AMERICAN CIVIL LIBERTIES UNION REPORT ON

THE ANNIVERSARY OF *FURMAN V. GEORGIA*

THREE DECADES LATER:
Why We Need a Temporary Halt on Executions

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Published June 2003

Written by Rachel King

The author wishes to thank Jason Stramoglia for his assistance in researching and writing the report, Thomas Barnard for his help editing it, and Ronald Tabak and Richard Dieter for their helpful suggestions on earlier drafts.

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The ACLU's Capital Punishment Project is committed to exposing, confronting and opposing this notorious betrayal of the principles of justice.

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EXECUTIVE SUMMARY

More than thirty years ago, in *Furman v. Georgia*, the United States Supreme Court ruled that the death penalty as applied was arbitrary, capricious and discriminatory – as random as being struck by lightening. It commuted the sentences of all 629 death row inmates, sending states scrambling to rewrite their capital punishment statutes.

Four years later, in 1976, the Court upheld newly crafted death penalty statutes in *Gregg v. Georgia.* Executions resumed in 1977; as of June 2003, 855 people had been executed.

Problem solved? Not exactly. Since 1973, 108 people have been released from death row after evidence of their innocence was uncovered. More than half of those releases came in the last 10 years – which turns out to be one person exonerated for every eight people executed.

Overturned convictions – coming sometimes only days before a death sentence was scheduled to be carried out – are merely the canary in the coal mine. While the US Supreme Court has ruled that the death penalty should be applied based on the severity of the crime and the merits of the defendant, study after study confirms that what really determines sentencing is the quality of legal representation, the socioeconomic status and race of the defendant and victim, and geography.

It is time once again for a temporary halt to executions while these serious errors are investigated. This report provides a brief overview of four of the death penalty's systemic flaws: wrongful conviction of the innocent, inadequate counsel, geographic disparity, and racial and socioeconomic bias.

One of the primary factors in wrongful convictions is inadequate legal representation. Poor people are the most likely to receive inadequate representation in capital cases, the cases that require the most financial resources. If you cannot afford an attorney, you must depend on court-appointed counsel or public defenders. Yet few if any states have the funds to compensate lawyers for their work; nor do they have competency requirements for attorneys defending capital murder suspects. As this report shows, studies in states from Georgia to Pennsylvania reveal just how serious the problem of competent counsel is.

Then there is geography. Death penalty laws vary dramatically from state to state. Of the 855 executions since 1977, 82 percent were carried out by ten states. Texas and Virginia alone accounted for more than half of those. Twenty-two states allow for the execution of a person who committed a crime while under the age of eighteen; sixteen do not. Felony murder – an unintentional murder in the course of a serious crime – is a capital crime in New Jersey, but not in Maryland. Differences in plea bargaining policies and death penalty trial decisions often exist within the same state. Reports in Maryland, Nebraska and New York reveal that prosecutors in certain parts of the state are more likely to seek the death penalty.

Adding to the disparity of geography is race. Skin color all too often makes the difference between life and death. Numerous studies have found that people who kill white victims are more likely to be sentenced to death than those who kill black victims. The race of the prosecutor and the racial composition of juries are also decisive factors. Only one percent of the district attorneys in death penalty states are African-American, only one percent Hispanic. The remaining 97.5 percent are white. Almost all are male. Prosecutors in certain areas systematically remove African-Americans from juries because they believe these jurors are less likely than their white counterparts to impose the death sentence.

States are beginning to act in the face of these systemic flaws. Illinois and Maryland have imposed temporary halts; North Carolina's Senate has passed a moratorium bill and the House will consider that bill in June of 2003. Hundreds of city councils, businesses, and religious organizations have passed moratorium

resolutions. More and more states are commissioning studies to get a better picture of just how the death penalty is being applied. These are good first steps, but they are insufficient. Thousands of people await execution across the country; it is a virtual certainty that many are innocent or were sentenced to death only because they did not have a good lawyer. Instead of being the worst of the worst offenders, people populating death row are there because they are poor or because of whom they killed and where the crime occurred. Thirty years after *Furman,* the death penalty is still arbitrary, capricious and discriminatory - just as 'wantonly and freakishly imposed' as Justice Stewart put it.

In 1994, Justice Blackmun said that his previous support of the death penalty was wrong – that the death penalty experiment had failed. It is still failing. If we are going to continue to have the death penalty as part of our public policy, we must halt executions until we can assure that this ultimate sentence can be applied the way it was intended – reserved for the most serious of crimes and handed out in a fair and equitable manner.

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Three Decades Later: Why We Need a Temporary Halt on Executions

In the landmark 1972 case *Furman v. Georgia*, the Supreme Court struck down the death penalty statutes of Georgia and Texas, ruling that the manner in which the penalty was imposed throughout the country constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[1] In his concurring opinion, Justice Stewart wrote:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed…I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[2]

The court commuted the sentences of all 629 death row prisoners in the country, and, in rendering all existing statutes invalid, in effect suspended the use of the death penalty.

Four years later in *Gregg v. Georgia,* the Court upheld Georgia's newly revised death penalty statute beginning the "modern era" of the death penalty.[3] In response to *Gregg*, *Furman*, and other decisions, states established new and "objective" sentencing procedures designed to ensure that the death penalty would be imposed fairly. Executions resumed in 1977. As of June 2003, 38 states, the federal government, and the military have death penalty statutes on their books, 855 prisoners have been executed and nearly 4,000 men, women and youthful offenders – 83 people on death row are there for committing crimes while under the age of 18 – remain under a death sentence.[4]

A careful review of the last thirty years shows that despite efforts at reform, the death penalty is as arbitrary as it was in 1972. The problems: one hundred and eight exonerated people have been released from death row, the death penalty remains primarily the province of the poor, and racial and geographic disparity in sentencing continues. This report discusses some of the most pervasive systemic flaws that continue to plague death penalty systems:

- wrongful conviction of the innocent,
- inadequate counsel,
- geographic disparity, and
- racial and socioeconomic bias.

It concludes that there are reasons for another temporary halt to executions while individual states reexamine their statutes and their performance.

"NO MATTER HOW CAREFUL courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some. . . . Surely there will be more as long as capital punishment remains part of our penal law."

