ryan Commission Report, *supra* note 28, at 73.
75. THE CONSTITUTION PROJECT, DEATH PENALTY INITIATIVE, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY at 15 (emphasis added) (2001), citing *Gregg v. Georgia*, 428 U.S. 153 (1976).
76. See PAUL H. ROBINSON AND JOHN H. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 178 (1995). Robinson and Darley summarize the results of their research on informed public attitudes toward the felony murder doctrine thus:  

The data pattern suggests that, from our respondents' view, the felony-murder rule is on the right track but simply goes too far. The subjects would support a felony-murder rule that significantly aggravates negligent killings during a robbery, but only to the level of manslaughter for principals and to something less than that for accomplices, not to the level of murder as the current doctrine does. In other words, they would support a "felony-manslaughter rule" with a standard "accomplice discount."
- Id.* at 178.
77. See David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Edmund and Tison Standards*, 32 ARIZONA STATE LAW JOURNAL 843, 846-47 (2000).
78. See *id.*
79. *Id.* at 884.
80. See *id.* at 874.
81. *Id.*
82. See *id.* at 884-85 (albeit choosing an example in which the felon's accomplice commits the act causing death).
83. *Atkins v. Virginia*, 536 U.S. 304 (2002).
84. Emily Fabrycki Reed, THE PENRY PENALTY (1993).
85. Human Rights Watch, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation* (March 2001).
86. See generally Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMPORARY PROBLEMS 89 (1998).
87. For additional guidance on procedures for implementing *Atkins*, state legislatures should consult the following: James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL AND PHYSICAL DISABILITY LAW REPORTER 11-24 (2003); and Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing Atkins v. Virginia*, 32 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW 304 (2004).
88. *Atkins v. Virginia*, 536 U.S. 304 (2002).
89. See, e.g., Phyllis Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 22 FORDHAM LAW REVIEW 21 (1997).
90. See, e.g., Richard J. Bonnie, and C. Robert Showalter, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW 159-67 (1984).
91. Cf. *Miller v. Florida*, 373 So.2d 882, 885-886 (Fla. 1979).
92. *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

93. See *Penry v. Johnson*, 121 S.Ct 1910 (2001) and *Penry v. Lynaugh*, 492 U.S. 302 (1989).
94. See Appendix for dissent of Beth Wilkinson.
95. See Ryan Commission Report, *supra* note 28, at 68.

## CHAPTER III: EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

1. William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEXAS LAW REVIEW 605 (1999).
2. Peter Finn, *Given Choice, Va. Juries Vote for Life: Death Sentences Fall Sharply When Parole Is Not an Option*, WASHINGTON POST, Feb. 3, 1997, at A1.
3. Bowers and Steiner, *supra* note 1; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL LAW REVIEW 1 (1993).
4. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 INDIANA LAW JOURNAL 1043, 1100-01 (1995).
5. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).
6. See *Jurek v. Texas*, 428 U.S. 262, 275 (1976).
7. See *California v. Brown*, 479 U.S. 538, 545 (1987).
8. *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994).
9. See also *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001), reaffirming *Simmons*.
10. *California v. Ramos*, 463 U.S. 992, 1026-27 (1983).
11. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).
12. See James S. Liebman, *The Overproduction of Death*, 100 COLUMBIA LAW REVIEW 2030 (2000).

### EDITOR'S NOTES FOR CHAPTER III

- E1. <http://www.deathpenaltyinfo.org/article.php?did=555&scid=59>
- E2. Life Without Parole Bill, S.B. 60, 79th Leg. (Tex. 2005)

## CHAPTER IV: SAFEGUARDING RACIAL FAIRNESS

1. *McCleskey v. Kemp*, 481 U.S. 279 (1987).
2. See *America's Views on the Death Penalty*, Peter D. Hart/American Viewpoints, Sept. 14, 2000; see also *Poll Analysis, Slim Majority of Americans Think Death Penalty Applied Fairly in the Country*, Gallup Organization, June 30, 2000.
3. See *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) ("Legislatures . . . are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts . . .").
4. *Batson v. Kentucky*, 476 U.S. 79 (1986).
5. See Appendix for dissent of Timothy Lynch.

## CHAPTER V: ENSURING PROPORTIONALITY REVIEW

1. *Furman v. Georgia*, 408 U.S. 238 (1972).
2. *Gregg v. Georgia*, 428 U.S. 153 (1976).

3. *Pulley v. Harris*, 465 U.S. 37 (1984).
4. See Appendix for additional statement of William G. Broaddus, Esq.

## CHAPTER VI: PROTECTING AGAINST WRONGFUL CONVICTIONS AND SENTENCES

### Exculpatory DNA Evidence and Newly Discovered Evidence; Credible Claims of Innocence

1. Joseph L. Hoffman, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEXAS LAW REVIEW 1771 (2000); Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFFALO LAW REVIEW 501 (1996).
2. See Hoffman, *supra* note 1.
3. See Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death Sentenced Prisoners Leads Nowhere*, 35 WILLIAM & MARY LAW REVIEW 943 (1994).
4. In 2001, Virginia enacted a “Writ of Actual Innocence” to allow the Virginia Supreme Court to issue such writs, but only in cases in which an individual’s innocence could be proven through biological evidence. <http://leg1.state.va.us/cgi-bin/legp504.exe?000+coh+19.2-327.2+403617>. In 2004, the “Writ of Actual Innocence” was extended to cases in which innocence could be proven through nonbiological evidence, but those who plead guilty are excluded from relief. <http://leg1.state.va.us/cgi-bin/legp504.exe?000+coh+19.2-327.10+403617>. Under both statutes the evidence must be newly discovered to qualify.
5. No. 04-8990 (2005).
6. *House v. Bell*, 125 S. Ct. 2991 (2005).
7. Bandes, *supra* note 1.
8. *Strickland v. Washington*, 466 U.S. 668 (1984).

