

## Death Penalty Debates

*Is the capital punishment system working?*

Public support for capital punishment in the United States remains strong on paper, but opponents say it is weakening in practice. The number of new death sentences fell in 2009 to its lowest point in four decades and seems likely to end even lower in 2010. The number of executions has also fallen to half the number or fewer than in the 1990s. Critics and opponents of the death penalty say prosecutors may be seeking the death penalty less often because of the costs of a capital trial, sentencing and post-conviction proceedings. Jurors may also be worried about the costs of the system, the delay between sentence and execution and the risk of executing an innocent person. Supporters of capital punishment counter that the costs and delays result primarily from obstructionism by death penalty lawyers and that the risk of a wrongful execution is all but nonexistent.



*Dr. William Petit, who survived a horrific, night-long rampage that killed his wife and two daughters, embraces his sister on Nov. 8, after jurors gave the death penalty to Steven Hayes. "This is justice," said Petit, who had wanted capital punishment for Hayes and his co-defendant.*

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# Death Penalty Debates

BY KENNETH JOST

## THE ISSUES

Jurors in the Steven Hayes triple-murder trial in Connecticut needed less than a full day on Oct. 5 to convict the burly, 47-year-old parolee of one of the most gruesome crimes in the state's history. After three-and-a-half weeks, however, the trial was only half finished. Prosecutors and defense lawyers still had to present evidence and arguments on whether Hayes should be given the death penalty or sentenced to life imprisonment without possibility of parole.

Over the next two-and-a-half weeks, prosecutors depicted Hayes as a longtime offender who took sadistic delight in planning the home invasion in the suburban Connecticut town of Cheshire in July 2007 that left a mother and two daughters dead after a night of beatings, rape, strangulation and arson. Defense lawyers countered the prosecution's plea for the death penalty by portraying Hayes' yet-to-be-tried co-defendant, 30-year-old Joshua Komisarjevsky, as the mastermind of the killings. Hayes, the defense lawyers contended, was a drug-addicted victim of childhood abuse so filled with remorse over the killings that he was hoping for a death sentence.

The jury of seven women and five men deliberated over four days, including a weekend, before rendering their decision. Death, the jurors said, would be "the appropriate sentence" for each of the six capital felony counts against Hayes in their earlier verdicts.

William Petit, the only survivor of the night-long crime spree, spoke to reporters after the verdict from the steps



Connecticut State Police

*The death sentence given to Steven Hayes on Nov. 8 for the July 2007 murders of Dr. William Petit's wife and daughters reflects Americans' support of capital punishment, even in a liberal state such as Connecticut, where the legislature voted to abolish the death penalty in future cases. Said a juror: "Here is a case where somebody doesn't deserve to remain on the face of the Earth."*

of the courthouse in nearby New Haven. "I was glad for the girls," said Petit, who had called for the death penalty for Hayes and Komisarjevsky, who faces trial in 2011. "This is justice."

Petit, a prominent physician, was himself beaten, tied up and left for dead in the basement as the two parolees used gasoline to set the home ablaze. He freed himself and fled to the yard of a neighbor, who summoned police. Officers found Petit's wife, Jennifer Hawke-Petit, and their two daughters, Michaela, 11, and Hayley, 17, dead in separate, second-story bedrooms. Jennifer and Michaela had been sexually assaulted.<sup>1</sup>

Hayes' sentence shows Americans' support for capital punishment even in

a politically and socially liberal state such as Connecticut, where the Democratic-controlled legislature voted in May 2009 to abolish the death penalty in future cases. Gov. M. Jodi Rell, a Republican, pointed to the then-pending case against Hayes and Komisarjevsky in vetoing the measure. "We should not, will not, abide those who have killed for the sake of killing," she said in her June 5 veto message.

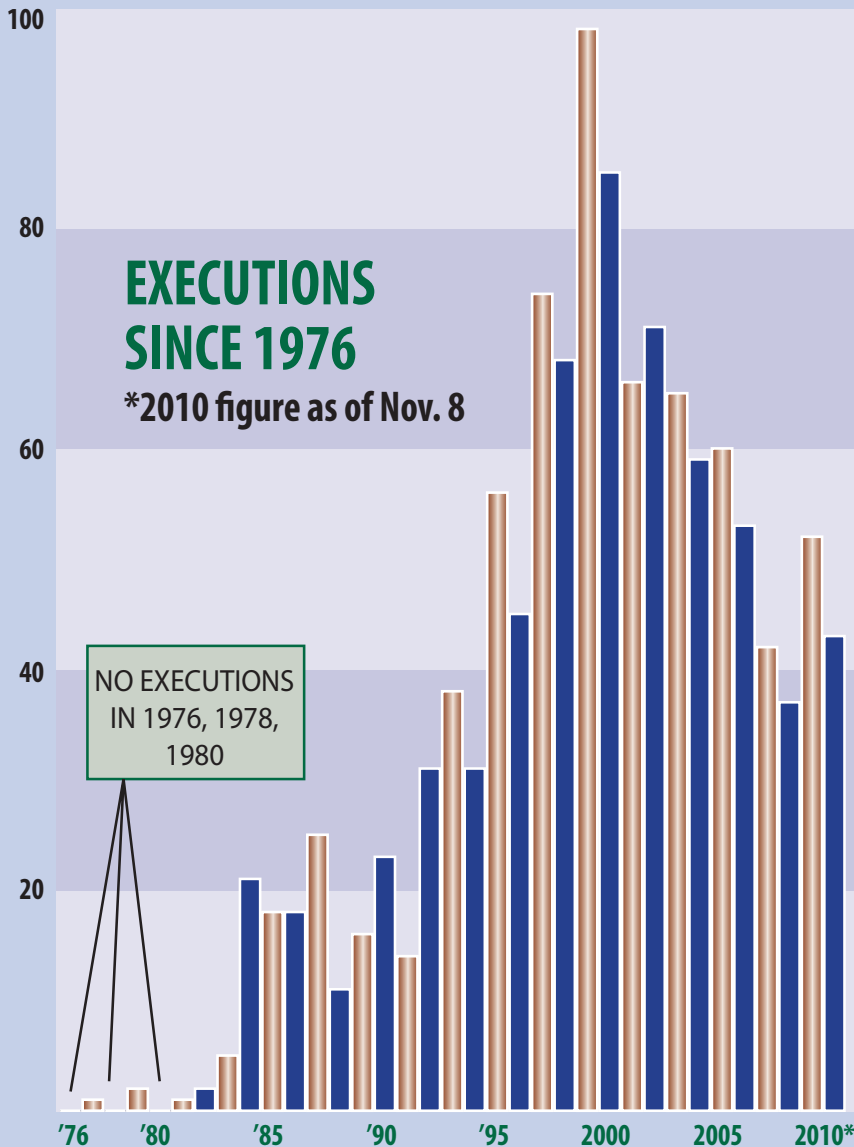
After the verdict, jurors in Hayes' trial said they carefully discussed the morality of capital punishment during their weekend deliberations, but were as one in the final decision. "It was just so heinous and just so over the top and depraved," Herbert Gram told *The New York Times*. "Here is a case where somebody doesn't deserve to remain on the face of the Earth."<sup>2</sup>