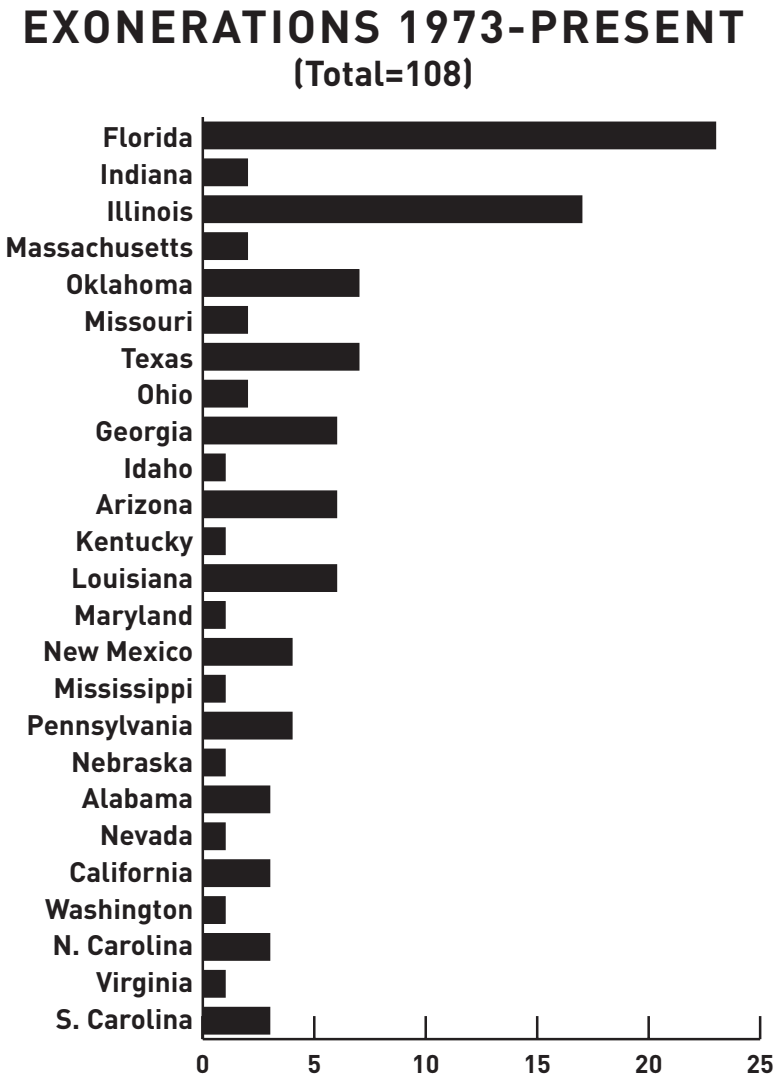
– Justice John Marshall in his concurrence in Furman v. Georgia, 1972.[5]

THE DEATH PENALTY PUNISHES INNOCENT PEOPLE

On April 8, 2002, Ray Krone was released from prison in Arizona after DNA evidence proved that he was not responsible for the murder of a Phoenix bartender. Krone became the 100th person exonerated since 1973 after having been on death row. Convicted twice for a brutal murder, largely because of forensic testimony that a bite on the victim matched his teeth, Krone spent ten years in prison, two of them on death row. The DNA evidence that ultimately proved his innocence also implicated the real murderer.

Unfortunately, Mr. Krone's story is not unique. As of June 2003, 108 people have been released from death row in 25 states, more than half in the last 10 years. That works out to be one person exonerated for every eight people executed, or an average of four people a year.[6]

Proponents of the death penalty often suggest that this indicates our criminal justice system is working. However, in many of the 108 cases it was good luck – not the system – that established innocence. Often, it was people outside the system who proved their innocence. For example, it was journalism students at Northwestern University whose work led to the release of several death row inmates in Illinois, including Anthony Porter, who



This information is taken from Death Penalty Information Center's Website at: http://www.deathpenaltyinfo.org/article.php?did=412&scid=6

came within two days of execution. It was a fluke that Mr. Porter was not executed. The students had previously decided not to investigate Mr. Porter's case due to insufficient time before his scheduled execution date. However, Mr. Porter got a last minute stay from the court to determine his competency, an issue completely unrelated to his innocence. The students decided to look into his case and located the real killer, who confessed on videotape to the murder. Nearly presiding over the execution of an innocent man convinced Governor George Ryan of the need to impose a moratorium on executions.[7]

Likewise, students in an investigative journalism class at Webster University uncovered evidence of prosecutorial misconduct and helped get a new trial for a Louisiana death row inmate.[8] If it had not been for the work of these students, innocent people would have been killed. In other instances, coverage in the media has led to exposing mistaken death penalty convictions – such as the movie "The Thin Blue Line" which exposed Randall Dale Adams' innocence.[9]

The list of 108 is a conservative one. It excludes people who are almost certainly innocent. It does not include Sonya "Sunny" Jacobs, whose story is portrayed in the play "The Exonerated." Ms. Jacobs was present at the murder of two Florida State Troopers, but was in the back seat of the car shielding her children, and did not even observe the crime. She was convicted, sentenced to death, and spent 17 years in a maximum-security facility, based on the testimony of the co-defendant, who later confessed to being the actual killer. The only other person who testified against her was a cellmate who claimed that Ms. Jacobs had confessed to killing the officers. This witness later recanted on national television, claiming that the prosecutor had offered her an early release for her testimony.[11] However, after the appellate court overturned her conviction the state of Florida refused to dismiss the charges against her and threatened to try her again. Wanting to avoid another trial, and having served nearly two decades in prison, Ms. Jacobs agreed to a plea, whereby she has a conviction on her record for a less serious crime, but is free to maintain her innocence. Because of this conviction, she does not meet the DPIC's definition of "innocent". Her partner, Jesse Tafero, was convicted based on the same evidence. Unfortunately, Ms. Tafero, was executed before the evidence of his innocence was revealed. Adding Ms. Jacobs and Mr. Tafero to the list would bring the total number of exonerees to 110.[12]

WHO IS INNOCENT?

There has been much debate surrounding the use of the term "innocent" to describe those exonerated from death row. Proponents of the death penalty often argue that many of those wrongfully convicted, who are later released because of legal innocence, may have committed the crime. The Death Penalty Information Center (DPIC) – the organization that keeps track of innocence cases – includes people who have been convicted and sentenced to death and were either acquitted at a re-trial, had all charges dropped, or were given an absolute pardon by the governor based on new evidence of innocence.[10]

Executing the Innocent

No one has yet been able to prove conclusively that an innocent person has been executed during the modern era, although most believe it has happened. A June 2002 CNN/USA Today/Gallup Poll found that 80 percent of Americans believe an innocent person has been executed in the United States in the past five years.[13]

There is no way to tell how many of the more than 800 people exe-

cuted since 1976 may have been found innocent if further investigation had been done into their cases. Attorneys and court officials generally do not continue investigation into claims of innocence after a person is put to death. There are, however, a few cases where strong claims of innocence existed and the prisoner was still put to death. Mr. Tafero, mentioned above, is one example. Another is Roger Coleman, who was convicted of the rape and murder of his sister-in-law without any witnesses, motive, or fingerprints. Blood and semen tests matched Coleman's, but were not unique to him. Mr. Coleman asserted his innocence to the end. After his execution, more sophisticated DNA testing became available that might prove Mr. Coleman's innocence, but the state of Virginia has continued to oppose requests by his attorneys to retest the evidence.[14] Another case may be that of Shaka Sankofa (aka Gary Graham) who was convicted and sentenced to death based on the testimony of an eyewitness who observed the crime at night from her car from a distance. Two other eyewitnesses claimed that Mr. Sankofa was not the killer; an expert who evaluated the case said that under the conditions existing at the time of the crime, the witness could not have made a positive identification. Unfortunately, Mr. Sankofa was executed even though no court had ever heard the testimony of the other two eyewitnesses or the expert.[15]

The Benefits, and Limits, of DNA

Although there has been much attention surrounding DNA testing, only 13 death row prisoners of the 108 have been exonerated through DNA testing.[16] Many people falsely believe that DNA testing is a panacea that guarantees innocent people will not be put to death. But DNA testing is usually not able to determine the killer. There may not be any physical evidence to test, either because none was collected from the crime scene, or because it has since been destroyed. If the suspect is a person that the victim knew, there may be legitimate explanations for why the physical evidence was at the crime scene.

