The Death Penalty and Reform in the United States

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Use of the death penalty in the United States has always been controversial. The first voices of opposition in Colonial America were raised in the early 1700s, not long after the first recorded execution.¹ Over the years, most of the rest of the world has abolished the death penalty. But the United States government, and a majority of its citizens, defend and support its continued use.

There is evidence, however, that some attitudes about the death penalty are changing. The debate has shifted from whether capital punishment is appropriate in a modern civilized society to questions about the fairness of the trials and the reliability of the results. These questions gave rise to the current movement toward death penalty reform in the United States.

A sharply divided United States Supreme Court also appears to be struggling with several important aspects of the death penalty. Concern about the quality of legal representation poor defendants receive has prompted unprecedented public comment from two Supreme Court Justices.² Especially vulnerable members of society – children, the mentally ill, and the mentally retarded – are increasingly viewed as undeserving of death sentences. And the release of more than 100 wrongfully convicted persons from death row in recent years has even the most ardent supporters of capital punishment wondering whether we are executing the guilty or the innocent. With more than 3500 people on death row today, the United States is facing a real crisis of confidence in its system of capital punishment.

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² In a July 2001 speech at a meeting of the Minnesota Women Lawyers in Minneapolis, US Supreme Court Justice Sandra Day O'Connor said that in capital cases with defendants too poor to hire their own lawyers, the work of court-appointed counsel "has been too often inadequate." "Perhaps it's time to look at minimum standards for appointed counsel in death cases, and adequate compensation for appointed counsel when they are used." Ken Armstrong, Steve Mills, Tribune staff reporters, and AP writer Brian Bakst, O'Connor questions fairness of death penalty, Justice rethinking laws she shaped, Chicago Tribune, July 4, 2001, at 1. In a speech in 2001, US Supreme Court Justice Ruth Bader Ginsburg commented, “I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial. People who are well-represented at trial do not get the death penalty.” Associated Press, Oklahoma Governor Commutes Death Case, Texas Bill Boosts Defense for Poor, Chicago Tribune, April 11, 2001, at 8.
I. History of the Death Penalty in the United States

In 1972, concerns about the “arbitrary and capricious” application of the death penalty prompted the United States Supreme Court to find that death penalty procedures violated the United States Constitution. Executions were halted and the death sentences of 629 inmates were commuted to life in prison without parole.

Somewhat surprisingly, the Court’s decision resulted in renewed public support for capital punishment and pressure to reform death penalty procedures so the practice could resume. Legislators and politicians quickly announced their intent to reinstate capital punishment in their jurisdictions.

The “modern” death penalty era began in 1976, when the United States Supreme Court approved new state statutes and reinstated use of the death penalty after a four-year hiatus. Capital trials resumed with new procedural “safeguards” in place to address previous concerns. These measures included a narrowing of the number of crimes that were eligible for the death penalty, new procedures to guide and instruct juries, and bifurcated trial proceedings that permitted an unlimited introduction of mitigation evidence regarding the defendant’s character and background. These safeguards were intended to accomplish the “twin objectives” of making imposition of the death penalty “consistent and principled but also humane and sensible to the uniqueness of the individual.” Death sentences would be reserved for those defendants who had committed particularly brutal and heinous crimes – “the worst of the worst.”

The new procedures eliminated some of the most egregious abuses. Unfortunately, they did not resolve the most serious concerns. Opponents argued that poor people and people of color were still disproportionately sentenced to death. Concerns about racism in jury selection and proceedings continued, and new attention was given to the dismal quality of legal representation received by poor people charged with capital crimes.

Despite these concerns, the number of defendants sentenced to death increased dramatically in the 1980s and 1990s as part of a national movement to address the increase of violent crime. At the same time, government funding for legal representation of poor defendants decreased or was eliminated. In the wake of the Oklahoma City bombing and public fear of domestic terrorism, Congress adopted a habeas reform bill known as the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) in 1996. The bill dramatically expanded the number of federal crimes eligible for the death penalty and instituted a set of procedural hurdles and timing limitations for death row appeals. All of this had

4 Gregg v. Georgia, 428 U.S. 153 (1976) and companion cases.
the intended result of sharply curtailing the scope of available appeals, limiting judicial review, and increasing the number of executions. Public support of the death penalty reached an all time high, at close to 80% approval, in 1994.