The United States retains the death penalty for specifically defined cases of murder even though most of the world has abolished capital punishment either in form or practice, according to the Death Penalty Information Center, a Washington-based organization opposed to capital punishment with a comprehensive and well-regarded database on death penalty issues. The 58 countries that retain capital punishment include only three other major democracies: India, Indonesia and Japan. With 60 executions in 2009, the United States ranked fifth in the world behind four countries with unfavorable human rights records: China, Iran, Saudi Arabia and Iraq.<sup>3</sup>

Yet death penalty opponents and critics say capital punishment is declining in popularity in the United States even as polls continue to show substantial majority support for the practice.

## Number of Executions Has Declined

The number of executions in the United States since the Supreme Court reinstituted capital punishment in 1976 peaked in 1999 and has been declining since then, except for a temporary spike in 2009 after the court rejected a challenge to lethal injection.



Source: Death Penalty Information Center, [www.deathpenaltyinfo.org/executions-year](http://www.deathpenaltyinfo.org/executions-year)

"The decline in the use of the death penalty is the continuing story," says Richard Dieter, the center's executive director. "Death sentences, executions, the number of states that have the death penalty and the size of the population on death row have all declined in the last decade."

The center's statistics bear out Dieter's claims. The number of executions since the Supreme Court's 1976 decision reinstituting capital punishment peaked in 1999 at 98 and has been declining since then except for a temporary spike in 2009 after the court rejected a challenge

to lethal injection practices. The center counts 45 executions so far in 2010, through early November.

The number of new death sentences peaked above 300 per year in the mid-to late-1990s, according to information cited by the center from the U.S. Department of Justice's Bureau of Justice Statistics (BJS). For 2009, the number had fallen by nearly two-thirds to 106, according to the center's compilation for the year. (See *graphs*, pp. 968, 969.)

"There's an ambivalence about the death penalty in the public," Dieter contends. "They generally support it in theory, but in practice they have deep concerns."

"It seems to be on the decline again," says Victor Streib, a death penalty expert at Ohio Northern University's Petit College of Law in Ada who takes no position on the issue of retaining or abolishing capital punishment. "There have always been problems with the death penalty system, and more are coming to light."

Death penalty supporters deny that public support for capital punishment is declining. "It's not ambivalence," says Kent Scheidegger, legal director for the pro-law enforcement Criminal Justice Legal Foundation in Sacramento, Calif. "There is a certain fatigue factor in that it's been so difficult to carry [death sentences] out and so many delays that prosecutors may take that into consideration in a borderline case. If we make progress in reducing delays, that factor may end up being reversed."

In fact, the Gallup Organization's annual surveys have registered 2-to-1 support throughout the past decade for imposing the death penalty for murder. (See *polls*, p. 972.) "The public support for the death penalty is remarkably robust," says Robert Blecker, a professor at New York Law School in New York City and a self-described "retributivist" supporter of capital punishment. "It's not yielding to the relentless attacks by the abolitionists."



Faced with the persisting public support for capital punishment, death penalty critics and opponents are today emphasizing pragmatic arguments against the practice. Most recently, they have been pointing to the fiscal strains on state and local governments in emphasizing the costs of capital trials, appeals and post-conviction challenges.

"It's very expensive to seek the death penalty. It's very expensive to get it," says John Blume, director of the Death Penalty Litigation Clinic at Cornell University Law School in Ithaca, N.Y. "Given the current financial situation, there will be some increasing reluctances in that regard."

Death penalty supporters dismiss the concerns. "It's a makeweight issue," says Blecker. "The irony is that the very people who complain about the costs are the very people who are doing everything they can to delay it and multiply its expense."