### Learning from Wrongful Convictions and Sentences And Avoiding Future Wrongful Convcitions and Sentences

9. See generally ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE (2d ed. 2003).
10. See *id.* at 579-89.
11. C. RONALD HUFF, WRONGFUL CONVICTIONS: CAUSES AND PUBLIC POLICY ISSUES 15, 15-16 (2003).
12. See *id.* at 16-19; BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES (2004).
13. Ronald Huff, *What Can We Learn From Other Nations About the Problem of Wrongful Conviction*, 86 JUDICATURE 91 (2002).
14. DONALD DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 175 (2003).
15. See Barry Scheck and Peter Neufeld, *DNA and Innocence Scholarship*, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 241, 241 (Saundra D. Westervelt and John A. Humphrey eds 2001); [www.innocenceproject.org](http://www.innocenceproject.org) (last visited July 20, 2005).
16. [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org) (last visited July, 20, 2005).
17. See Huff, *supra* note 11, at 16. “Index crimes” are those included in the Federal Bureau of Investigation’s Uniform Crime Reports — primarily and most reliably murder, rape, robbery, aggravated assault, burglary, theft, and motor vehicle theft. See GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 13 (1998).
18. BARRY SCHECK, PETER NEUFELD AND JAMES DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 315-16 (rev. ed. 2001); See also Huff, *supra* note 11, at 16

(“[T]housands of miscarriages of justice . . . allow many of the criminals who actually committed their crimes to remain free to victimize others.”).

19. See, e.g., DRIPPS, *supra* note 14, at 175.
20. See TRANSCRIPT, NATIONAL PUBLIC RADIO, *Talk of the Nation: The Concept of False Confessions and Its Relevance in the Central Park Jogger Case* (December 20, 2002).
21. See Andrew E. Taslitz, *Wrongful Rights*, 18 CRIMINAL JUSTICE 4, 4-6 (Spring 2003).
22. See Barry Scheck and Peter Neufeld, *DNA and Innocence Scholarship*, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 241, 241 (Saundra D. Westervelt and John A. Humphrey eds, 2001); www.innocenceproject.com (visited February 17, 2004).
23. See Taslitz, *Wrongful Rights*, *supra* note 21, at 5.
24. See DRIPPS, *supra*, note 14, at 125 (“In a nationwide sample of more than twenty thousand . . . [DNA] tests, a quarter of the conclusive results exonerated the suspect. There is little reason to believe that the police do better in cases without DNA evidence.”).
25. See Report of the [Illinois] Governor’s Commission on Capital Punishment 1, 1 (April 2002), [hereinafter Ryan Commission Report].
26. See Robert Pierre and Kari Lyderson, *Illinois Death Row Emptied*, Washington Post, A1, A11, January 12, 2003.
27. *Id.* at A1.
28. See Ryan Commission Report, *supra* note 25, at 1.
29. Margaret Graham Tebo, *Closing Argument: Barnett Supports Bill Seeking Death Penalty Inquiry*, 87 AMERICAN BAR ASSOCIATION JOURNAL 86 (October 2001).
30. Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans’ Views on the Death Penalty at the Turn of the Century*, in AMERICA’S DEATH PENALTY: BEYOND REPAIR? 7, 30 (Stephen P. Garvey ed., 2003) [hereinafter *Beyond Repair*].
31. See generally Huff, *supra* note 11, at 16-19.
32. See generally JEFFREY ROSEN, THE NAKED CROWD 62-95 (2004).
33. ABA, *Report of the Post-Conviction and Systemic Issues Subcommittee of the ABA Criminal Justice Section’s Committee on Innocence and the Integrity of the Criminal Justice Process* 1, 2 (draft 2003) [hereinafter *Systemic Issues Subcommittee Report*].
34. *Id.* at 2.
35. See generally *id.*
36. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CALIFORNIA WESTERN LAW REVIEW 333, 344-45 (2002).
37. See Criminal Appeal Act, 1995, §13 (1)(a)(Eng.) (declaring the standard); Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1241, 1276 (2001) (explaining the standard); See R.V. CRIMINAL CASES REVIEW COMMISSION, *ex parte Pearson*, 3 ALL ENGLAND LAW REPORTS 498 (1999).
38. Criminal Appeal Act, *supra* note 37, §13(1)(b).
39. Griffin, *supra* note 37, at 1276 (citing FRANK BELLONI & JACQUELINE HOGSON, CRIMINAL INJUSTICE 187 (2000)).
40. *Id.* at 1279.
41. *Id.* at 1278; see also David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 NORTHERN ILLINOIS UNIVERSITY LAW REVIEW 91, 140 (2000) (tracing origins of CCRC and its processes).
42. See Griffin, *supra* note 37, at 1278-79 (summarizing the above procedures).
43. See *id.* at 1279; CCRC ANNUAL REPORT for 1998-99 132; R.V. Mattan, (unreported) (C.A. Mar. 5, 1998), available at <http://www.casetrack.com> (on the short review procedure).

44. See *Systemic Issues Subcommittee Report*, *supra* note 33.
45. Griffin, *supra* note 37, at 1276-77.
46. See Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 1000 (Sept.-Oct. 2002).
47. See Findley, *supra* note 36, at 342.
48. See Jack King, *The Ordeal of Guy Paul Morin: Canada Copes with Systemic Injustice*, *The Champion* (Aug. 1998), available at <http://www.criminaljustice.org/CHAMPION/ARTICLES/98aug1.htm>.
49. See Findley, *supra* note 36, at 342.
50. See *id.*
51. See *id.*
52. See *id.* at 343.
53. Fred Kaufman, *Executive Summary: Commission on Proceedings Involving Guy Paul Morin* 14 (1998), available at <http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/excesumrec/morin-esumm.pdf>.
54. See *id.* at 343-44.
55. *Id.* at 344.
56. See Scheck & Neufeld, *supra* note 15, at 102-03.
57. See 49 U.S.C. §§1101-1155 (2000).
58. See Scheck & Neufeld, *supra* note 15, at 103.
59. See Carlisle, Comments, *The FAA v. the NTSB: Now That Congress Has Addressed the Federal Aviation Administration's "Dual Mandate," has the FAA Begun Living Up to Its Amended Purpose of Making Air Travel Safer, or is the National Transportation Safety Board Still Doing Its Job Alone?*, 66 AIR LAW & COMMERCE 741, 757 (2001).
60. Scheck & Neufeld, *supra* note 15, at 103-05.
61. See Michael Saks, et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZONA STATE LAW JOURNAL 665, 712 (2001).
62. See Scheck & Neufeld, *supra* note 15, at 102.
63. *Systemic Issues Subcommittee Report*, *supra* note 33, at 8. These recommendations have not yet been adopted by the ABA or its Criminal Justice Section. A vote is scheduled for August 2005. In the interim some language has changed.
64. *Id.*; see also Lauren B. Simon and Mary Katherine Moore, *Intermediate Sanctions for Women Offenders Project*, 16 CRIMINAL JUSTICE 54 (Spring 2001).
65. See *Systemic Issues Subcommittee Report*, *supra* note 33, at 8.
66. *Id.* at 9.
67. [www.state.ga.us/cjcc](http://www.state.ga.us/cjcc).
68. *Systemic Issues Subcommittee Report*, *supra* note 33, at 9 (quoting [www.state.ga.us/cjcc](http://www.state.ga.us/cjcc)).
69. See *Systemic Issues Subcommittee Report*, *supra* note 33, at 9 (quoting [www.cjjcc.org](http://www.cjjcc.org)).
70. *Id.* at 9.
71. See [www.innocenceproject.org](http://www.innocenceproject.org).
72. See Andrew E. Taslitz, *Wrongful Convictions Seminar Website*, [www.lawschool.westlaw.edu/taslitz/wrongfulconvictions](http://www.lawschool.westlaw.edu/taslitz/wrongfulconvictions); see also [www.innocenceproject.org/about/course.php](http://www.innocenceproject.org/about/course.php) (national on-line wrongful convictions course taught at a growing number of law schools).