DNA testing is also only as effective as the people conducting the tests. In 2003, the Houston Police Department's lab came under attack because of ongoing gross negligence and fabrication of results. That led the FBI to purge the results of all DNA tests taken at that lab from the national DNA database.[17] Dozens of convictions from that jurisdiction have been called into question.

Still, DNA testing is an essential tool in proving innocence in some cases. In Illinois, five of the 17 people released from death row were released because of DNA evidence.[18] DNA has been especially useful in rape cases, where testing semen left at the crime scene can conclusively exclude innocent people.

Unfortunately, many prisoners do not have access to testing. Pending bi-partisan federal legislation – the Innocence Protection Act – sponsored by Senators Patrick Leahy (D-VT), Susan Collins (R-ME) and Gordon Smith (R-OR) and Representatives William Delahunt (D-MA) and Ray LaHood (R-IL), would ensure that DNA testing is available to all who have credible claims of innocence. It would also require states to examine their indigent defense systems and establish minimum competency standards. Testifying before the House Judiciary Committee, Representative Delahunt observed, "Our criminal justice system is not working as it should when innocent people are convicted of serious crimes and then spend decades – or have even reached the end of death row – before the mistakes, if ever, are caught." [19]

Some prosecutors place so much importance on securing a conviction, and protecting the finality of that conviction, that doubts about the person's guilt or innocence become secondary.

The risk of executing an innocent person is not only horrific; it is the ultimate indicator that

America's criminal justice system is broken. However, not all government officials believe that preventing the execution of an innocent person is paramount. Some prosecutors place so much importance on securing a conviction, and protecting the finality of that conviction, that doubts about the person's guilt or innocence become secondary. Frank Jung, an assistant to Missouri Attorney General Jay Nixon, recently told the Missouri Supreme Court that it should not concern itself with mounting evidence that death row inmate Joseph Amrine might be innocent. One judge asked Jung, "Is it not cruel and unusual punishment to execute an innocent person?" Jung responded, "If there is no underlying constitutional violation, there is not a right to relief." [20] The prosecutor is saying that as long as a person was convicted at a fair trial, then even if that person was later found to be innocent, he could still be executed. Truth is not as important as process. Similarly, the actions of the Virginia prosecutors objecting to further investigation of the Coleman case show how far some prosecutors may go to prevent investigation of the truth.

> "Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows."
>
> **– Justice Douglas from his concurrence in Furman v. Georgia, 1972.[21]**

THE DEATH PENALTY IS DISCRIMINATORY

Inadequate Counsel

There are many factors that contribute to convicting innocent people such as prosecutorial and police misconduct, mistaken eyewitness identification, lying jailhouse snitches and false confessions. Yet the factor that probably accounts for the most wrongful convictions is inadequate defense counsel, a problem that falls most heavily on the poor.

March 18, 2003 marked the 40th anniversary of the *Gideon v. Wainwright* decision, in which the Supreme Court ruled that the constitution required that indigent people charged with felonies who could not afford to hire a lawyer would be appointed one at public expense.[22] Not all public defenders or court-appointed counsel are incompetent. Many are excellent lawyers; however, they are usually hampered by limited resources. They often do not have the resources to hire experts who are necessary to provide a competent defense in complex capital cases. They almost never have the same amount of resources as the prosecutor who is seeking the death penalty.

The Supreme Court has not made sure that the counsel provided under *Gideon* are competent. There are major problems in capital cases. In 2002, the Court upheld the death sentences in a Virginia case where the lawyer had previously represented the murder victim and in a Tennessee case where the lawyer did not ask the jury to spare his client's life.[23] Other courts have ruled that counsel was competent in cases where the lawyer was unaware of the governing law or was intoxicated. A Texas case made national news when the state courts and the Fifth Circuit Court of Appeals held that it was not ineffective assistance of counsel for the attorney to sleep during the trial. The court sitting *en banc* reversed that ruling, but five of the 14 judges dissented and would have allowed the defendant to be executed.[24]

Delma Banks, Jr.

A recent case that epitomizes the problems of inadequate representation is that of Delma Banks, Jr., which the Supreme Court accepted for review on April 21, 2003. Delma Banks, Jr. received such poor representation that former FBI director and United States District Court Judge William Sessions intervened and asked the Supreme Court to temporarily stay his execution. Judge Sessions argued that the constitutional issues raised in Mr. Banks' petition called into question the reliability of the guilty verdict and the death sentence and the criminal justice system as a whole: "when a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined."[25]

Delma Banks, Jr. is an African-American man who was charged in 1980 with murder for killing Richard Whitehead, a white man, in Texarkana, Texas. The only "evidence" against Banks was the testimony of an informant who in exchange for his testimony received $200 and the dismissal of an arson charge that could have resulted in his life sentence as a habitual offender. Banks' lawyer did not vigorously cross-examine the informant, nor did he investigate the case. Had he done so, he would have learned of strong evidence that Banks was in another city at the time of the crime.

Banks was convicted and sentenced to death after a one-day trial in which the prosecutors systematically removed all African-Americans from the jury – again not challenged by Banks' attorney. At the sentencing hearing, Banks' lawyer did not challenge the state's claim that his client posed a "future danger to society" – a requirement for a death sentence in Texas – even though Banks had no criminal record or history of violence.

"When a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined."[25]

- United States District Court Judge William Sessions

No Competency Standards

Few if any states provide sufficient funds to compensate lawyers for their work and most do not have meaningful competency standards for an attorney to meet in order to defend a capital murder suspect. In 2003, the American Bar Association (ABA) published revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that include: requiring the attorneys to have abilities, expertise and skills in representing clients in capital cases; providing two attorneys, an investigator and mitigation specialist in every case; and providing full funding of the defense and eliminating statutory caps or flat fees.[26] According to the ABA, no state has yet established standards that meet its minimum requirements.

State Studies of Indigent Defense

Reports on indigent defense have recently been done in Texas, Georgia, North Carolina, Pennsylvania, and Tennessee. The Texas study, Lethal Indifference, conducted by the Texas Defender Service, found that the quality of legal representation is abysmal for death row prisoners both at the trial and appeals levels.[27]

The study found that judges often appointed defense attorneys based on their reputation for rapidly moving cases through the system, instead of for their competence and experience. Judges even appointed attorneys who have been disciplined, such as in the case of Leonard Rojas. He was appointed an appellate attorney who had been disciplined three times by the state bar and been given two probated suspensions. (A probated suspension allows an otherwise suspended attorney to continue representing clients.) The study concluded that death row prisoners, "face a one-in-three chance of being executed without

having the case properly investigated by a competent attorney or without having any claims of innocence or unfairness heard."