Unexpectedly, however, science gave critics of the death penalty renewed energy. A new procedure to test biological crime evidence (DNA) offered the first tangible proof that the death penalty system was seriously flawed. DNA testing exposed many wrongful convictions and resulted in the steady release of more than 100 death row inmates. Some defendants came within hours of being executed for crimes that DNA tests proved they did not commit. In 2003 Illinois Governor George Ryan became so concerned about the capital punishment system in his state that he first declared a moratorium on executions and then took the unprecedented step of commuting the sentences of 167 death row inmates to life in prison without parole.

II. The Process of the Death Penalty

Thirty-eight states in the US permit the death penalty, although the largest numbers of death row inmates and executions occur in just a handful of those jurisdictions. Although California has the largest death row with 625 inmates, this state does not execute people very frequently -- only two executions have occurred in the last three years.

Texas, in contrast, while also having a very large death row (453) executes more people each year than any other state in the country. The number of executions in Texas alone constituted 46% of all executions that occurred in 2002. The federal government and the military also use the death penalty for federal and military crimes. Within the last two years, US Attorney General John Ashcroft has instructed his subordinates to seek the death penalty in more federal cases than ever before.

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6 The United States executed a record 98 people in 1999.
7 Since 1976, 111 people have been released from death row after their convictions were overturned. Death Penalty Information Center, Innocence July 2003, available at www.deathpenaltyinfo.org (last visited Sept. 10, 2003).
8 For example, Anthony Porter, an innocent mentally retarded man on Illinois’ death row, came within 2 days of execution in 1998. A team of journalism students investigated his case and found the evidence that won his freedom. Earl Washington, who is also mentally retarded, came within 9 days of execution in 2000 in Virginia. Mr. Washington was released when DNA evidence confirmed he had not committed the crime for which he had been sentenced to death. See Margaret Edds, An Expendable Man: The Near-Execution of Earl Washington, Jr. (New York University Press 2003).
9 See Ryan Commission & recommended reforms, available at: http://www.idoc.state.il.us/ccp/ccp/reports/index.html
10 The states with the largest number of executions since 1976 are Texas (309); Virginia (89); Oklahoma (69); Missouri (60); and Florida (57). These states, all in the American South, are sometimes referred to as “the death belt.”
11 US Attorney General John Ashcroft has been twice as likely as his predecessor to reverse recommendations of local federal prosecutors and to order them to seek the death penalty in cases where they had recommended against doing so. Twenty-six of the 28 defendants in cases where General Ashcroft has overridden prosecutors to seek the death penalty are Black or Hispanic.
A. Seeking the Death Penalty

Each death penalty jurisdiction determines which crimes will be eligible for the death penalty and the criteria that will be used to “qualify” that crime for the death penalty. There is no “automatic” death sentence for any crime. The crime must have some “aggravating” feature, such as a “heinous or atrocious” nature, or cruelty. Other examples of aggravating factors include causing the death of a child and the commission of another crime in connection with the murder (for example, robbery, kidnapping or rape). In some states, the list of aggravating factors is very long and poorly defined, which means a large number of crimes can be potentially classified as “capital.”

Prosecutors in the jurisdiction where the crime occurred decide whether to seek the death penalty in a particular case. They have a tremendous amount of discretion and some critics have alleged that they are influenced to seek the death penalty by factors that should not be relevant – such as the race of the defendant or the victim, or in response to media attention or public outrage. Ninety-eight percent of the prosecutors who make these decisions in death penalty jurisdictions are white. Some argue that the race of these prosecutors may lead to unconscious or deliberate discriminatory prosecution.

B. The Death Penalty Trial

Capital trials are unlike any other trial. They are more complicated, more expensive, and more time intensive. Death penalty cases attract extreme and sometimes sensational media attention that can prove distracting and prejudicial to the defendant. There is often political and public pressure on the judge and the prosecutors to secure a conviction and death sentence. And there is a great deal of pressure on the defense lawyers to save their client’s life.

Juries in capital cases are also unique. All potential jurors in a capital case are first asked specific questions about their views on the death penalty. Any juror who answers that he or she is against the death penalty and will not impose it under any circumstances is excused from jury service. The remaining jurors are considered “death qualified” because they support use of the death penalty. Studies have indicated that juries who support the death penalty are also more likely to convict a defendant. In this way, cases in which the death penalty is sought are more likely to end in convictions than other kinds of cases.