## DNA Evidence

73. POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, NAT'L INSTIT. JUST., OFF. JUST. PROGRAMS, U.S. DEPT. JUST., Pub. No. NCJ 177626 (Sept. 1999) at 1; USING DNA TO SOLVE COLD CASES, Nat'l Instit. of Just., U.S. Dept. of Just., Pub. No. NCJ 194197 (July 2002).



74. As of March 2004, there were over 1.6 million convicted offender profiles in CODIS's National DNA Index System, and over 78,000 profiles from unsolved cases. See [www.fbi.gov/hq/lab/codis/index1.htm](http://www.fbi.gov/hq/lab/codis/index1.htm).
75. See <http://www.innocenceproject.org/case/index.php>.
76. Transcript of news conference, March 4, 2002. Available at <http://www.usdoj.gov/ag/speeches/2002/030402news-conferencednainitiative.htm>.
77. Nina Morrison, *Innocence Project*, July 21, 1005. See <http://www.innocenceproject.org/legislation/index.php>. See also U.S. Dept. of Just., POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, *supra* note 73, at 3-6 (outlining framework of analysis, with five categories of cases in which post-conviction DNA testing may or may not be probative of innocence, to guide prosecutors and judges in determining whether to consent to testing).
78. See, e.g., William Sessions, *DNA Tests Can Free the Innocent: How Can We Ignore That?*, THE WASHINGTON POST, September 21, 2003; *The Real Problem With DNA Tests* (Editorial), THE NEW YORK TIMES, September 1, 2003, p.A.16; Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, THE NEW YORK TIMES, August 29, 2003, p.A.1.; David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 547 (2002).
79. See Rudovsky, *id.*, at 547-50; Sara Rimer, *DNA Testing in Rape Cases Frees Inmate After Fifteen Years*, THE NEW YORK TIMES, Feb. 15, 2002, at A.12.
80. See *DNA Used to Link Suspected Killer to 8th Slaying* (Eddie Lee Mosley), TALLAHASSEE DEMOCRAT, Sept.2, 2001; Ardy Freedberg and Jason Smith, *Townsend Released: Judge Cites 'An Enormous Tragedy,'* SOUTH FLORIDA SUN-SENTINEL, p.1A, June 16, 2001; Daniel deVise, *For 14 Years, Justice Failed a Man Condemned to Die* (Frank Lee Smith), June 25, 2001; Sydney Freedberg, *DNA Clears Inmate Too Late* (Frank Lee Smith), ST. PETERSBURG TIMES, Dec. 15, 2000. See also Testimony of Prof. Barry Scheck before the U.S. Senate, Committee on the Judiciary, June 11, 2002, available at [http://judiciary.senate.gov/testimony.cfm?id=290&wit\\_id=633](http://judiciary.senate.gov/testimony.cfm?id=290&wit_id=633) (noting that investigation of related crimes after Smith and Townsend's exonerations have led Florida police to conclude that Mosley may have committed as many as sixty-two rapes and/or murders altogether).
81. See Dennis Wagner et al., *DNA Frees Arizona Inmate after 10 Years in Prison*, ARIZONA REPUBLIC, April 9, 2002; see also Tom Tingle, *First Day Out as a Free Man*, ARIZONA REPUBLIC, April 10, 2002 (re: Phillips' prior sex offense conviction); *We 'Won't Ever Know All the Truth'* (Editorial), LAS VEGAS REVIEW-JOURNAL, Dec. 7, 2003 (same).
82. See Charlie Goodyear & Erin Hallisy, *The Other Side of DNA Evidence: An Innocent Man is Freed*, SAN FRANCISCO CHRONICLE, Oct. 19, 1999; Barry Scheck, Peter Neufeld, and Jim Dwyer, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, New American Library, 2003 ed., at pp.309-316.
83. See James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, NEW YORK TIMES, Sept. 6, 2003; Dan Rodricks, *Delay in Matching DNA Should be Explained*, BALTIMORE SUN, Sept. 11, 2003.
84. See, e.g., Robert McFadden, *Official Says DNA and Alibis Clear Suspect in Sex Attacks*, NEW YORK TIMES, Feb. 27, 2004 (reporting that charges would be dismissed against man arrested and charged with series of four rapes based on eyewitness identification in police lineups, after DNA tests excluded him and proved victims' identifications were mistaken); Marcus Franklin, *DNA Pinpoints a New Suspect in 2003 Slaying*, ST. PETERSBURG TIMES, Jan. 8, 2004 (reporting that DNA "hit" in databank identified real perpetrator, and exonerated suspect who had been wrongfully jailed for previous year). Indeed, one notable FBI study in 1996 showed that, in nearly 25 percent of all sexual assault cases in which DNA testing was obtained pretrial that were tracked by the Bureau over a seven-year period, the person identified by investigators as the "prime suspect" in the case was actually excluded by the DNA results. See CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, NAT'L INSTIT. JUST., OFF. JUST. PROGRAMS, U.S. DEPT. JUST., Pub. No. 161258 (June 1996) at xxviii.