Texas is not alone in providing inadequate counsel for death penalty cases. The Tennessee Supreme Court reviewed all death sentences post-*Furman* and found that in one-fourth of those cases, attorneys did not submit evidence that might persuade a jury to impose a prison sentence instead of death.[28] In Philadelphia, 60 percent of all capital cases went without proper investigation or experienced attorneys.[29] In fact, a March 2003 report prepared for the Pennsylvania Supreme Court by an appointed commission had such grave concerns about the quality of representation in that state that it recommended an overhaul of the entire system.[30] It also found that people of color were affected to a greater degree by the problems of indigent defense because of their overrepresentation in the criminal justice system. The concerns of racial bias led the commission to recommend a moratorium in the report it prepared on behalf of the court.[31]

In December 2002, at the request of the Georgia Supreme Court Chief Justice's Commission on Indigent Defense, the Spangenberg Group issued a 100-page report on the state's failure to provide adequate representation for indigent people. Supplementing that report was a series of recommendations reported by the Commission on Indigent Defense. Although the recommendations did not focus specifically on needs in death penalty cases, they are applicable. Recommended reforms include: increasing funding for indigent defense, including shifting funding from the counties to the state; establishing multi-county public defender offices that would operate throughout a judicial circuit; adopting principles to govern the system of providing legal services to indigent criminal defendants; and adopting performance standards for defense attorneys.[32]

The study concluded that death row prisoners, "face a one-in-three chance of being executed without having the case properly investigated by a competent attorney or without having any claims of innocence or unfairness heard."

According to a report just released by the Common Sense Foundation of North Carolina, Life and Death Lottery: Capital Defendants and the Lawyers Who Fail Them, no fewer than 35 prisoners currently on death row in North Carolina–one out of every six–were represented by lawyers who had been disbarred, suspended or otherwise disciplined by the state.[33] That list did not include at least four prisoners who had already been executed. One of those prisoners was Michael McDougall, who had been represented by Jerry Paul. A judge reviewing the case found that Paul "acted unethically or even criminally" while defending his client.[34]

The problem of ineffective counsel for those on death row has been so pronounced that two Supreme Court Justices have publicly remarked on it, an unusual practice for high court judges. Supreme Court Justice Ruth Bader Ginsburg said, *"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."*[35] Justice Sandra Day O'Connor expressed similar concerns when addressing the Minnesota Women Lawyers, stating, *"[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."*[36]

When a person faces the death penalty, effective counsel can mean the difference between life and death. A system that executes people based on their inability to afford adequate representation rather than the nature of the crime committed is both arbitrary and discriminatory. Justice and fairness require that every defendant in a capital case receive a competent and zealous defense.

Discrimination Against the Poor

Whether the death penalty is biased against poor people, apart from the issue of incompetent counsel and inadequate defense resources, has not been thoroughly studied. However, over 90 percent of those sentenced to death are indigent. There are a handful of middle-class defendants, and upper-class defendants are virtually non-existent. Although not the focus of the study, a 2002 Maryland study on the death penalty found that 90 percent of the people on death row in Maryland were indigent.[37]

The Economic Background of the Victim

The issue of how much the victim's socioeconomic status affects the result of the case has not been widely studied either. However, in one study commissioned by the Nebraska legislature, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, researcher David Baldus found that defendants who killed victims with high socioeconomic status were almost six times more likely to be sentenced to death than those whose victims had low socioeconomic status.[38] According to Baldus, "this is a classic example of disparate treatment, that is, people are being treated differently on the basis of factors that have nothing whatever to do with their culpability but rather on the socioeconomic status of the victim that they have killed. It's a system-wide influence that exists in both the major urban counties and it exists in greater Nebraska, and you can see it in the decisions of both the prosecutors and the sentencing judges."

"When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."

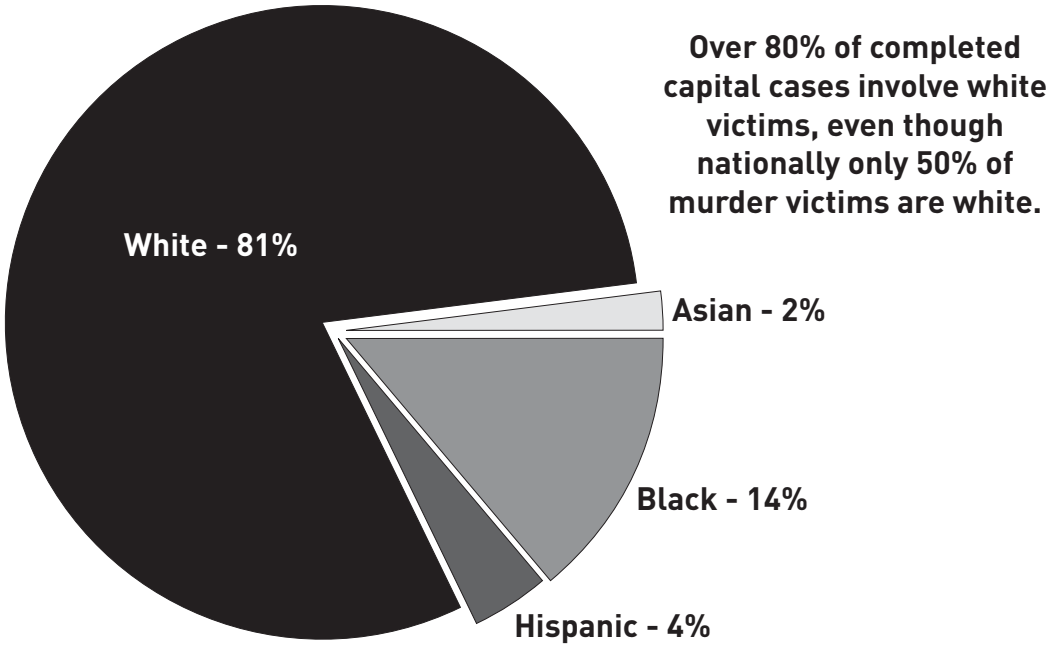
– Justice Brennan from his concurrence in Furman v. Georgia, 1972.[39]

THE DEATH PENALTY IS ARBITRARY

Geographic and Racial Disparities

Where the crime occurs and whom one kills, as much as the nature of the crime, are determining factors in who receives a death sentence. Death penalty statutes differ widely from state to state. Some states, such as Florida, have many aggravating factors that make a defendant eligible for the death penalty. Other states, like New Hampshire, have fewer. In Maryland, felony murder – an unintentional murder that occurs in the course of a serious crime – is not a capital crime, but in New Jersey it is. In 22 states, people who commit homicides while under the age of 18 are eligible for capital punishment, but in the other 16 death penalty states juveniles are ineligible for the death penalty. The federal government does not have the juvenile death penalty.

RACE OF VICTIMS IN DEATH PENALTY CASES



This information was taken from the Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=5&did=184#inmaterace.

Of the more than 800 executions carried out since 1977, 82 percent were carried out by only ten states: Alabama, Arkansas, Florida, Georgia, Louisiana, Missouri, Oklahoma, South Carolina, Texas, and Virginia.[40] Texas and Virginia alone accounted for more than half of those executions. While Texas has executed over 300 people in the past 27 years, a number significantly higher than any other state, 12 other death penalty states performed only one, or no, executions in that time.