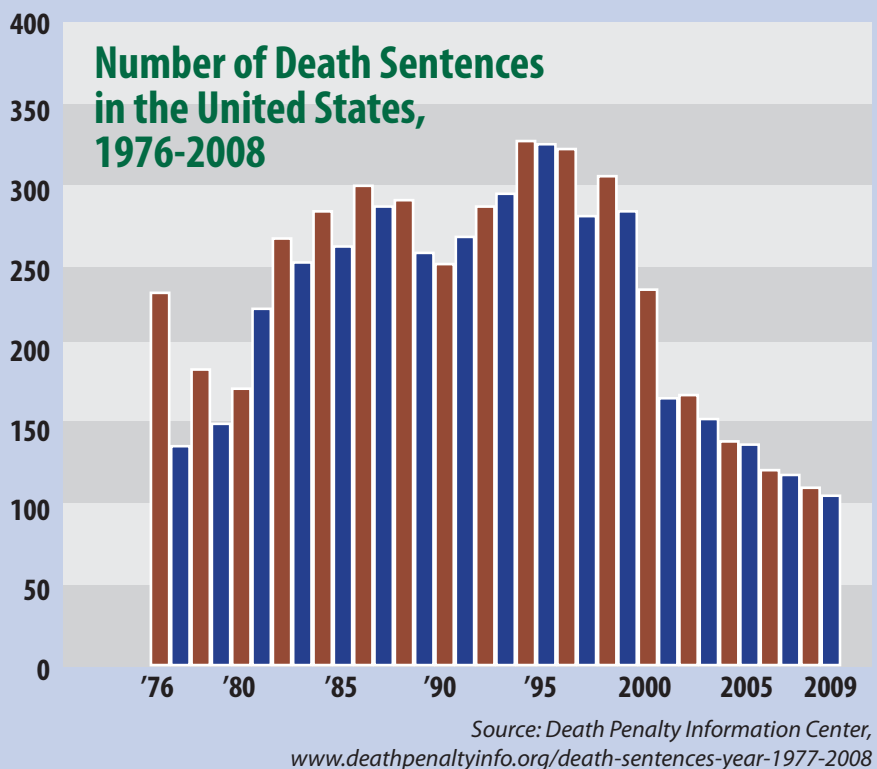
Supporters and opponents also continue to debate the question of whether use of the death penalty acts as a deterrent for other potential murderers. The issue remains unresolved — arguably, unresolvable — despite debates dating back centuries and statistical studies in the United States going back to the mid-1970s.

In addition, the opposing camps disagree about the risks of a wrongful execution. Death penalty critics point to the growing number of what they call "exonerations" of death row inmates to insist that the risk is real. Indeed, they point to a Texas case as a likely candidate: the execution of Cameron Todd Willingham in 2004 after having been convicted of the deaths of his three young children in a house fire deemed to be arson based on what is now highly disputed forensic testimony.<sup>4</sup>

Death penalty supporters discount the exoneration of death row inmates, arguing that court-ordered reversals of death sentences do not amount to judicial findings of innocence. They say

## Far Fewer Death Sentences Handed Down

The number of death sentences declined in 2009 to 106, a nearly two-thirds drop since the number peaked above 300 in the mid- to late-1990s. Death penalty opponents say the decline mirrors the public's concern. But supporters say the decline reflects prosecutors' awareness that carrying out the death penalty is difficult and often fraught with delays.



the risk of a wrongful execution is minimal at most and specifically dispute the now pending challenge to the evidence used in the Willingham case. (See sidebar; p. 970; Willingham case, p. 978.)

The Supreme Court, meanwhile, has narrowed the death penalty somewhat in three successive rulings over the past decade that have barred executions of mentally retarded offenders, juvenile offenders or child rapists. Death penalty critics, however, say that states have been inconsistent in applying the 2002 ruling against executing defendants with intellectual disabilities. (See sidebar; p. 976.)

As court cases continue and rival camps press their arguments on state legislatures, here are some of the major issues being argued:

### Does the death penalty deter capital crimes?

Three decades after casting the pivotal vote in the 1976 decision to uphold revised death penalty laws, Justice John Paul Stevens in 2008 urged the Supreme Court and state legislatures to reconsider the issue. Among his reasons, Stevens cited what he called the lack of "reliable statistical evidence" that capital punishment deters potential offenders. Without such evidence, Stevens wrote, "deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment."

Stevens' opinion — a separate concurrence in a decision that upheld the procedures for lethal injection executions — prompted a tart response from conservative Justice Antonin Scalia. He

## Texas Death Row Inmate Is 139th to Be 'Exonerated'

*"There is nothing that connects Anthony Graves to this crime."*

Anthony Graves walked out of a Texas jail on Oct. 27 as a free man for the first time in nearly two decades, no longer facing the death penalty for a crime that the local district attorney now concedes Graves did not commit.

Graves became the 139th former death row inmate to have been exonerated of his alleged crime since 1973, according to a compilation by the anti-capital punishment Death Penalty Information Center. The center's updated database includes accounts of each of the cases along with statistical compilations.<sup>1</sup>

The list is not without controversy. Death penalty supporters contend that the descriptions of the former death row inmates as "innocent" or "exonerated" overstate the effects of reversals of their convictions or sentences as a result of appeals or post-conviction challenges. They contend that a failure to convict the inmate again does not establish his innocence.

The center defends the classification by stating that someone is included on the list only if the conviction is overturned and the individual is acquitted at retrial, the charges are dropped or the state's governor issues a pardon based on new evidence of innocence. The list does not include anyone who was later given a reduced sentence or convicted of lesser charges, the center says.

The center's compilation lists Graves as the 12th person exonerated in Texas since the count began. Among the 25 other states with exonerations, Florida has the largest number: 23. Graves is African-American, like the majority of the exonerated (72). Among the others, 53 are white, 12 are Latino and two are listed as "other."