85. See, e.g., Jennifer Thompson and Debbie Smith, *Florida's DNA Deadline Can Hurt Victims, Too* (op-ed), TALLAHASSEE DEMOCRAT, Sept. 5, 2003 (argument by two rape survivors that crime victims' interests are served by giving inmates liberal access to post-conviction DNA testing that can both prove innocence and identify the real perpetrators); Jennifer Thompson, *I Was Certain, But I Was Wrong* (op-ed), NEW YORK TIMES, June 18, 2000 (first-person account of rape victim's eyewitness identification proven to be mistaken through post-conviction DNA testing).
86. See, e.g., *Let DNA Settle the Coleman Case* (Editorial), ROANOKE TIMES & WORLD NEWS, Mar. 2, 2004 (urging Virginia Gov. John Warner to permit posthumous DNA testing to proceed in the case of Roger Coleman, who was executed in 1992 for a rape-murder in which testable evidence remains at a DNA laboratory; and quoting prosecutor's support for testing on ground that state should not "be afraid of the truth, wherever it may lie"); *Test Time, Mr. Warner* (Editorial), THE WASHINGTON POST, Sept. 3, 2003 (same).
87. In one remarkable such case, a prosecutor in Florida, arguing that exculpatory DNA test results should not be admissible because the defendant's claim of innocence was time-barred, told the court that the State's position would not change even if officials "knew with 100% certainty that this [defendant] was absolutely innocent." Carl Hiaasen, *Still Behind Bars, Despite DNA Evidence*, MIAMI HERALD (op-ed), May 9, 2004; Liptak, *Prosecutors Fight DNA Use for Exoneration*, *supra* note 77 (discussing same case). See also *DA to Retry 'Slayer' Freed by DNA* (AP), THE NEW YORK POST, Sept. 12, 2003 (DA of Nassau County, NY, announcing plans to retry man convicted, along with two co-defendants, of 1986 rape-murder, despite the fact that a series of DNA tests had excluded all three men from semen found in victim); Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, THE NEW YORK TIMES, February 6, 2002, p.A.14 (reporting District Attorney's refusal to concede that two identical DNA test results on two rape kits, conducted in private lab and state's crime lab, prove innocence of Bruce Godschalk, who was excluded in each of the tests).
88. See Sessions, *supra* note 78.
89. See, e.g., Maurice Possley and Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored*, CHICAGO TRIBUNE, Oct. 26, 2003 (reporting that in nearly half of all cases in U.S. in which a post-conviction DNA exoneration left the underlying crime unsolved, prosecutors and police still have not submitted DNA from case into CODIS database).

## Forensic Laboratories

90. STANLEY COHEN, THE WRONG MEN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS 220 (2003).
91. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
92. See STEVEN FRIEDLAND, PAUL BERGMAN, AND ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE 283-84 (2000) (summarizing *Daubert* criteria).
93. *Weisgram v. Marley Co.*, 528 U.S. 440, 442 (2000).
94. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
95. See *General Electric Co. v. Joiner*, 522 U.S. 136, 138-39 (1997).
96. See 1 PAUL GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §1-15 (3d ed. 1999) (summarizing jurisdictions retaining *Frye*); *Ramirez v. State*, 810 S. 2d 836, 843 (Fla. 2001) (*Frye* is dictated by the state's burden to prove every element of its case beyond a reasonable doubt); *State v. Copeland*, 922 P. 2d 1304, 1314 (Wash. 1996) (en banc) ("The trial court's gatekeeper role under *Frye* involves by design a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that 'pseudoscience' is kept out of the courtroom.").
97. *Frye* test, see American Bar Association Criminal Justice Section, Ad Hoc Committee on Innocence and Ensuring the Integrity of the Criminal Justice System, *Scientific Evidence Subcommittee Recommendations* 5 (November 2003 Draft) (describing *Frye* standard as "reinvigorated") [hereinafter *Scientific Subcommittee Recommendations*].

98. *Scientific Subcommittee Recommendations*, *supra* note 97, at 5.
99. See Paul C. Giannelli & Emmie West, *Forensic Science: Hair Comparison Evidence*, 37 CRIMINAL LAW BULLETIN 514 (Sept.-Oct. 2001) (documenting cases); Edward Imwinkelried, *Flawed Expert Testimony: Striking the Right Balance in Admissibility Standards*, 18 CRIMINAL JUSTICE 29 (Spring 2003) (noting widespread recognition of the problem).
100. See Paul Giannelli, *The "Science" of Wrongful Convictions*, 18 CRIMINAL JUSTICE 55, 55 (Spring 2003) (hair comparison); Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 41 HASTINGS LAW JOURNAL 15 (1990); COHEN, *supra* note 90, at 225-30 (bite mark comparison and hypnosis illustrative cases), BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 209 (2001) ("The weakness of the field [of hair comparison] is well established.").
101. See Jim Dwyer, *Some Officials Shaken by New York Central Park Jogger Inquiry*, N.Y. TIMES, Sept. 28, 2002, at B1, B3 ("At the trial, the prosecution had argued that hairs found on Ms. Richardson's clothes came from the jogger. Recent DNA tests show that claim to be wrong.").
102. *Ramirez v. State*, 810 So. 2d 836, 853 (Fla. 2001) (citations omitted).
103. See, e.g., Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW 439 (1997) (documenting instances of fraud); George Castelle, *Lab Fraud: Lessons Learned*, THE CHAMPION 13-14 (May 1999) (fraud and inadvertent error are equally pervasive).
104. See Castelle, *supra* note 103, at 14.
105. See Hansen, Caudill & Boone, *Crisis in Drug Testing: Results of CDC Blind Study*, 253 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2382 (1985) (Center for Disease Control proficiency test of laboratories doing immunoassay drug testing); J. PETERSON, E. FABRICANT & K. FIELD, CRIME LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM (1978) (a study of 21 tests in 240 laboratories); Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO STATE LAW JOURNAL 671, 675-92 (1988) (discussing the Laboratory Proficiency Testing Program of the Law Enforcement Assistance Administration); D. Michael Risinger, Mark P. Denbeavy, & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 731, 743-51 (1989) (proficiency tests of questioned documents examiners by the Forensic Science Foundation); Grieve, *Possession of Truth*, 46 JOURNAL OF FORENSIC IDENTIFICATION 521 (1996) (proficiency test of fingerprint examiners).
106. See Giannelli, *Science of Wrongful Convictions*, *supra* note 100, at 55-56; Imwinkelried, *Flawed Expert Testimony*, *supra* note 99, at 33 ("Many of the published proficiency tests identify sloppy test procedures as a leading cause of erroneous findings.").
107. Imwinkelried, *Flawed Expert Testimony*, *supra* note 99, at 33; see also Edward J. Imwinkelried, *The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis*, 69 WASHINGTON UNIVERSITY LAW QUARTERLY 19, 32 (1991).
108. See Imwinkelried, *Flawed Expert Testimony*, *supra* note 99, at 33-34.
109. Castelle, *supra* note 103, at 479.
110. See FEDERAL RULES OF EVIDENCE. 702; FRIEDLAND, et. al., *supra* note 92, at 298-304 (explaining genesis and significance of this amendment to Rule 702).
111. See, e.g., U.S. DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (April 1997) (recommending, among other things, that FBI forensic analysts have adequate scientific backgrounds, mandating the preparation and signing of separate reports attributable to each examiner, establishing unit chief review procedures, requiring adequate case files to support reports, monitoring