Disparities within states

However, even within the same state, some counties or municipalities bring more capital cases than others. The prevalence of geographic disparity in the death penalty system has been frequently demonstrated over the past two decades, including a 1995 survey by the *New York Times* and a 1999 survey by *USA Today.*

USA Today reported that the odds that a convicted killer will be sentenced to death vary dramatically from county to county within many states.[41] For example, Hamilton County, Ohio, which includes Cincinnati, had 50 people on death row at the time but prosecutors in Franklin County had sent only 11 people to death row, even though the county's population was 14 percent larger than Hamilton's and it had twice as many murders. In New York, accused killers were more likely to face a death sentence if the crime occurred outside of New York City and its suburbs, even though 83 percent of the state's murder convictions come from that region.

Tiny Baldwin County of Georgia also showed signs of geographic disparity. Although the population of the county was approximately 42,000, it had five people on death row, a number that exceeded that of Fulton County, population 722,400. The study concluded that, "the willingness of the local prosecutor to seek the death penalty seems to play by far the most significant role in determining who will eventually be sentenced to death."

Harris County Texas, where Houston is located, accounts for 140, nearly a third, of the state's death row inmates. Prosecutor Johnny Holmes has a special death squad that tries a capital case about every three weeks. Dallas, with a higher murder rate, has only 37 people on death row.[42]

In the fall of 2002, the University of Maryland released a comprehensive report on a study that examined all the death eligible cases in Maryland from 1978 (the year Maryland reinstated the death penalty following *Gregg*) to 1999.[43] The study documented geographic and racial disparities in the prosecution of death cases in Maryland, concluding that prosecutorial discretion was a key factor in determining who receives the death penalty. For example, prosecutors in Baltimore County were 13 times more likely to seek the death penalty in an eligible case than those in Baltimore City, the state's largest city. Baltimore County was also found to be five times more likely to seek the death penalty in an eligible case than was Montgomery County and three times more likely than was Anne Arundel County.

In addition to the Maryland study, the Nebraska Crime Commission found that prosecutors in the urban counties of Omaha and Lincoln were more likely to seek the death penalty and refuse plea bargains than those in the more rural counties of Nebraska.[44] The study found that over the past 16 years, the odds were 2.4 times as great that prosecutors in a major urban county would seek the death penalty than those in a rural area.

Studies from both Pennsylvania and North Carolina demonstrated similar disparities. Of the people sentenced to death in Pennsylvania, more than half came from Philadelphia County, where people were sentenced to death at a rate 11 times greater than were those in the Harrisburg area, even though Philadelphia only accounts for 14 percent of the state's total population.[45] Two North Carolina counties accounted for 40 and 42 percent of all capital cases respectively. People who lived in those counties were 2.8 times more likely to face capital charges than those in the county with the lowest rate.[46]

Race of the Victim

Study after study has shown that people who kill whites are more likely to get a death sentence than people who kill blacks. In some places, blacks who kill whites are the most likely to end up on death row. This discrepancy is revealed even more when one considers that 86 percent of white victims were killed by whites and 94 percent of black victims were killed by blacks.[47]

The same University of Maryland study found the probability that a state's attorney will seek the death penalty is 1.6 times higher when the victim is white than for a black homicide victim, even after considering case characteristics and jurisdiction issues. Blacks who kill whites are 2.5 times more likely to be sentenced to death than whites who kill whites, and 3.5 times more likely than blacks who kill blacks." [48] The two counties with the highest incidence of charging capital cases and sentencing defendants to death – Baltimore and Harford – are also the two jurisdictions with the highest instance of white victim and black defendant homicides.

In 2001, a report released by the New Jersey Supreme Court found disturbing evidence regarding race and the death penalty.[49] The report stated, "There is unsettling statistical evidence indicating that cases involving killers of white victims are more likely to progress to a penalty phase than cases involving killers of African-American victims." The American Civil Liberties Union of Virginia released a report in 2000 that found race to be a controlling factor in the way the death penalty is administered.[50] The ACLU's study, which was based on 20 years worth of data, found that capital murder defendants in Virginia who murdered whites were more likely to be sentenced to death than those who murdered blacks.

In addition, according to a report by the Texas Defender Service, of the 301 prisoners executed in the State of Texas between 1982 and 2003, 78 percent were put to death for crimes involving white victims. In 21 percent of the cases, a black defendant was convicted of killing a white person. Only 11 percent of defendants sentenced to death were convicted of killing black men, even though black men accounted for 23 percent of murder victims in Texas.[51]

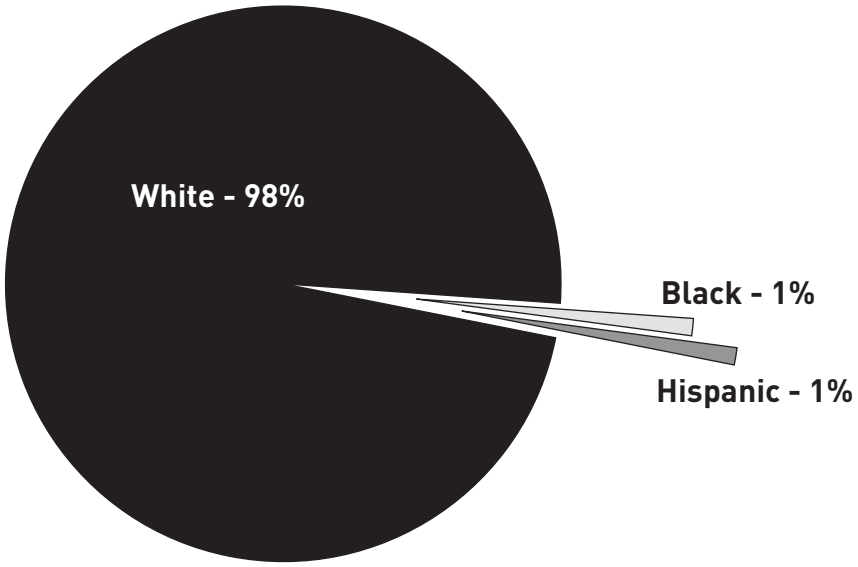
Findings by the General Accounting Office (GAO)

These recent studies confirm what a study conducted by the General Accounting Office (GAO) found more than a decade ago. The GAO reviewed 28 empirical studies on race and the death penalty from around the country. It found that in 82 percent of the studies, the race of the victim was a decisive factor in determining the likelihood of receiving the death penalty. Those who murder whites were more likely to be sentenced to death than those who murdered blacks.[52]

One of the most compelling studies reviewed was the Baldus study, which examined the death penalty in Georgia. After reviewing 2,400 cases over a seven-year period, the study concluded that defendants whose victims were white were more than four times more likely to receive the death penalty than others who committed crimes of similar severity. This study was submitted as evidence by the defendant in the case of *McCleskey v Kemp*.[53] The Court did not dispute the accuracy of the findings that in Georgia, defendants who killed whites were four times more likely to be sentenced to death than those who killed non-whites, but it ruled that in order for a defendant to make a successful appeal he or she would have to provide "exceptionally clear proof" that the decision makers had acted with discriminatory intent in his or her case. The GAO found the Baldus study to be valid and it found studies contradicting it to be invalid.