Despite the attention focused on the use of DNA evidence in identifying wrongful convictions, only 17 of the exonerations are attributed to DNA testing. Most of the exonerations, like Graves', are based on a reexamination of evidence at trial

along with errors by police or prosecutors.

Graves was convicted in 1994 of assisting another man, Robert Earl Carter, two years earlier in the slaying of a Texas woman, her teenaged daughter and four young grandchildren. Carter's testimony against Graves was the prosecution's major evidence. Jurors rejected Graves' brother's testimony that he was asleep at home when the killings occurred.

Carter recanted his accusation two weeks before his scheduled execution in 2000 and again minutes before his death. "Anthony Graves had nothing to do with it," Carter said, according to the account in the *Houston Chronicle*. "I lied on him in court."<sup>2</sup>

Ruling on Graves' federal habeas corpus petition, the Fifth U.S. Circuit Court of Appeals granted Graves a new trial in 2006 on the grounds that prosecutors had elicited false testimony and withheld information that could have influenced jurors. The former prosecutor continued to defend the conviction and sentence, but a special prosecutor chosen from another district to reinvestigate the case concluded Graves was innocent.

Graves was released from the Burleson County jail late in the afternoon of Oct. 27 after District Attorney Bill Parham filed a court motion to dismiss all charges. "He's an innocent man," Parham said. "There is nothing that connects Anthony Graves to this crime."

— Kenneth Jost



*Anthony Graves spent nearly two decades in prison for a crime he did not commit.*

Texas Coalition to Abolish the Death Penalty

<sup>1</sup> See Death Penalty Information Center, "The Innocence List," [www.deathpenaltyinfo.org/innocence-list-those-freed-death-row](http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row) (last updated Oct. 28, 2010).

<sup>2</sup> Brian Rogers and Cindy George, "After Years on Death Row, He's an Innocent Man," *Houston Chronicle*, Oct. 28, 2010, p. A1. See also Pamela Colloff, "Innocence Lost," *Texas Monthly*, October 2010, [www.texasmonthly.com/2010-10-01/feature2.php](http://www.texasmonthly.com/2010-10-01/feature2.php). Colloff's investigative report was published a month before Graves' release. Colloff wrote a short follow-up, "Free at Last," for the magazine's November issue ([www.texasmonthly.com/2010-11-01/webextra6.php](http://www.texasmonthly.com/2010-11-01/webextra6.php)).

accused Stevens of ignoring what two scholars had called "the significant body" of evidence pointing to a possible deterrent effect. Regardless of the evidence, Scalia concluded, the Supreme Court has no right "to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather

than commonsense predictions about human behavior."<sup>5</sup>

The question of deterrence has divided supporters and opponents of the death penalty in the United States at least since the early 19th century, according to legal historian Stuart Banner. In those days, the UCLA law professor writes,

there was "a virtual absence of any attempt by either side to back up its claims with numbers."<sup>6</sup> Today, by contrast, the debate is densely statistical. Even so, more than three decades of research by economists and law professors published in two dozen or more academic articles have failed to resolve the debate.<sup>7</sup>

The modern debate dates from an article published in 1975 in the *American Economic Review* by Isaac Ehrlich, now chairman of the economics department at the University of Buffalo and also a distinguished professor at the State University of New York. Ehrlich used data from the period 1933-1969 to conclude that each execution served on average to prevent eight murders through deterrence of other killings. As Banner relates, the article drew unaccustomed attention for a statistically technical study — followed by “intense criticism” of Ehrlich’s methodology and conclusion.<sup>8</sup>

Many more studies followed. By the early 2000s, supporters of capital punishment counted a total of 14 that found evidence of a deterrent effect from the death penalty. In an influential study published in 2003, Emory University economists Hashem Dezhbakhsh and Paul H. Rubin and Emory law professor Joanna Shepherd used data from before and after then-recent death penalty moratoriums to conclude that each execution prevented on average 18 murders.

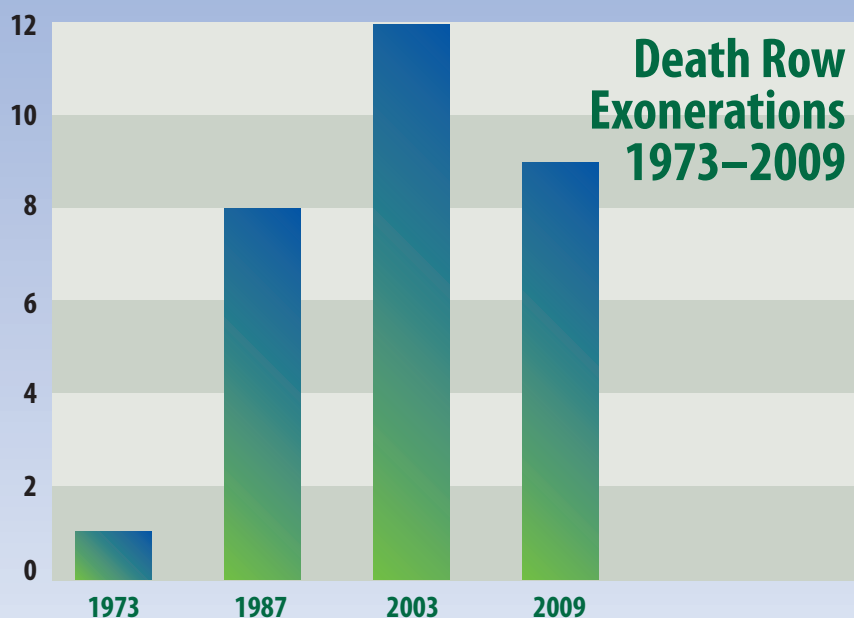
Their conclusion was challenged in turn in a 2005 article by Yale law professor John Donohoe and economist Justin Wolfers of the University of Pennsylvania’s Wharton School. They called the evidence for deterrence “surprisingly fragile,” noting that minor changes in methodology resulted in completely different results. In a condensed version that appeared along with an exchange with the Emory authors, Donohoe and Wolfers wrote: “The view that the death penalty deters is still the product of belief, not evidence.”<sup>9</sup>