Capital trials are divided into two distinct parts. The first is the guilt phase, at which only evidence of the crime and any defenses are heard. At the close of the guilt phase, the jury must deliberate and make a decision to convict or acquit. They do not deliberate about a sentence at this time.

If the defendant is convicted, the penalty phase of the trial begins almost immediately. During this phase the jury hears arguments and evidence about the kind of sentence that the defendant should receive. The prosecutors argue for a death sentence, and must introduce the evidence of aggravating factors in the commission of the crime. They will also introduce evidence about the defendant – for example, his lack of remorse about the crime, or his criminal record. The defense lawyers will argue against a death sentence and try to persuade the jury to sentence their client to life in prison. They will introduce mitigating evidence such as the defendant’s good character, his positive relationship with his family, his young age, or the absence of any criminal record. They might also introduce evidence that helps explain why the defendant committed the crime, such as evidence of abuse or neglect as a child, mental illness, or mental retardation. Sometimes family members, teachers and friends will testify in support of the defendant. Family members of victims are sometimes permitted to testify about their loss, or their preference for a life or death sentence. At the close of all the evidence, the jury will once again deliberate, this time to decide the appropriate sentence.

C. The Appeals Process

If the defendant is sentenced to death, he will appeal his conviction and sentence first in what is called the direct appeal. This is a mostly perfunctory review by the state appellate courts. The evidence that can be presented in a direct appeal is limited to what occurred at trial – for example, whether a particular objection was correctly sustained or overruled. Almost all direct appeals are simply affirmed.

Death row inmates must file an appeal within one (1) year after their direct appeal is decided in order to preserve their rights. If they fail to do so, the defendant is deemed to have waived his appeals and further judicial review. Defendants who do not have lawyers have missed filing deadlines and have been severely prejudiced as a result. For example, the state of Alabama set execution dates for two death row inmates without lawyers who did not even know they had an appeal deadline. Defendants do not get another chance to file an appeal, even if the reason they missed their deadline is because their lawyer was incompetent.

The next phase of appeal is state post-conviction. In this appeal, the defendant can raise any state constitutional claims and present any evidence that might bring him relief from his conviction and sentence of death. Typical

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13 Most capital murder convictions have only two possible sentences – death or life in prison without parole. A few jurisdictions offer life with parole as a sentencing option.
claims in state post-conviction appeals include prosecutorial and police misconduct, ineffective assistance of counsel, race discrimination, and erroneous jury instructions. New evidence that was either not available or not discovered at the time of trial is included in this appeal, including claims of actual innocence. In some jurisdictions, a defendant might have an opportunity to present his evidence in a hearing before the same trial court that presided over the trial. The state courts then decide whether, in light of all the evidence and argument, the defendant’s conviction and death sentence should be overturned.

Relief is difficult to obtain. The law requires that the defendant bear the burden of proof in demonstrating that his conviction and/or sentence was unconstitutionally obtained. He must raise every claim he thinks might be relevant or he will effectively waive his right to present the claim(s) in the future. An in-depth investigation of the case and evidence is required by defense counsel. This is often a time consuming and expensive proposition, and for the many unskilled and under-resourced lawyers than represent death row inmates, the job often proves too challenging. The failure of defense counsel to adequately investigate the case and available mitigation evidence is the most profound failure observed in death penalty cases.

Although many death row defendants receive inadequate legal representation at trial, it is extremely difficult to obtain relief based on ineffective assistance of counsel. Unlike other constitutional violations, it is not enough to merely prove that a defendant was denied his constitutional right to the effective assistance of counsel. He must also prove that this violation prejudiced his case such that a different result would have occurred. In other words, if the court finds that the defendant would have been convicted and sentenced to death regardless of the poor performance of his lawyer, then he is not entitled to relief.

If a defendant does not obtain relief in state post-conviction, he will have one last chance to appeal, this time in the federal courts. This appeal process is referred to as federal habeas. Because of AEDPA, the federal court must defer to the findings of the state courts and has limited ability to hear any new evidence or grant relief.

When all appeals are exhausted, a defendant’s last hope is to ask the clemency board or the governor (or the President of the United States in federal death penalty cases) to grant him mercy and commute his death sentence to life in prison. There may be a hearing at which friends and supporters of the

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15 Under the US Supreme Court case that lays out the test to determine ineffective assistance of counsel, there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland v. Washington, 466 U.S. 668 at 689 (1984). Thus, under Strickland, a lawyer is presumed effective unless the defendant can show that counsel's performance was deficient, i.e., “counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment” id. at 687, and also that the deficient performance prejudiced the defense, i.e., “counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id.
defendant tell the decision-maker why they believe the defendant should not be put to death. Sometimes the prosecutors of family members of the victims also testify in support of a death sentence. Clemency is granted only in exceptional circumstances and has become more rare in recent years.