Dr. Issac Unah, author of the North Carolina study that found that defendants whose victims are white are 3.5 times more likely to be sentenced to death, came to the sobering observation that, "[i]n sum, no matter what analyses we have performed, and no matter what stage of the process we have examined, the fact that the homicide victim is a white person turns out to operate as a "silent aggravating circumstance" that makes death significantly more likely to be imposed."[54]

ALMOST ALL PROSECUTORS RESPONSIBLE FOR THE DEATH PENALTY ARE WHITE



RACE OF DISTRICT ATTORNEYS IN DEATH PENALTY CASES

STATE	White DAs	Black DAs	Hispanic DAs
Alabama	39	1	0
Arizona	15	0	1
Arkansas	24	0	0
California	55	0	3
Colorado	21	0	1
Connecticut	12	0	0
Delaware	3	0	0
Florida	19	0	1
Georgia	45	1	0
Idaho	44	0	0
Illinios	102	0	0
Indiana	90	1	0
Kansas	104	1	0
Kentucky	56	0	0
Louisiana	39	1	0
Maryland	23	2	0
Mississippi	21	1	0
Missouri	115	0	0
Montana**	56	0	0
Nebraska	89	0	0
Nevada	17	0	0
N.Hampshire	10	0	0
New Jersey	20	1	0
New Mexico	9	0	5
New York	61	1	0
N. Carolina	37	2	0
Ohio	87	1	0
Oklahoma**	26	0	0
Oregon	36	0	0
Pennsylvania	67	0	0
South Carolina	15	1	0
South Dakota	66	0	0
Tennessee	31	0	0
Texas	137	0	11
Utah	29	0	0
Virginia	113	8	0
Washington	39	0	0
Wyoming	22	0	0
TOTAL	1794	22	22
	97.5%	**1.2%**	**1.2%**

The information for these graphs was taken from the Death Penalty Information Center's "The Death Penalty In Black and White: Whose lives, Who Decides" http://www.deathpenaltyinfo.org/article.php?scid=45&did=539

The Role of Prosecutors and Judges

One of the likely factors contributing to the racial discrepancies is the lack of diversity among the decision makers. Almost all of the prosecutors making the key decision about whether to seek the death penalty are white. Professor Jeffrey Pokorak of St. Mary's University School of Law collected data regarding the race and gender of the government officials empowered to prosecute criminal offenses, and, in particular, capital offenses, from all 38 states that use the death penalty. The study was concluded in February 1998. It revealed that only one percent of the District Attorneys in death penalty states are black, and only one percent are Hispanic. The remaining 97.5 percent are white, and almost all of them are male.[55]

Chattahoochee County, Georgia, a county where prosecutors vigorously pursue the death penalty, presents a microcosm of the all-white judicial process. An evaluation of the death penalty cases in that county revealed that while black people were 65 percent of homicide victims, 85 percent of the capital trials were for white-victim cases. In potentially capital cases, the district attorney sought the death penalty on average 34.3 percent of the time when the victim was white, but only 5.8 percent of the time when the victim was black. This percentage broke down further: the district attorney sought the death penalty 38.7 percent of the time when the defendant was black and the victim white, 32.4 percent when both defendant and victim were white, 5.9 percent when both defendant and victim were black, and never when the defendant was white and the victim black.[56]

Stephen Bright, of the Southern Center for Human Rights in Atlanta, a prominent capital litigator, illustrated the way that race affects outcomes in criminal cases in Chattahoochee County:

> [A]n investigation of all murder cases prosecuted . . . from 1973 to 1990 revealed that in cases involving the murder of a white person, prosecutors often met with the victim's family and discussed whether to seek the death penalty. In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty. When the contractor replied in the affirmative, the prosecutor said that was all he needed to know. He obtained the death penalty at trial. He was rewarded with a contribution of $5,000 from the contractor when he successfully ran for judge in the next election. The contribution was the largest received by the District Attorney. There were other cases in which the District Attorney issued press releases announcing that he was seeking the death penalty after meeting with the family of a white victim. But prosecutors failed to meet with African-Americans whose family members had been murdered to determine what sentence they wanted. Most were not even notified that the case had been resolved. As a result of these practices, although African-Americans were the victims of 65 percent of the homicides in the Chattahoochee Judicial District, 85 percent of the capital cases in that circuit were white victim cases.[57]

Jury Selection

Another area where race plays a role is jury selection. At least one in five of all black prisoners executed since 1976 were convicted by all-white juries. Although the Supreme Court has ruled that jurors cannot be excluded on the basis of race, certain prosecutors have been found to remove African-Americans from juries believing that they are less likely to impose the death penalty than whites. During the 1997 election campaign for Philadelphia's District Attorney, it was revealed that one of the candidates had produced, as an assistant district attorney, a training video for new prosecutors in which he instructed them about whom to exclude

from the jury, noting that "young black women are very bad" on the jury for a prosecutor, and that "blacks from low-income areas are less likely to convict." The training tape also instructed the new recruits on how to hide the racial motivation for their jury strikes.[58]

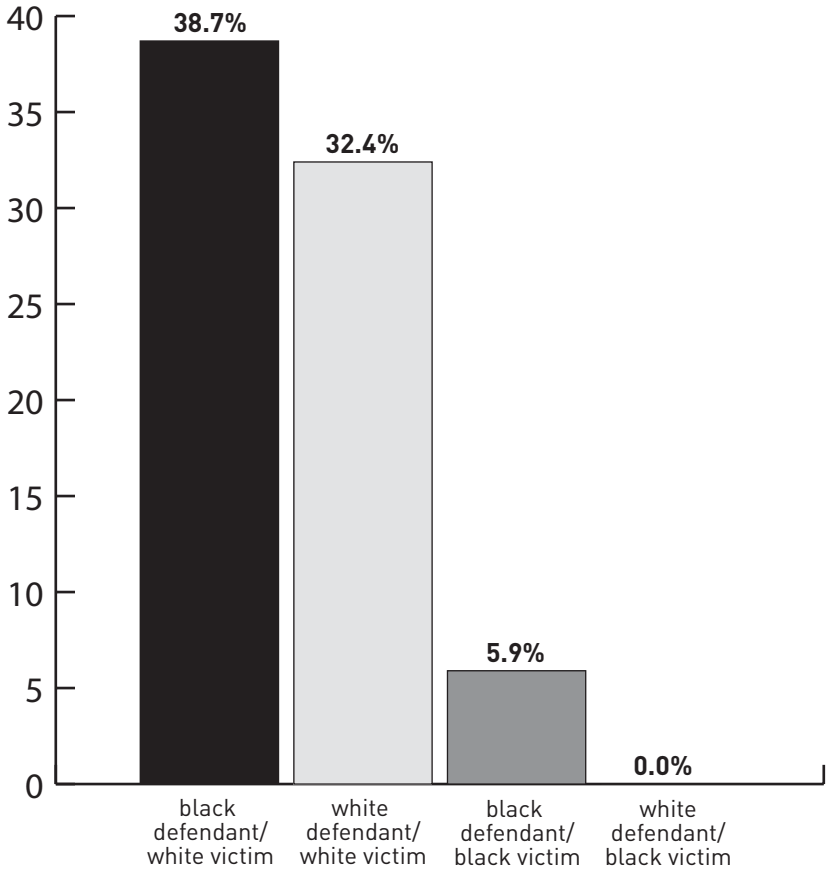
African-American jurors who find themselves to be the only person of color on a jury are sometimes pressured to convict or impose a death sentence. Both Louis Jones and Walanzo Robinson were convicted by juries composed of eleven whites and one black. Both men were sentenced to death. In both cases, the sole black juror later alleged that he or she was pressured to follow other jurors and change their vote.[59] Similarly, Abu-Ali Abdur'Rahman, also African-American, was sentenced to death by a jury composed of eleven whites and one black, even though his county's population was approximately 23 percent black. The Supreme Court heard Abdur'Rahman's case on December 10, 2002; however, the case was dismissed without a ruling and returned to the lower court. Abdur'Rahman is scheduled to be executed in Tennessee on June 18, 2003.[60]