Today, the economists remain in disagreement while appearing to acknowledge the impossibility of a definitive conclusion. “There are ways to do the analyses to find deterrence and ways to do it to find no deterrence,” says Rubin. For his part, Wolfers says the presence or absence of deterrence “is difficult to tell no matter whatever angle you look at it.”

With the economists in disagreement, pro- and anti-death penalty advocates tend to side with the view that supports

## Exonerations on the Rise

Nine death row inmates were exonerated in 2009, continuing a rising trend since the early 1970s. From 1973-1999, an average of 3.1 exonerations occurred each year; from 2000-2007 an average of 5 exonerations occurred yearly.



Source: Death Penalty Information Center, [www.deathpenaltyinfo.org/innocence-and-death-penalty](http://www.deathpenaltyinfo.org/innocence-and-death-penalty)

their position. “I think the literature as a whole still shows deterrence,” says Scheidegger with the Criminal Justice Legal Foundation. “And I think the evidence will grow stronger over time.” From the other side, Cornell’s Blume says flatly, “There’s no credible evidence that the death penalty is a deterrent.”

Even while supporting the death penalty, many in the law enforcement community voice doubts that killers actually weigh the potential consequences of their crimes before committing them. “Do people in emotional circumstance contemplate” the potential punishment? asks Scott Burns, executive director of the National District Attorneys Association. “Probably not.”

The search for evidence of deterrence is difficult in part because of the relative infrequency of executions in the United States. “In 99 percent of the murders,

there are not going to be executions, not even a death sentence,” says Dieter with the Death Penalty Information Center.

“It’s certainly an enormous waste of money in terms of deterrence,” says Streib, the Ohio Northern University professor. “There are so many other things we could do with that money.”

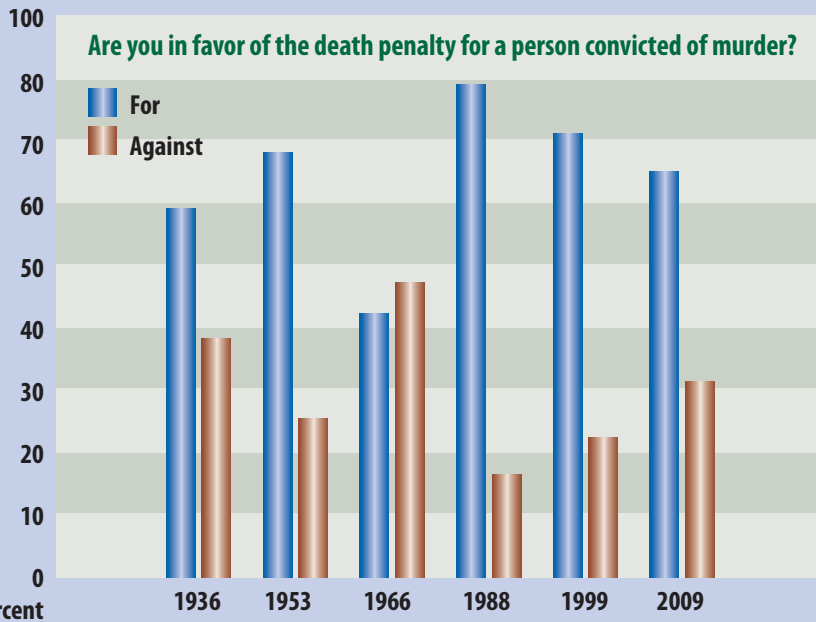
## Does capital punishment cost more to administer than it is worth?

California was spending upwards of \$100 million a year on death penalty cases as of 2008 in state post-trial costs alone, according to a blue-ribbon commission. But that was not nearly enough to prevent appeals and post-conviction challenges from dragging on for an average of 20 years after death sentences were imposed.

To get the lapse of time down to the national average of about 10 years

## Majority of Americans Support Death Penalty

Since the late 1930s, a substantial majority of Americans has favored the death penalty for a person convicted of murder, except for a dip in the mid-1960s.



Source: Gallup Poll

or so, the California Commission on the Fair Administration of Justice concluded, would cost the state at least another \$95 million a year. But noting what it called the state's "budget crisis," the commission also said that costs could be reduced to a mere \$11.5 million a year by substituting life without parole as the maximum punishment for capital offenses.

Law enforcement representatives on the 22-member commission dissented from the decision to list alternatives to the state's existing death penalty statute. But none disagreed with the cost figures, including the need to nearly double the state's spending to cut the backlog that at the time had filled the state's death row beyond capacity to 670 inmates.<sup>10</sup>

Whatever one's views about the death penalty, the increased cost needed for a capital trial itself under existing law is beyond dispute. A Kansas study cited by the California commission found that a capital trial cost \$1.2 million compared

to \$700,000 for a non-capital murder case. In Tennessee, adding a capital charge was found to raise the cost of a trial by about 50 percent. And an Indiana study found that the total trial and post-trial cost of a capital case was five times the cost for a non-capital murder.