III. Continuing Concerns about Reliability of the Death Penalty

In the year 2003, public support in the United States for the death penalty remains constant, at about 68% approval. But that number drops to a bare majority when life in prison is offered as an alternative. People support the death penalty for various reasons, including religious, moral, and belief in ideals such as retribution and deterrence. But more than ever before, there is concern about the fairness of capital trials and the reliability of the result. Evidence of the high rates of error in capital cases has new voices calling for a moratorium on executions until the problems in the system can be fixed. Among those calling for a national moratorium is the American Bar Association.

A. Inadequate Legal Representation

Chief among the problems with the capital punishment system is the inadequacy of qualified and experienced lawyers to represent those charged with or convicted of capital crimes. Nearly 100% of those on death row are indigent. It is often said that the American legal system works better for those with money and status. The poor, who are without any means to hire a competent lawyer, find themselves severely prejudiced in capital cases.

Under the Sixth Amendment of the United States Constitution, all defendants are entitled to the “guiding hand of counsel” at trial. But because most can’t afford to hire an attorney, they are appointed lawyers by the government. Too often, these appointed lawyers are compensated with mere token amounts and not provided with the necessary resources to properly investigate the case or hire experts. On average, the prosecutorial effort is usually afforded three times the

16 According to recent polls, Americans are closely split on the proper sentence for convicted murderers. Though most respondents support the death penalty, that support dropped to 53% when people were offered the alternative sentence of life without parole (LWOP), with 44% supporting LWOP. Jeffrey M. Jones, Support for the Death Penalty Remains High at 74%. Slight majority prefers death penalty to life imprisonment as punishment for murder, Gallup News Service, May 19, 2003.

17 A study headed by Columbia Law School Professor James Liebman found that nationally, the overall rate of prejudicial error in capital cases was 68% - i.e., courts found serious reversible error in nearly 7 out of 10 capital cases that were fully reviewed during the study period. A Broken System: Error Rates in Capital Cases, 1973-1995, available at http://www2.law.columbia.edu/instructionalservices/liebman/.


20 For example, in Alabama, appointed lawyers representing an individual facing a death sentence are paid $60 per hour for time expended in court and $40 per hour for time reasonably expended out of court in preparation of the case. (Ala. Code 1975 §15-12-21).
amount of resources as the defense effort.  Representing someone charged with the death penalty is politically unpopular in many Southern states, where more than 80% of executions take place, so lawyers are also reluctant to take death penalty cases and risk offending local judges and clients. And few jurisdictions enforce meaningful performance standards for death penalty defense counsel. Consequently, many of the only lawyers who will handle death penalty cases are untrained, inattentive, or inexperienced. In the worst cases, lawyers in capital cases are drunk, taking illegal drugs, sleeping during the trial, assisting the prosecution’s case or so incompetent that the defendant never receives a competent defense and fair trial.

A death row inmate has no Sixth Amendment right to a lawyer after conviction. As a result, if there are errors in his trial, or if he is innocent, he has no guarantee that a lawyer will help him with his appeals. Some states provide death row inmates with the same kind of incompetent and ineffective lawyers they provide to defendants at trial. Other states refuse to provide inmates with any legal assistance for appeals. Hundreds of prisoners on death row in the United States are without lawyers and without any means of challenging their convictions and death sentences.

B. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

The American Bar Association Death Penalty Representation Project recruits lawyers from law firms in the United States to handle death penalty appeals pro bono. It trains and supports civil lawyers how to handle death row appeals. The Project has recruited more than 100 law firm teams but cannot come close to filling the urgent need for legal representation in many jurisdictions.

The Project recently published new guidelines for death penalty jurisdictions and defense counsel that detail the absolute minimal effort required in the defense of capital cases. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) is an expression of the national standard of care for the defense of death penalty cases. The ABA is urging all death penalty jurisdictions to adopt and enforce the Guidelines as meaningful reform of capital defender systems.