These three cases are not unique. According to a federal court decision in Alabama reviewing a death penalty case, the Tuscaloosa District Attorney's Office had a "standard operating procedure . . . to use the peremptory challenges to strike as many blacks as possible from the venires in cases involving serious crimes."[61] In Philadelphia, prosecutors were shown to have struck 52 percent of potential black jurors, but only 23 percent of other potential jurors.[62]

Unfortunately, there has been very little progress in addressing the overt racial disparities that continue to affect the imposition of the death penalty. Only recently have responses begun to materialize. The Racial Justice Act, which allows a capital defendant to use statistical evidence to show that race influenced the decision to seek the death penalty in his or

PERCENTAGE OF CASES IN WHICH DEATH SENTENCE WAS SOUGHT:

in Chattahoochee Judicial District, by Race of Defendant and Victim



Taken from Chattahoochee Judicial District: BUCKLE OF THE DEATH BELT: The Death Penalty in Microcosm. Death Penalty Information Center http://www.deathpenaltyinfo.org/article.php?scid=45&did=540

her case, was twice passed by the United States House of Representatives, but was defeated each time by the Senate. In 1998, Kentucky became the first state to pass a Racial Justice Act. Other states have tried, but none have been successful at getting such legislation passed.

Disparity in the Federal Death Penalty

Racial bias in the death penalty is not limited to the state systems. A Department of Justice report found racial disparities in the federal death penalty.[63] The report revealed that, in the past five years, 80 percent of the cases submitted by federal prosecutors for review involved racial minorities as defendants. In more than half of those cases, the defendant was black. Currently, 19 out of the 25 prisoners on federal death row are people of color. Attorney General John Ashcroft contends that there is no evidence of racial discrimination in the federal death penalty, but in spite of the fact that he promised Congress that he would commission a follow-up study on these disparities, as of 2003, three years after the initial report was released, the study has still not been completed.

Despite the strong evidence of racial disparities in the federal death penalty system, in March 2003, Louis Jones, who was African-American, was put to death for the murder of a white woman. On the day of his execution Senator Russell Feingold stated, "Today, more than two years after the United States Department of Justice released a survey showing geographic and racial disparities in the federal death penalty, we still do not have an explanation why who lives and who dies in the federal system appears to relate to the color of the defendant's skin…Attorney General John Ashcroft pledged to continue this study, but we still await the results…Today, with the execution of Mr. Jones, our federal criminal justice system has taken a step backward. Our goals of fairness and equal justice under law were not met…"[64]

The influence of race on the death penalty is pervasive, to say the least, influencing all aspects of a capital trial. Race has proven to act as an insidious aggravating circumstance when the death penalty is being considered, and this bias is unacceptable. Whether you favor the death penalty or not, there is no looking past the fact that the race of the defendant, victim, prosecutor, and jury play an overwhelming role in determining who will receive a death sentence.

CONCLUSION

Governor Ryan's decision in 2000 to impose a moratorium on executions in his state, until he could be sure that innocent people were not going to die, opened the door to confronting the problems in Illinois' death penalty system. In one of his last acts as governor, he commuted the sentences of 163 death row prisoners to life in prison and pardoned four others. At a speech at Northwestern University he said, "Our capital system is haunted by the demon of error: error in determining guilt and error determining who among the guilty deserves to die."[65]

Although his successor Governor Rod Blagojevich criticized Governor Ryan's broad grant of clemency, he announced in April 2003 that he would continue the moratorium. "The decision for me on an issue like lifting the moratorium won't be driven by what happens in the state Senate or the House," Blagojevich said. "It will be driven by whether or not the system in Illinois has been reformed in such a way where we can have no doubt that we're (not) going to make any mistakes. And it begs the question of whether we can ever get to a point in Illinois that we can feel comfortable with that."[66]

The Illinois example has prompted other jurisdictions to examine their death penalty systems. In May 2002, then Maryland Governor Paris Glendenning imposed a moratorium on execu-

tions until the University of Maryland death penalty study was completed. In January of 2003, the study was released and demonstrated racial and geographic bias in the implementation of the death penalty. Unfortunately, his successor, Governor Robert Ehrlich, lifted the moratorium upon taking office in January 2003. The Maryland legislature failed to pass a moratorium bill by one vote in the Senate and had sufficient votes to pass it in the Assembly, although Governor Ehrlich had said he would veto the measure. However, he has promised to study the issue and has asked Lieutenant Governor Michael Steele to be in charge of the study.

The North Carolina Senate passed a moratorium bill in May and the house will take the issue up in June. Across the country, hundreds of local city councils, businesses and religious organizations have passed resolutions in support of a moratorium and more than two million have signed petitions.

This momentum demonstrates the growing awareness of systemic problems in the death penalty system. For many, time is running out. Thousands face execution now, many of whom received death sentences at trials plagued with error, tainted by bias and represented by unqualified lawyers. Some of those people are innocent. Based on past trends, the number of innocent people currently on death row likely exceeds 100. Equity demands that executions cease until the systems can be thoroughly examined and those with claims of innocence can have a fair day in court.

The ACLU remains skeptical that the unfairness that has plagued the death penalty for so long can ever be completely eliminated. But as long as the death penalty remains public policy basic decency requires all citizens of good will to try.

In 1994, conservative Justice Harry A. Blackmun, who had voted with the dissent in the *Furman* case, announced that he regretted the decision he made when he voted with the majority to reinstate the death penalty in *Gregg*. He wrote, "Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[67]

The Supreme Court in *Furman* held that death penalty laws must be narrowly drafted to punish the worst offenders. Yet factors like the quality of legal representation, class, geography, and race powerfully influence the outcome in capital cases. These factors are unrelated to the severity of the crime or the individual merits of the defendant and should not determine who lives and who dies. The same arbitrariness and discrimination present at the time of the *Furman* decision persist today. Like the Court did in *Furman*, states and the federal government must temporarily halt executions while necessary changes are made.

ENDNOTES

1 Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

2 Id. at 309-310 (Stewart, J., concurring).

3 Gregg v. Georgia, 428 U.S. 153, 207 (1976).

4 Death Penalty Information Center at http://deathpenalty-info.org/article.php?scid=8&did=146 and http://deathpenaltyinfo.org/article.php?did=205&scid=27.

5 See note 1 at 367-68 (White, J., concurring).

6 The Death Penalty Information Center keeps an updated tab of executions and demographics of death row populations. For additional information, please visit http://www.deathpenaltyinfo.org.