"We used to have not such an elaborate system either at trial or on appeal or later in habeas corpus," says Ohio Northern University professor Streib. "The system today is extraordinarily expensive."

Critics and opponents cite the increased costs — at a time, they stress, of strained state budgets — as an argument for moving away from the death penalty. "We spend a lot of money to execute a very small number of people," says Cornell law professor Blume. "We could take that money, spend it elsewhere and make society a safer place."

Burns with the DAs' group counters that it is wrong to "put a price tag" on a life. "How do you tell the family of a victim," he asks, "that it is not worth the money under our system of justice

to seek the death penalty when the voters of a particular state have decided the death penalty is an option?"

The Supreme Court set the cost spiral in motion by upholding death penalty laws in 1976 only if they included a separate sentencing phase that allowed a capital defendant to present mitigating evidence even after being found guilty. Law enforcement advocate Scheidegger criticizes the result.

"We shouldn't need to dig up the guy's entire life history," Scheidegger says. Trial costs could be cut, he says, "if we kept the case focused on the crime and the defendant's culpability for it."

"Cutting costs is not easy," counters Dieter with the Death Penalty Information Center. "If you're going to do a case, you're going to have to do it well."

Post-trial procedures raise the costs of capital cases even further. With the trial and sentencing themselves more complex, appellate review is necessarily more time-consuming and thus more expensive. In addition, post-conviction challenges in both state and federal courts are all but inevitable, again with more time and more expense entailed to review a capital trial.

In its report, the California commission estimated the death penalty adds \$51 million annually to the cost of appeals and federal habeas corpus proceedings. Most of the added spending recommended by the commission — about \$85 million — was for additional lawyers to speed up appeals and post-conviction challenges. At the time, nearly half of the death row inmates were awaiting appointment of counsel to handle federal habeas corpus proceedings.

Housing inmates on death row also costs \$90,000 more per inmate per year than imprisonment in a maximum security facility, the commission said. The total additional cost was put at \$63 million per year.

Blecker, the New York Law School professor, says studies such as those cited by the California commission fail to note costs saved by the use of the death penalty as a bargaining chip for



prosecutors in plea negotiations. "They don't take into account the hundreds of thousands of dollars saved for every guilty plea obtained and life without parole accepted because — and only because — the death penalty is taken off the table," Blecker says.

But Blecker also dismisses the cost issue as irrelevant. "Justice ain't cheap," he says. "If it turns out that the death penalty is the only just alternative in certain cases, we should do it."

### ***Do capital defendants have adequate legal representation in court and after sentencing?***

As a child, Kevin Wiggins suffered physical abuse from his alcoholic mother and sexual abuse in two foster homes. But his defense lawyers in a capital murder trial in Baltimore in 1989 made only a cursory investigation of Wiggins' background and decided to present none of the evidence in the sentencing phase after his conviction.

More than a decade later, the U.S. Supreme Court in 2003 ordered a new sentencing hearing for Wiggins on the grounds that his lawyers' performance fell below the established professional standards for defense attorneys in a capital case. Commenting at the time, David Bruck, a Columbia, S.C., lawyer specializing in death penalty cases, lamented what he called "a real neglect of the right to counsel in capital cases." Bruck predicted that it would be "much harder for reviewing courts" to ignore the issue in the future.<sup>11</sup>

Today, however, death penalty critics and opponents say many capital defendants still receive inadequate representation at trial and that many or even most death row inmates have little if any legal help in challenging their convictions or sentences afterward. "Capital defendants are still getting abysmal representation at trial, representation that is negligent and incompetent in many cases," says Robin Maher, director of the Death Penalty Representation Project at the American Bar

Association (ABA). In post-conviction proceedings, Maher says, "it's more of the same, or no lawyer at all."

Law enforcement advocates call the criticisms overblown. "You can go to every state in the union and find some of the best and brightest defense attorneys representing those accused of murder," says Burns with the district attorneys' group. "It does a disservice to them and to the system to say that they are less than qualified."

"Can you find individual cases" of inadequate representation? Burns asks rhetorically. "Yes, but as a whole they do an incredible job."

Some death penalty opponents see some improvements in representation for death penalty defendants in recent years. Dieter with the Death Penalty Information Center says that some jurisdictions have raised pay for court-appointed defense attorneys or removed overall caps on spending for a case. Texas — the state with by far the greatest number of executions — has adopted standards for lawyers to be appointed to represent capital defendants. And Virginia has recently joined the list of states with a statewide capital defender office to provide counsel for indigents in death penalty cases.

Despite improvements in some states, Terrica Redfield, a staff attorney with the Southern Center for Human Rights in Atlanta who also serves as death penalty counsel for the National Association of Criminal Defense Lawyers, says others continue to have systemic problems. She points in particular to Alabama, a state with no statewide public defender system at all. As a result, indigent capital defendants are represented by private lawyers willing to accept court appointments. She says many lack training, and compensation is low. "They're basically getting paid a little bit of nothing," she says. "It's not hard to see that the capital case gets pushed to the bottom of the stack of things to do."

Ineffective-assistance claims continue to be a major issue in appellate or post-

conviction review of capital cases. The California commission noted that as of 2008, three-fifths of the death sentences reviewed in federal courts were struck down even after having been upheld in state courts. Ineffective-assistance claims were the most frequent reason, according to Gerald Uelmen, the Santa Clara University Law School professor who served as the commission's executive director.

Law enforcement advocate Scheidegger blames the problem on the open-ended sentencing phase in capital cases. "You really don't see many claims that the defense lawyer botched the guilt phase," he says. "That doesn't come up very often."