22 It should be noted that there are many hard working and heroic public defenders and volunteer lawyers working on behalf of death row defendants who cannot do the job they should because they are not afforded necessary resources and support. Many defense lawyers who represent the poor, however, are just barely competent and far too many are horribly negligent. See, e.g., Stephen B. Bright, Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994).
23 Alabama, for example, refuses to provide any state funding for a statewide indigent defense system or provide any resources to post-conviction legal representation.
24 In February 2003, the ABA House of Delegates passed the following resolution adopting the Guidelines:
IV. Recent Developments

A. Mental Retardation

In 2002, the United States Supreme Court held that a national consensus had developed against the execution of mentally retarded defendants and outlawed the practice. Although the decision was clear, the mechanism for implementing it was not. There is confusion in many states over the definition of “mental retardation” and the proof a defendant must provide about his condition to escape the possibility of a death sentence. For those already on death row, there is the daunting prospect of finding a lawyer and the funds to prove their case in court. Other inmates who have already completed their appeals must first seek permission to file new appeals, or stays of execution. Courts across the country have decided these cases and issues differently, causing greater chaos and increases the risk that the United States will continue to execute mentally retarded defendants despite clear legal authority that forbids it.

B. Mental Illness and Prison Conditions

There is no prohibition against execution of the mentally ill. A significant percentage of death row inmates are either mentally ill before being sentenced to death or deteriorate in extreme prison conditions and become mentally ill soon thereafter. Death row inmates are typically held in near-total isolation for 23 hours each day. Access to newspapers, television, and the outside world is limited or prohibited; phone and visitation privileges are severely curtailed. Cells are typically just a few feet wide and long, with no air conditioning, and poor ventilation and heating. New “supermax” prisons and the recent trend to privatize prison systems have resulted in a worsening of living conditions. Despair, depression and untreated mental illness has lead to a dramatic increase

\[\text{Resolved, That the American Bar Association adopts the black letter ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, dated February 2003; and Further Resolved, that the American Bar Association recommends adoption by death penalty jurisdictions of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, dated February 2003,}\]


\[\text{26 In Mississippi, a federal judge recently ruled that the “filthy conditions” on Mississippi’s death row are so bad that they constitute cruel and unusual punishment in violation of the US Constitution. Inmates were subjected to “profound isolation… intolerable stench and filth … consistent exposure to human excrement, dangerously high temperatures and humidity … insect infestations, deprivation of basic mental health care and constant exposure to severely psychotic inmates in adjoining cells.” The judge said that the harsh conditions were contributing to the high rate of mental illness among the prisoners. Henry Weinstein, Miss. Told to Fix Conditions on Death Row Poor state of prison is 'cruel' and offends current concepts of decency, judge says, Los Angeles Times, May 22, 2003, at 14.}\]
in the number of “volunteers” who abandon their appeals and ask to be executed.27

C. Juveniles

Execution of defendants who committed crimes when they were under the age of 18 is permitted in the United States. It is one of a handful of countries in the world that still executes children.28 Four of nine members of the United States Supreme Court have declared their belief that the practice is out of step with national and international opinion and have opined that it should be outlawed.29 The Supreme Court may resolve this question in the next few years.30

There are currently 82 people who committed crimes as juveniles on death row. The international community has strongly objected to this practice for years. In fact, the execution of juvenile offenders was recently held to be a violation of a norm of jus cogens, a rule of international customary law.31

The United States leads the world in the execution of juveniles – three were executed last year, all in Texas. The trend in the US reveals increased discomfort with this practice, as evidenced by the legislation in several states to raise the eligibility age for the death penalty.32

The backgrounds of the juveniles who end up on death row reveal much about who receives the death penalty in the United States. The majority of the children on death row are either mentally retarded, mentally ill, or illiterate. Many have been severely neglected and physically or sexually abused by family members or other adults. Sadly, this important mitigation evidence was rarely introduced at trial because of the incompetence of their lawyers.