7 Id.

8 Jim Suhr, "Students Get Man a New Trial: Journalism Class Uncovers the Lies in Death Row Case," Houston Chronical, August 11, 2001; Douglas Holt & Flynn McRoberts, "Porter Fully Savors 1st Taste of Freedom: Judge Releases Man Once Set for Execution," Chicago Tribune, February 6, 1999.

9 For a complete list of those exonerated from death row, visit: http://www.deathpenaltyinfo.org/article.php?scid=6&did=110.

10 Definition taken from "Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions," Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, One Hundred Third Congress, First Session, Issued October 21, 1993. Find report at: http://www.deathpenaltyinfo.org/article.php?scid=45&did=535hompson.

11 See note 9, "Released from Death Row, Possible or Probable Innocence," http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#ReleasedASK.

12 Id.

13 CNN/USA Today Gallup Poll Release, June 30, 2000.

14 Leonard Pitts Jr., "In Death Penalty Cases, the Truth Won't Set You Free," Houston Chronical, March 17, 2003; John Aloysium Farrell, "Court Bars DNA Test in 1981 Killing, Bid to Investigate Va. Execution Fails," The Boston Globe, November 2, 2002.

15 Jim Dwyer, "Gore's Ghost of a Campaign," New York Daily News, June 25, 2000.

16 See note 9.

17 Steve McViker & Roma Khanna, "All HPD Cases will be Purged from State, U.S. DNA Databases," Houston Chronical, March 25, 2003.

18 American Bar Association, "Death Penalty Symposium: A Call to Action: A Moratorium on Executions: The Imposition of the Death Penalty is Fraught with Error: Where Do We Go From Here?" New York Law Review, Spring 2002.

19 Testimony of William Delahunt (D-MA) in support of the Innocence Protection Act before the Judiciary Committee of the U.S. House of Representatives, June 20, 2000.

20 Barbara Shelly, "A system in need of repair," The Kansas City Star, February 8, 2003.

21 See note 1 at 251-252 (Douglas, J., concurring).

22 Gideon v. Wainwright, 372 U.S. 335 (1963).

23 Stephen B. Bright, "Turning Celebrated Principles into Reality," The Champion, January/February 2003, at 6 referring to Mickens v. Taylor, 122 S.Ct. 1237 (2002) and Bell v. Cone, 122 S.Ct. 1843 (2002).

24 Id.

25 The Justice Project, "Prosecutorial Misconduct and Ineffective Counsel: The Case of Delma Banks, Jr.," profile on Delma Banks at http://justice.policy.net/proactive/newsroom/release.vtml?id=33663.

26 American Bar Association. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Revised Edition. February 2003. See http://www.abanet.org/deathpenalty.

27 "Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals," The Texas Defender Service, December 3, 2002. Report available at: http://justice.policy.net/proactive/newsroom/release.vtml?id=32477.

28 State v. Melson, 772 S.W. 2d 417, 421 (Tenn. 1989).

29 Dieter, Richard C., "Killing For Votes: The Danger of

Politicizing the Death Penalty," Death Penalty Information Center," October 1995.

30 "Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System," March 4, 2003, at http://www.courts.state.pa.us/Index/Supreme/biasreport.htm.

31 Id. at 221.

32 Georgia Judicial Branch, Indigent Defense Commission Reports, at http://www.georgiacourts.org/aoc/idcreports.html.

33 Common Sense Foundation of North Carolina, "Life and Death Lottery: Capital Defendants and the Lawyers Who Fail Them," October 2002.

34 Liz Chandler, "Lawyers, Inadequate Defense Cited in a Third of Death Case Reversals," The Charlotte Observer, September 11, 2000.

35 Joseph L. Rauh Lecture at the David A. Clarke School of Law of the University of the District of Columbia, "In Pursuit of the Public Good: Lawyers Who Care," April 9, 2001.

36 Justice Sandra Day O'Connor, Remarks at the Meeting of the Minnesota Women Lawyers, July 2, 2001.

37 The University of Maryland, "An Empirical Analysis of Maryland's Death Sentencing System With Respect to Race and Legal Jurisdiction," January 2003 at http://justice.policy.net/proactive/newsroom/release.vtml?id=32881.

38 David Baldus, "The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis," Commissioned by the State of Nebraska, October 2001 at: http://justice.policy.net/proactive/newsroom/release.vtml?id=23960.

39 See note 1 at 293 (Brennan, J., concurring).

40 The U.S. Justice Department, "The Federal Death Penalty System: A Statistical Survey (1988-2000)," September 12, 2000 at http://justice.policy.net/proactive/newsroom/release.vtml?id=18720.

41 Gary Fields, Richard Willing, "Geography of the Death Penalty," USA Today, December 20, 1999.

42 Id.

43 See note 37.

44 Pam Belluck, "Nebraska Said To Use Death Penalty Unequally," The New York Times, August 2, 2001.

45 See note 30.

46 Jack Boger; Isaac Unah, "Race and the Death Penalty in North Carolina An Empirical Analysis: 1993-1997," University of North Carolina, April 16, 2001. Report available at: http://www.deathpenaltyinfo.org/article.php?scid=19&did=246.

47 The Death Penalty Information Center maintains statistics on racial disparity in application of the death penalty. For additional information, please visit http://www.deathpenaltyinfo.org/article.php?did=105&scid=5.

48 See note 37.

49 Judge David S. Baime, "Report to the Supreme Court: Systemic Proportionality Review Project," New Jersey, August 13, 2001. Report available at: http://justice.policy.net/proactive/newsroom/release.vtml?id=24361.

50 American Civil Liberties of Virginia, "Unequal, Unfair, and Irreversible: The Death Penalty in Virginia," December 2000. Report available at: http://members.aol.com/aclu-va/.

51 Texas Defender Service, "A State of Denial: Texas Justice and the Death Penalty," October 2000. Report available at: http://www.deathpenaltyinfo.org/article.php?did=221&scid=19.

52 U.S. General Accounting Office, "Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities," February 1990.

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

54 See note 46.

55 Jeffrey Pokorak, "Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors," Cornell Law Review, February 1998.

56 David Margolick, "In Land of Death Penalty, Accusations of Racial Bias," The New York Times, July 10, 1991.

57 Stephen Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty," 35 Santa Clara Law Review, 433, 453-54 (1995) (emphasis added).

58 Dick Dieter, "The Death

Penalty in Black and White: Who Lives Who Dies," Death Penalty Information Center, 1998. Available at: http://www.deathpenaltyinfo.org/article.php?scid=45&did=539.

59 Amnesty International, "U.S. Death By Discrimination: The Continuing Role of Race in Capital Cases" April 24, 2003. Available at: http://justice.policy.net/proactive/newsroom/release.vtml?id=34201.

60 Id.

61 See note 58 citing Jackson v. Thigpen, 752 F. Supp. 1551, 1554 (N.D. Ala. 1990), rev'd in part and aff'd in part, sub nom. Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995).

62 See note 58.

63 See note 40.

64 Statement of Senator Russell Feingold on the Federal Execution of Louis Jones, Before the U.S. Senate, March 18, 2003.

65 Jeff Flock, "'Blanket Communication' Empties Illinois Death Row," CNN News, January 13, 2003.

66 Rick Pearson, "Governor says ban to stay on death penalty but gambling may be expanded," The Chicago Tribune, April 24, 2003.

67 Callins v. Collins, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting).

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