Federal habeas corpus cases present an especially burdensome task for lawyers, according to Uelmen, because they essentially entail reinvestigating the entire case. Private lawyers are reluctant to take habeas cases, Uelmen says, and the state legislature has not fully funded the office created in 1998 to provide representation in post-conviction proceedings.

Scheidegger blames the lack of lawyers to handle those cases in part on the federal government's failure to implement a provision in the 1996 overhaul of habeas corpus law to give states financial incentives for appointment of lawyers for death row inmates. For his part, Burns with the district attorneys' group calls for limiting the number of post-conviction challenges. "We have to put some degree of finality in this ad nauseam system," he says. "It's not fair to the victims of crime. It's not fair to the defenders and the prosecutors. It's not fair to the public."

In her opinion for the Supreme Court in the *Wiggins* case, Justice Sandra Day O'Connor cited standards issued by the ABA that call on lawyers in capital cases "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor" (emphasis in original). Dieter believes the court's ruling has had some effect. "The message is getting across," he says.

Death penalty cases tried before the 2003 ruling, however, are continuing to be reversed because of inadequate representation at trial. In October, the Alabama Court of Criminal Appeals set aside a death sentence imposed on LaSamuel Gamble in 1998 for a pawnshop robbery-killing two years earlier. The trial lawyers' investigation "was so inadequate that they failed to discover any mitigation evidence to present at the penalty phase," the court wrote, even though the post-conviction challenge showed that "a plethora of evidence" could have been presented.<sup>12</sup> ■

## BACKGROUND

### Death Debates

The death penalty has been practiced in America since colonial times and has been a contentious issue for almost as long. Efforts to narrow or abolish capital punishment date from the Revolutionary era. Over time, the death penalty came to be reserved in many states solely for murder and was abolished altogether in some.

Support for abolishing capital punishment helped produce an unofficial moratorium in the 1960s, followed by the Supreme Court's controversial decision in 1972 invalidating all existing death sentences. Four years later, however, the court upheld rewritten death penalty laws, allowing states to resume executions even as debates and legal challenges over the practice continued.<sup>13</sup>

Colonial America carried over the death penalty from England, but narrowed its scope. Thus, several Northern colonies dropped the death penalty for property crimes or for rape. Abolitionist sentiment developed before independence and began to have a concrete effect soon after. In the 1790s, five states abolished the death penalty for all crimes except murder.

The trend continued in the North in the 1800s. Michigan abolished the death penalty except for treason in 1846; Rhode Island and Wisconsin abolished it altogether in the 1850s. By 1860, no Northern state provided capital punishment for any crime other than murder or treason. By contrast, no Southern state had completely abolished capital punishment before the Civil War. And the death penalty was invoked against African-Americans in the South for such crimes as spreading insubordination among slaves or rape or attempted rape.

Capital punishment continued to recede from the end of the Civil War through the mid-20th century. Executions, once public events, became private: The last public execution, a hanging, was in Kentucky in 1936. States sought what were viewed as more humane methods of execution, such as electrocution or lethal gas.

More states abolished or limited capital punishment in the early 20th century, though some reinstated it during the "Red Scare" era of the 1920s. The number of executions fell over time — from 1,289 in the 1940s to 715 in the 1950s and 191 in the 1960s before the milestone year of 1968, the first with no executions anywhere in the United States. Support for capital punishment also sagged; it fell to 42 percent in 1966, the lowest percentage recorded in modern polling.

Buoyed by these developments, opponents of capital punishment continued to lobby state legislatures at the same time as lawyers with the NAACP Legal Defense Fund and others challenged the death penalty in court as unconstitutional. The litigation strategy peaked in 1972 with the Supreme Court's 5-4 decision in *Furman v. Georgia* invalidating all existing death penalty sentences as unconstitutional under the Eighth Amendment's Cruel and Unusual Punishments Clause.

Ominously for death penalty opponents, the five justices in the majority failed to agree on a single opinion. Two — William J. Brennan Jr. and Thurgood

Marshall — found the death penalty unconstitutional in all circumstances; a third, William O. Douglas, appeared also to rule it out as inherently discriminatory. But Justices Potter Stewart and Byron R. White both concluded more narrowly that, as then administered, the death penalty was too arbitrary to pass constitutional muster.<sup>14</sup>

The court's ruling triggered a public backlash. Support for the death penalty increased to 65 percent by 1976. State legislatures responded by reenacting death penalty laws along two models. A few established a mandatory death penalty for specified crimes; the larger number — 25 in all — enacted so-called guided discretion statutes that required separate capital sentencing hearings with jurors directed to consider specified aggravating or mitigating circumstances.

In 1976 — with Douglas replaced by Stevens — the Supreme Court ruled the mandatory death penalty statutes unconstitutional on a 5-4 vote, but upheld the guided discretion laws by a 7-2 margin with only Brennan and Marshall dissenting. "No longer can a jury wantonly and freakishly impose the death sentence," Stewart wrote in the pivotal opinion in *Gregg v. Georgia*. "[I]t is always circumscribed by legislative guidelines."<sup>15</sup>

Executions resumed, but slowly since sentences under the new laws still faced a gauntlet of appeals and post-conviction challenges. Only 140 persons were executed in the 1980s. The Supreme Court, meanwhile, narrowed capital punishment somewhat by prohibiting the death penalty for rape (1977), limiting its use somewhat for accomplices in felony murders (1982, 1987) and barring the execution of someone who was insane or mentally incompetent (1986).