27 See infra n. 47
28 Since 1990, juvenile offenders are known to have been executed in only seven countries: Democratic Republic of Congo, Iran, Pakistan, Yemen, Nigeria, Saudi Arabia, and the United States. The juvenile death penalty violates numerous international law instruments including: the Convention on the Rights of the Child; International Covenant on Civil and Political Rights; The Geneva Conventions, Protocol II; and American Convention on Human Rights.
29 “[O]ffenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.” In Re Stanford, 537 U.S. 968, 971 (2002) (Stevens, J., dissenting).
30 The Missouri Supreme Court recently held that the death sentence for Christopher Simmons, who was 17 years old at the time of his crime, was unconstitutional under the United States Constitution. The State of Missouri has indicated that it will appeal this decision to the United States Supreme Court. If the Court accepts certiorari, the case and issue of whether executing juvenile defendants is constitutional will be decided sometime in Spring 2004. State ex rel. Christopher Simmons, Petitioner v. Donald P. Roper, 2003 WL 22006834 (Supreme Court of Missouri, 2003).
31 See decision of the Inter-American Commission on Human Rights in Domingues v. USA.
32 In 2003, legislators in thirteen states introduced bills that would ban the execution of juvenile offenders.
D. International Law

International courts and human rights instruments have taken on new importance in US death penalty cases within the last few years. Although the death penalty itself violates several international law and human rights instruments, US courts have given these violations little notice until now.

1. Article 36 of the Vienna Convention of Consular Rights

International courts have recently taken a harder view toward the United States and its refusal to comply with treaties and international law that relate to death penalty proceedings. On June 27, 2001, the International Court of Justice (ICJ) issued a binding judgment in a case that Germany brought against the United States involving the interpretation and application of rights under Article 36 of the Vienna Convention on Consular Relations (VCCR). The ICJ determined that the United States had violated the VCCR by failing to notify two German nationals of their right to contact the German consulate. This ruling contradicted the long-standing legal position of US authorities in domestic courts.

Geraldo Valdez was a Mexican national with significant mental illness. After being arrested for murder, he was appointed an inexperienced lawyer who had never handled a capital case before. Valdez was also never told of his rights under the Vienna Convention. Following his conviction, the Mexican consulate intervened in the case and pressed for a new trial, partly on the grounds that their earlier involvement would have helped the defense at trial. His conviction and death sentence were ultimately vacated.

There are more than 119 foreign nationals on US death rows. The majority are from Mexico (54). On January 9, 2003, Mexico filed an application with the International Court of Justice instituting binding proceedings against the United States for violations of Article 36 of the Vienna Convention in the cases of Mexican nationals on death row in the US. Mexico simultaneously filed an application with the ICJ for the issuance of provisional measures, which would require the United States to take no actions that might prejudice the rights of Mexico or its nationals pending the ICJ’s decision on the merits. On February 7th, the ICJ entered provisional measures requiring the stay of execution for three citizens of Mexico. At least one state, Texas, has indicated that it will not comply and does not intend to delay the executions of Mexican nationals on its death row.

33 See, e.g., Universal Declaration of Human Rights (“everyone has a right to life, liberty and security of the person;” and International Covenant on Civil and Political Rights (“every human being has the inherent right to life”).
34 Article 36 creates specific rights for individual foreign nationals under international law.
36 The Mexican government was able to discover significant mitigation evidence that Valdez had suffered repeated head injuries and had brain damage; this information was not discovered or presented at Valdez’s trial. Valdez v. State, 2002 OK CR 20, 46 P.3d 703 (2002).
2. Role of International Opinion

It would appear that international opinion is bringing some pressure on even the highest US court. In two recent cases members of the United States Supreme Court have cited to international opinion in support of a decision to change US law.\(^{37}\) These references are almost without precedent and not without controversy, even on the Court itself.\(^{38}\) The references do, however, indicate a new awareness of the United States’s role as a citizen of the international community.

E. Racial Bias

Many commentators have described capital punishment as the modern day descendent of lynching, an extra-judicial form of execution that was directed at African-Americans in the late 19\(^{th}\) and early 20\(^{th}\) centuries as a method of oppression and control.\(^{39}\) This claim is based on a long history of racism in the administration of the death penalty in the United States.

For decades, the death penalty was applied disproportionately (and sometimes exclusively) to African Americans. Today, African Americans and other persons of color (Latinos, Asian and Native Americans) are represented on death row in disproportionate numbers.\(^{40}\) Many defendants of color were convicted by all-white juries after prosecutors deliberately removed all African American jurors.\(^{41}\) There is evidence that this discriminatory practice continues, despite the fact that it is illegal.\(^{42}\) White prosecutors make decisions about who should be charged with the death penalty; mostly white juries decide guilt and sentence.