- courtroom testimony to preclude examiners from testifying in unprofessional ways or beyond their expertise, and calling for development of written protocols for scientific procedures).
112. See *Castelle*, *supra* note 103, at 13.
  113. *Id.*
  114. *Id.*
  115. *Id.*
  116. *In re Investigation of the W. Va. State Police Crime Lab, Serology Div.*, 438 S.E. 2d 501, 503 (W. Va. 1993) (quoting report).
  117. See *Castelle*, *supra* note 103, at 13.
  118. *Id.*
  119. *Id.*
  120. See *id.* at 13.
  121. See Scientific Subcommittee Recommendations, *supra* note 97, at 5-6.
  122. See MARK FUHRMAN, DEATH AND JUSTICE: AN EXPOSE' OF OKLAHOMA'S DEATH ROW MACHINE 20 (2003).
  123. *Id.* at 21.
  124. *Id.* at 21.
  125. See *id.* at 22, 110-11.
  126. *Id.* at 22.
  127. See *id.* at 106-22.
  128. *Id.* at 120.
  129. See *id.* at 22.
  130. *Castelle*, *supra* note 103, at 13.
  131. <http://www.hpdlabinvestigation.org/reports/050630report.pdf>, July 2005.
  132. See e.g., Imwinkelried, *Flawed Experts Testimony*, *supra* note 99, at 30 (“[T]here is now solid evidence that erroneous expert testimony is causing a significant number of erroneous convictions.”).
  133. BARRY SCHECK, ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000); COHEN, *supra* note 90, at 223-25, 230-34 (discussing forensic errors and their contributions to mistaken verdicts in selected infamous cases).
  134. See, e.g., COHEN, *supra* note 90, at 232-25, 230-34.
  135. Steve Mills & Maurice Possley, *Texas man executed on disproved forensics; Fire that killed his 3 children could have been accidental*, CHICAGO TRIBUNE, December 9, 2004, at C1.
  136. Friedland, *supra* note 92, at 237-38, 241-42.
  137. *Castelle*, *supra* note 103, at 14.
  138. *Id.*
  139. *Id.*
  140. See *id.*
  141. See *id.* (noting that there was “independent” non-scientific evidence in every one of Fred Zain’s cases, evidence likely contaminated by Zain’s fraudulent findings).
  142. See *id.* at 15-16.
  143. See Scientific Subcommittee Recommendations, *supra* note 97, at 19-28.
  144. See *id.* at 23-30.
  145. Compare Clinical Laboratory Improvements Act of 1988, 42 U.S.C. §2639, with Scientific Subcommittee Recommendations, *supra* note 97, at 7 (noting no equivalent federal statute for crime laboratories).
  146. See N. Y. EXEC. §995-b (McKinney 1996); OKLA. STAT. ANN. TIT. 74 §150.37 (requiring accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (“ASCLAD”) or the Ameri-

- can Board of Forensic Psychology); TEX. CRIM-PROC. CODE ART. 38.35 (accredited by the Department of Public Safety).
147. Eric Lander, *DNA Fingerprinting On Trial*, 339 *Nature* 501, 505 (1989).
148. Jack B. Weinstein, *Science and the Challenge of Expert Testimony in the Courtroom*, 77 *OREGON LAW REVIEW* 1005, 1011 (1998).
149. See DNA Identification Act of 1994, 42 U.S.C. §14131(i)(a)&(c).
150. *State v. Smith*, 702 N.E. 2d 668, 073 (Ind. 1998).
151. Graham R. Jones, *President's Editorial — The Changing Practice of Forensic Science*, 47 *JOURNAL OF FORENSIC SCIENCE* 437, 438 (2002).
152. *Scientific Subcommittee Recommendations*, *supra* note 97, at 12.
153. See, e.g., Joseph L. Peterson, et. al., *The Feasibility of External Blind DNA Proficiency Testing, Background and Findings*, 48 *JOURNAL OF FORENSIC SCIENCE* 21 30 (2003).
154. Cf. NATIONAL RESEARCH COUNCIL, *DNA TECHNOLOGY IN FORENSIC SCIENCE* 55 (1992) (“No laboratory should let its results with a new DNA typing method be used in court, unless it has undergone such proficiency testing via blind trials.”).
155. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).
156. *Id.* at 593-94.
157. See generally Imwinkelried, *Flawed Expert Testimony*, *supra* note 99.
158. See, e.g., *Howard v. State*, 697 So. 2d 415, 429 (Miss. 1997) (“[W]hile few courts have refused to allow some form of bite-mark comparison evidence, . . . [s]uffice it to say that testimony concerning bite marks in soft, living flesh has not been scientifically accredited at this time.”). Lisa Steele, “*All we want you to do is confirm what we already know*”: A *Daubert* Challenge to Firearms Identification, 38 *CRIMINAL LAW BULLETIN* 465 (2002) (suggesting that there is an embarrassing lack of empirical research on firearms identification); Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint “Science” Is Revealed*, *SOUTHERN CALIFORNIA LAW REVIEW* 13 (2001).
159. See NATIONAL RESEARCH COUNCIL, *THE EVALUATION OF FORENSIC DNA EVIDENCE* (1996); NATIONAL RESEARCH COUNCIL, *AN ASSESSMENT OF COMPARATIVE BULLET LEAD ANALYSIS* (2003); NATIONAL RESEARCH COUNCIL, *ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION* (1979).
160. See Friedland, *supra* note 92, at 292-93.
161. See generally, D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left in the Dark?*, 64 *ALBANY LAW REVIEW* 99 (2000).
162. See Mark Hansen, *Expertise to Go*, 86 *AMERICAN BAR ASSOCIATION JOURNAL* 5 (Feb. 2000) (“checkbook credentials”); Elizabeth MacDonald, *The Making of an Expert Witness: It’s in the Credentials*, *WALL STREET JOURNAL*, FEB. 8, 1999, at Br.
163. *Scientific Subcommittee Recommendations*, *supra* note 97, at 13.
164. *Id.*
165. *Id.* at 13-14.
166. Castelle, *supra* note 103, at 14.
167. <http://www.hpdlabinvestigation.org/reports.htm> , July 2005.
168. See Castelle, *supra* note 103 at 13-14; *NEW YORK TIMES*, Oct. 29, 1997; *AMERICAN BAR ASSOCIATION JOURNAL* March 1993, June 1993, Feb. 1996; Office of Inspector General Memorandum of Investigation, Jan 23, 1996, Interview of FBI agent Greg Parsons.
169. Castelle, *supra* note 103, at 14.
170. See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 *I. & CONTEMPORARY PROBLEMS* 221, 228 (2003) [hereinafter Taslitz, *Racial Auditors*].