There is also significant evidence that race of the victim is a powerful factor in who receives the death penalty. A study in the state of Maryland recently

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\(^{37}\) "The European Court of Human Rights has followed not Bowers v. Hardwick [citations omitted]but its own decisions... The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.” Lawrence v. Texas, 123 S.Ct. 2472, 2483 (2003); “[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” Atkins v. Virginia, 536 US 304, 316 n.4 (2002).

\(^{38}\) “Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people. ‘We must never forget that it is a Constitution for the United States of America that we are expounding.... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.” Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J. dissenting).


\(^{40}\) People of color represent more than 50% of those on death row nationwide. Many states have much higher percentages. See Death Penalty Information Center, available at http://www.deathpenaltyinfo.org (last visited Sept. 10, 2003).

\(^{41}\) In Alabama there have been at least 28 death penalty cases in which courts have concluded that prosecutors illegally excluded blacks from jury service in a racially discriminatory manner.

\(^{42}\) Batson v. Kentucky, 476 U.S. 70 (1986). In Texas and Pennsylvania, it was the official policy of the offices of the district attorney to exclude all people of color from serving on juries.
concluded that an African American defendant was 3.5 times more likely to receive the death penalty if his victim was white than if his victim was black. All of those on death row in Maryland were convicted of killing white victims, despite the fact that 55% of the murder victims in Maryland are black. These statistics suggest that the lives of whites are more highly valued than the lives of people of color in the American criminal justice system.

Maryland’s governor recently declared a moratorium on executions chiefly because of the concern that the death penalty system was discriminatory. Other states have long histories of official and unofficial discrimination but defendants are limited in their ability to introduce such evidence. Repeated attempts to pass national legislation that would permit use of statistical evidence of discrimination in death penalty cases has failed; defendants are therefore forced to prove intentional discrimination by prosecutors in order to obtain relief. This is a very challenging and often unsuccessful task for poor defendants without resources or counsel.

F. Deterrence

Deterrence of violent crime has always been one justification for support of the death penalty, but it is no longer the leading reason cited by the American public. Numerous studies have failed to show a conclusive deterrence effect. If the death penalty truly deterred crime, one would expect states that do not have the death penalty to have a higher murder rate. In fact, states without the death penalty have consistently lower murder rates. The US also has a much higher murder rate than European nations that do not have the death penalty.

Some recent studies have indicated use of the death penalty actually has a reverse or “brutalization” effect. This theory suggests that use of the death penalty devalues the worth of human life and legitimizes killing. It is argued that a killer would not be deterred by the possibility of the death penalty because he does not identify with a person to be executed – he identifies with the

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43 Professor Raymond Paternoster, University of Maryland and Professor Robert Brame, University of South Carolina, et al., An Empirical Analysis of Maryland’s Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003), available at http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf.; see also the “Baldus Study” conducted by Professors Baldus, Pulaski, and Woodworth, which examined over 2000 murder cases in Georgia. The study concluded that people accused of killing whites were 4.3 times more likely to receive the death penalty than individuals accused of killing blacks.

44 See, e.g., The Fairness and Death Sentencing Act (also known as the Racial Justice Act) was proposed in the US Congress in 1988. It has been reintroduced several times since then but has never passed. Several state bills that acknowledged and attempted to eliminate racial disparities were also introduced last year but not a single one passed.

45 Presidential candidates Al Gore and George Bush both cited deterrence as their primary reason for support of the death penalty during the 2002 presidential election campaign. But the primary reason cited by Americans was retribution or “an eye for an eye.”

46 A New York Times review in 2000 of murder rates over the past twenty years found that the murder rate in states with the death penalty has been 48% to 101% higher than in non-death penalty states.
executioner, who kills those who “deserve” to be killed. Using this rationale, some people may also be incented to kill in order to receive the death penalty.\footnote{For example, Paul Hill repeatedly stated that he shot and killed two people so that the state of Florida would execute him and make him a martyr. He waived all his appeals and was executed on September 3, 2003. \textit{See generally} James Kimberly, \textit{Execution ‘volunteers’ raise troubling questions}, Houston Chronicle, Sept. 8, 2003, at 1.}

V. Conclusion

Overwhelming evidence compels the conclusion that the death penalty system is broken. Racial prejudice, incompetent lawyers, inadequate funding and human mistake contribute to a death penalty “reality” of wrongful convictions and injustice. The risk that we have or will execute the innocent is very real in a system so replete with error. Reform is essential and urgent for the men, women and children on death row. It is our challenge to work for systematic change that will guarantee due process, fairness and equal access to justice for all those facing a death sentence.