171. See O. RAY WHITTINGTON & KURT PANY, *PRINCIPLES OF AUDITING AND OTHER ASSURANCE SERVICES* 11 (13th ed. 2001).
172. Notably, the FBI DNA Quality Assurance Standards, which governs DNA laboratories receiving federal funding, require periodic external audits to ensure compliance with the required quality assurance standards. (See Scientific Subcommittee Recommendations, *supra* note 97, at 7 n. 24; 42 U.S.C. §14131(i)(a) & (c)). ASCLAD does these audits for the laboratories accredited under its program (there are few mandatory auditing procedures, however, for forensic methods other than DNA). See Scientific Subcommittee Recommendations, *supra* note 97, at 7 & n. 24. Other audits may be specially ordered where evidence is uncovered of endemic problems in a specific lab.
173. See Taslitz, *Racial Auditors*, *supra* note 170, at 230-31.
174. This Committee's charge concerns capital cases only. The Committee takes no position on the wisdom of requiring examiner audits in other sorts of cases.

### Videotaping and Recording of Custodial Interrogations

175. See Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, Northwestern School of Law, Center for Wrongful Convictions, 6, 24-26 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf>. Shorter versions of this article may be found at Thomas P. Sullivan, *Police Experience with Recording Custodial Interrogations*, JUDICATURE, Nov.-Dec. 2004, at 132; Thomas P. Sullivan, *The Police Experience: Recording Custodial Interrogations*, CHAMPION, Dec. 2004, at 24; Thomas P. Sullivan, *Recording Custodial Interrogations: The Police Experience*, FEDERAL LAW, Jan. 2005, at 20; Thomas P. Sullivan, *Recording Custodial Interrogations*, LAW & ORDER, Mar. 2005, at 46.
176. See Andrew E. Taslitz, *Wrongful Rights*, 18 CRIMINAL JUSTICE MAGAZINE 4, 8-9 (2003).
177. Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW 105, 153-554 (1997).
178. Editorial, *Crime, False Confessions, and Videotape*, NEW YORK TIMES, A24, January 20, 2003. See also STANLEY COHEN, *THE WRONG MEN* 255-67 (2003) (describing the detailed events supporting the exoneration of the Central Park jogger defendants).
179. See Ryan Commission Report, Recommendation 16.
180. Richard Ofshe and Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENVER UNIVERSITY LAW REVIEW 979, 1118 (1997).
181. See BARRY SCHECK, *supra* note 15; Ronald Duff, *Wrongful Convictions: Causes and Public Policy Issues*, 18 CRIMINAL JUSTICE 15, 18 (Spring 2003).
182. See WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 140-46 (2001).
183. See *id.* at 146.
184. See Hugo M. Bedeau and Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STANFORD LAW REVIEW 21 (1987) (the source of these data); WHITE, *supra* note 182, at 144-46 (analyzing the data on those interrogations that resulted in wrongful convictions).
185. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 37-38 (2003).
186. *Id.* at 38.
187. See *id.* at 37-38.
188. *Id.* at 38.
189. See generally Ofshe and Leo, *supra* note 180; WHITE, *supra* note 180, at 196-215.
190. See WHITE, *supra* note 182, at 196-215.
191. *Miranda v. Arizona*, 384 U.S. 436 (1966),
192. See WHITE, *supra* note 182, at 76-101.

193. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 304 (1993) (quoting DAVID SIMON, *A YEAR ON THE STREETS* (1985)).
194. See ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* 590-612 (2d. ed. 2003) (summarizing the case law).
195. See *id.* at 645.
196. Shaila K. Dewan, *New York Police Resist Videotaping Interrogations*, NEW YORK TIMES, September 2, 2003 (quoting Commissioner Kelly).
197. See *id.*
198. See *id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. Thomas Sullivan, *Three Police Station Reforms to Prevent Convicting the Innocent*, 17 APR CBA RECORD 30 (April 2003).
203. *Id.* at 32.
204. 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2004); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2004).
205. ME. REV. STAT. ANN. tit. 25 § 2803-B(1)(K) (West 2004); H. B. 382, 47th Gen. Assem., Reg. Sess. (N.M. 2005). D.C. OFFICIAL CODE §§ 5-116.01, 5-116.03 (2005);
206. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587 (Minn.1994); *State v. Jerrell*, No.2002AP3423 (Wis. July 7, 2005) [*available at* <http://www.courts.state.wi.us/sc/opinion/DisplayDocument.html?content=html&seqNo=18921>].
207. *Commonwealth v. DiGiambattista*, 813N.E.2d 516, 533-34 (Mass. 2004).
208. “Guidelines for Electronic Recording of Interrogations”, email communication with Eleanor Sinnott, Chief Legal Counsel for Massachusetts State Police, (August 3, 2005).
209. Interview with Thomas Sullivan, July 21, 2005.
210. See Sullivan, *supra* note 202.
211. See American Bar Association, House of Delegates, Report No. 8A, *Resolution on Videotaping Custodial Interrogations* (passed February 2004).
212. Cf. TASLITZ & PARIS, *supra* note 194, at 210 (prosecution ordinarily has the burden of proving the existence of an exception to the rule requiring suppression of the fruits of all unconstitutional searches or seizures).
213. Cf. Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 MARGINS 306, 380 & n. 415 (2001)(employer benefits in discrimination suits where he can show that his company has instituted adequate procedures to discourage hostile environment sexual harassment); Ellen McLaughlin & Carol Merchasin, *Training Becomes Important Step to Avoid Liability*, NAT. L.J. BIO , January 29, 2001, at Bio (“Training a work force on a company’s anti discrimination/harassment policy has thus become arguably the most important tool for an employer that wants to protect itself from Title VII liability and punitive damages.”).
214. Cf. Andrew E. Taslitz, *Report to the American Bar Association House of Delegates in Support of the Criminal Justice Section Resolution on Eyewitness Testimony* (April 2004) (reviewing case and administrative law on, and recommending, cautionary jury instructions where lineup and photo spread procedures have not been videotaped or otherwise adequately recorded or where other procedural factors create a risk of misidentification).
215. See Appendix for dissent of Beth Wilkinson.



## CHAPTER VII: DUTY OF JUDGE AND ROLE OF JURY

1. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (emphasis in original).
2. *Id.* at 318-19.
3. See Lissa Griffin, *The Correction Of Wrongful Convictions: A Comparative Perspective*, 16 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1241 (2001).
4. Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 NEW YORK UNIVERSITY LAW REVIEW 979, 991 (1993).
5. James S. Liebman, *The Overproduction of Death*, 100 COLUMBIA LAW REVIEW 2030 (2000).
6. See *Gregg v. Georgia*, 428 U.S. 153 (1976).
7. SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 37 (2003).
8. See Appendix for dissent of Beth Wilkinson.
9. Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO LAW REVIEW 79, 83, 138 (2002).
10. Newman, *supra* note 4, at 992.
11. *Id.* at 987.
12. See, e.g., *Spaziano v. Florida*, 468 U.S. 447 (1984).
13. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).
14. *Spaziano v. Florida*, 468 U.S. 477 at 469-70 (1984) (Stevens, J., dissenting).
15. *Lockhart v. McCree*, 476 U.S. 162, 181 (1986).
16. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
17. *Franklin v. Lynaugh*, 487 U.S. 164 (1988).
18. Jennifer R. Treadway, Note, "Residual Doubt" in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor, 43 CASE WESTERN RESERVE LAW REVIEW 215, 222 (1992).
19. See *id.*
20. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 INDIANA LAW JOURNAL 1043, 1090-93 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 INDIANA LAW JOURNAL 1161, 1164-67 (1995); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICHIGAN LAW REVIEW 2590, 2596-99 (1996).
21. See Steiker, *supra* note 20; see also Craig Haney, *Taking Capital Jurors Seriously*, 70 INDIANA LAW JOURNAL 1223 (1995).
22. See Bowers, *supra* note 20.
23. *Woodson v. North Carolina*, 428 U.S. 280 (1976).
24. See Steiker, *supra* note 20.
25. See, e.g., *Weeks v. Angelone*, 528 U.S. 225 (2000) (upholding an instruction that arguably left the jury with the impression that it was required to sentence the defendant to death if it found the requisite aggravating factors existed). See also *id.* at 237-39 (Stevens, J., dissenting); Stephen Garvey, Sheri Lynn Johnson, & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL LAW REVIEW 627 (2000); see also Bowers, *supra* note 20.
26. See Steiker, *supra* note 20, at 2622 n.134.
27. Garvey, et al., *supra* note 25.
28. *Id.*

### EDITOR'S NOTES FOR CHAPTER VII

- E1. 530 U.S. 466 (2000)
- E2. 536 U.S. 584 (2002)
- E3. 125 S. Ct. 21 (2004)

- E4. 125 S. Ct. 738 (2005)
- E5. 125 S. Ct. 26 (2004)
- E6. *Ring v. Arizona*, 536 U.S. 584, 621 (2002) (O'Connor, J., dissenting)
- E7. 487 U.S. 164 (1998)
- E8. No. 04-928

## CHAPTER VIII: ROLE OF PROSECUTORS

1. *Gregg v. Georgia*, 428 U.S. 153 (1976).
2. See FLA. REV. CRIM. PROC. 3.220.
3. *Brady v. Maryland*, 373 U.S. 83 (1963).
4. See *Jackson v. State*, 770 A.2d 506, 514 (Del. 2001) (requiring disclosure of an implicit promise of leniency, which the court labeled a “troubling practice,” and which was used by the state in an effort to avoid disclosure and the undermining of a witness’s credibility).
5. See *United States v. Wade*, 388 U.S. 218 (1967).
6. See *Mandatory Justice: The Death Penalty Revisited* Recommendation 8, *supra*.
7. Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMPORARY PROBLEMS 125 (1998).
8. See N.Y. CRIM. PROC. LAW § 250.40.
9. David Baldus & George Woodworth, *Proportionality: The View of the Special Master*, 6 CHANCE MAGAZINE 1 (1993).
10. See *Mandatory Justice: Eighteen Reforms to the Death Penalty* 23-29 (2001). In addition to the sources referenced in that publication, there is a wealth of literature suggesting that charging decisions in death penalty cases depend in part on illegitimate factors such as the race of the victim, the urban/rural nature of the county in which the crime occurred, and the race of the prosecutor. See, e.g., Report of the Governor’s Commission on Capital Punishment, Recommendation 30 (April 2002) [hereinafter Ryan Commission Report] (discussing and citing studies demonstrating rural/urban bias in death penalty charging decisions); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL LAW REVIEW 1811 (1998) (addressing impact of prosecutor’s race on charging decision); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27 (1984) (analyzing impact of victim’s race on charging decision); see also Garth Davies, Jeffrey Fagan, Andrew Gelman, Alexander Kiss, James Liebman, and Valerie West, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, (documenting wide disparities in charging decisions), available from the Criminal Justice Reform Education Fund, at <http://justice.policy.net/cjedfund/dpstudy/>.
11. See *Mandatory Justice: The Death Penalty Revisited* Recommendation 22, *supra*.
12. The Ryan Commission recommended staggered terms of office relating to the terms of office of its member elected officials. The Commission suggested that most members have 4 year terms, although staggered, “so that the Committee would have stability; there would be several members with shorter terms to enable a rotation through the process with some regularity.” See Ryan Commission Report, Recommendation 30. Our recommendations concerning the Committee’s composition are adapted from the Ryan Commission, which proposed: “(1) the elected Attorney General or his or her designee; (2) the elected State’s Attorney of Cook County [head of prosecution in the state’s largest county] or his or her designee; the current president of the Illinois State’s Attorneys Association; (4) a State’s Attorney from some County other than Cook chosen by lottery; and (5) a retired judge, preferably with experience in criminal law and/or appellate level cases, who would be appointed by the Governor.” See *id.*



13. See, e.g., *id.* The Ryan Commission recommended:

The death penalty sentencing statute should be revised to include a mandatory review of death eligibility undertaken by a state-wide review committee. In the absence of legislative action to make this a mandatory scheme, the Governor should make a commitment to setting up a voluntary review process, supported by the presumption that the Governor will commute the death sentences of defendants when the prosecutor has not participated in the voluntary review process, unless the prosecutor can offer a compelling explanation, based on exceptional circumstances, for the failure to submit the case for review.

The Illinois legislature has not yet implemented a mandatory review process of charging decisions. See Edwin Colfax, *Status of Action on Recommendations of the Illinois Governor's Commission on Capital Punishment*, available from Northwestern University School of Law's Center on Wrongful Convictions, at [www.law.northwestern.edu/depts/clinic/wrongful/documents/GCCPStatus.htm](http://www.law.northwestern.edu/depts/clinic/wrongful/documents/GCCPStatus.htm).

Thomas Sullivan, a highly-respected former prosecutor and co-chair of the Ryan Commission, has called for Illinois to continue its moratorium on executions because "some of the most important [Commission] recommendations have yet to be adopted." Thomas P. Sullivan, *Death Penalty: For Capital Punishment, More Reforms Necessary*, CHICAGO TRIBUNE (January 4, 2004). Recommendation 30 is among those that Sullivan identified as "most important."

14. See United States Department of Justice *U.S. Attorney's Manual* § 9-10.020, available from the Department of Justice, at [www.usdoj.gov](http://www.usdoj.gov).
15. Vienna Convention on Consular Relations, April 21, 1963, 596 U.N.T.S. 262-512. Article 36 of the VCCR provides: *Communication and Contact with Nationals of the Sending State*
1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
    - (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
    - (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
    - (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
  2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.
16. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Merits, Judgment of 31 March 2004. The *Avena* judgment and other materials relating to the case can be found on the ICJ's website at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.
17. See JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 115-16 (2nd ed. 2003).

18. *Id.* at 116 (quoting *United States v. Pink*, 315 U.S. 203, 230-32 (1942)).
19. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 21, 1963, 596 U.N.T.S. 262-512; see also *Torres v. Mullin*, 124 S.Ct. 919 (2003) (opinion of Stevens, J., respecting the denial of the petition for *certiorari*) (denial of *certiorari* reported at 123 S.Ct. 1580 (2003)). Article I of the Optional Protocol provides:

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

The ICJ has the authority to interpret the VCCR for purposes of the disputes brought before it. Its interpretations and decisions would appear to be binding upon the United States insofar as those disputes are concerned, although presumably they are not binding within the United States for other purposes. See Paust, *supra* note 17, at 12-15. But the United States Supreme Court has not yet spoken clearly on this issue. In the *Torres* case, cited above, the Court denied *certiorari* in a case raising the issue. In his “opinion respecting the denial,” Justice Stevens implied that he considers the ICJ’s interpretations to be binding in Convention-related disputes: “In its *authoritative* interpretation of Article 36 in the LaGrand Case, the International Court of Justice explained . . .” *Torres*, *supra*, at 919 (opinion of Stevens, J., respecting the denial of the petition for *certiorari*, emphasis added; citations omitted). Justice Breyer also wrote an opinion in the *Torres* case, dissenting from the denial of *certiorari*. With respect to the question whether the treaty and ICJ interpretations bind the United States, Breyer stated that “Torres’s and Mexico’s arguments seem substantial.” *Torres*, 124 U.S. 562, 565 (2003) (opinion of Breyer, J., dissenting from denial of *certiorari*). Justice Breyer also noted:

[T]he United States has not filed a brief directly addressing the issues Torres has raised in this case, nor has any group of individuals expert in the subject of international law. The United States has filed a brief in opposition in the related cases *Ortiz v. United States*, and *Sinesterra v. United States*, in which it argues, *inter alia*, that “the ICJ does not exercise any judicial power of the United States, which is vested exclusively by the Constitution in the United States federal courts.” While this is undeniably correct as a general matter, it fails to address the question whether the ICJ has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred by the Vienna Convention.

*Id.* at 565 (citations omitted).
20. Bureau of Consular Affairs, U.S. Department of State, CONSULAR NOTIFICATION AND ACCESS, PART ONE: BASIC INSTRUCTIONS available at [www.travel.state.gov/notification1.html](http://www.travel.state.gov/notification1.html).
21. *Avena* judgement, *supra* note 16 at paragraph 90.
22. See *id.*
23. *Brief of the Government of Mexico* at 66-7. The brief can be found on the ICJ’s website, *supra* note 16.
24. In his official press release announcing the grant of clemency, Governor Henry took note of the ICJ’s decision and acknowledged that “the ruling of the ICJ is binding on U.S. Courts.” Said Governor Henry, “I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty.” See Press Release of May 13, 2004, available at [http://www.governor.state.ok.us/display\\_article.php?article\\_id=301&article\\_type=1](http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1). Just prior to Governor Henry’s action, the Oklahoma Court of Criminal Appeals had stayed Torres’s execution based on the ICJ’s decision. See *id.*
25. *Medellin v. Dretke*, No. 04-5928 (U.S. 2004)
26. George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curaie* 9a.
27. See Louis Klarevas and Howard Schiffman, *The Supreme Court Dismisses the Controversial Consular Rights Case: A Blessing in Disguise for International Law Advocates?*, FindLaw (June 6, 2005).
28. See The International Justice Project, Current Cases and Past Cases, available at [www.internationaljusticeproject.org](http://www.internationaljusticeproject.org).
29. *Torres*, *supra* note 19 at 919 (opinion of Stevens, J., respecting the denial of the petition for *certiorari*).

30. See *Avena*, *supra* note 16; see also *LaGrand* (*Germany v. United States of America*), *Merits, Judgment of 27 June 2001*. The *LaGrand* judgment and other materials relating to the case can be found on the International Court of Justice website at [www.icjciij.org/icjwww/idocket/igus/igusframe.htm](http://www.icjciij.org/icjwww/idocket/igus/igusframe.htm).
31. The ICJ has declined to hold that the VCCR requirement of notification “without delay” necessarily requires notification before interrogation. See *Avena*, *supra* note 16, at paragraph 87. Instead, the notice requirement is tied to the point at which the authorities realize, or have grounds to think, that the person is a foreign national. *Id.* at paragraph 88.
32. *LaGrand*, *supra* note 30, paragraph 74.
33. U.S. Dep’t of State, 7 FOREIGN AFFAIRS MANUAL 400, Annex 28.
34. See *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000).
35. This is the interpretation of the “without delay” standard adopted by the ICJ. *Avena*, *supra* note 16, at paragraphs 87-88.
36. We note with particular interest that since 1999 California has required its law enforcement officers to provide notification of consular rights “upon arrest and booking or detention for more than two hours” of a foreign national. Cal. Penal Code § 834c(a)(1)(1999).