The court, however, rejected broader challenges. In 1984, the court held that states did not need to ensure that an individual death sentence was proportional to the punishment imposed on others convicted of similar crimes. And

*Continued on p. 976*

# Chronology

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## **Before 1960**

*Capital punishment is practiced since colonial times despite persistent debates; over time, death penalty abolished in some states, number of executions falls.*

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## **1960s-1970s**

*Support for death penalty sags; Supreme Court suspends, then reinstitutes capital punishment.*

### **1966**

Public support for death penalty dips to record-low 42 percent.

### **1968**

First year in U.S. history with no executions. . . . Unofficial death penalty moratorium as courts weigh constitutional challenges, legislatures consider repeal.

### **1972**

Supreme Court invalidates all existing death sentences as "cruel and unusual punishment" because of arbitrary imposition; 5-4 ruling prompts public backlash; states rush to revise death penalty laws.

### **1975**

Prominent economist claims proof of deterrent effect from executions.

### **1976**

Supreme Court upholds, 7-2, state death penalty laws with separate sentencing hearing and instructions to guide jurors' discretion; 5-4 companion ruling strikes down mandatory death penalty statutes.

### **1978**

Supreme Court says jurors must have discretion to consider any "mitigating" circumstance in sentencing phase of capital trial.

**1980s** *Pace of executions quickens; Supreme Court rejects broad challenges.*

### **1984**

Supreme Court rejects proportionality in state's use of death penalty. . . . Number of executions hits double digits (21) for first time since capital punishment reinstituted.

### **1987**

No equal-protection violation occurs if death sentences more likely with white victims than with black victims, Supreme Court rules; 5-4 decision seen as rejecting last of broad-based challenges to death penalty.

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**1990s** *Executions, new death sentences increase; Congress limits use of federal habeas corpus to challenge death sentences.*

### **1991**

Supreme Court permits "victim impact" statements in capital sentencing hearings.

### **1993**

Kirk Bloodworth is first death row inmate to win release through DNA testing.

### **1996**

Habeas corpus overhaul approved by Congress in Antiterrorism and Effective Death Penalty Act; death row inmates and other state prisoners limited to a single habeas corpus challenge; federal courts required to defer to state court rulings on most issues.

### **1998**

Number of executions peaks at 98.

**2000s** *Executions, death sentences slow; public support for death penalty still strong.*

### **2000**

Gov. George Ryan, R-Ill., declares moratorium on executions, citing study of wrongful convictions, later commutes all death row inmates' sentences to life in prison.

### **2002**

Supreme Court bars execution of mentally retarded offenders.

### **2005**

Supreme Court bars death penalty for juvenile offenders. . . . Economists' studies claiming deterrent effect from death penalty disputed in broad review; debate continues.

### **2007**

New Jersey abolishes death penalty.

### **2008**

Supreme Court rejects challenge to lethal injections; also bars death penalty for rape of minor, other non-homicide crimes. . . . California commission says nearly \$100 million more needed per year to cure death penalty backlog, but abolishing capital punishment could save nearly that much; two years later, recommendations unacted on.

### **2009**

New Mexico abolishes death penalty. . . . Gallup Poll again registers better than 2-to-1 public support for capital punishment. . . . Number of death sentences falls to 106, lowest figure since 1976.

### **2010**

Death row population stands at 3,261, down slightly from previous year. . . . Executions stand at 45 for year in mid-November; raise total to 1,233 since 1976.

# Mentally Retarded Defendants Still Face Execution

*Eight years after Atkins, critics say the intellectually disabled remain vulnerable.*

Teresa Lewis left the rear door to her trailer in rural Pittsylvania County, Va., unlocked on the evening of Oct. 30, 2002, to allow two hired gunmen to enter and kill her husband and stepson. Lewis planned to pay the hit men with the \$250,000 she would collect from the life insurance policy her stepson had recently taken out on himself before deploying to active military duty. She was the second beneficiary, behind her husband.

Lewis pleaded guilty to capital murder on May 15, 2003, and received a death sentence. She was executed on Sept. 23, 2010, but only after her lawyers tried to block the execution on the grounds that her trial counsel failed to introduce evidence that Lewis, who had an IQ of 72, was mentally retarded. Just a few months before her crime, the U.S. Supreme Court had issued a landmark ruling, *Atkins v. Virginia*, prohibiting the death penalty for mentally retarded offenders.<sup>1</sup>

Eight years after the *Atkins* decision, the results for protecting intellectually disabled defendants have been mixed. \* The Supreme Court cited a three-pronged definition from what then was the American Association on Mental Retardation — now the American Association on Intellectual and Developmental Disabilities (AAIDD) — but left it to the states to implement their own definitions of mental retardation.

"There's a lack of clarity in the states among what constitutes mental retardation," says Richard Dieter, executive director of the Death Penalty Information Center, an anti-capital pun-

ishment organization. "There are still people who are arguably mentally retarded but who are still facing executions, eight years after the decision."

Supporters of capital punishment disagree. "I doubt that there are very many actually retarded people on death row," says Kent Scheidegger, legal director of the Criminal Justice Legal Foundation. "In California, with 700 people on death row, you can count the number of people who are actually retarded on one hand, and they've gotten off. There are a whole lot of phony claims."

The AAIDD standard uses three criteria to define intellectual disability: an IQ below 70 or as high as 75; limitations in "adaptive functioning," such as self-care or social skills; and manifesting of symptoms before age 18.<sup>2</sup> Most states, including Virginia, have adopted the association's definition.

The Virginia Supreme Court followed that definition in denying Lewis' *Atkins* claim in June 2007. "None of the witnesses who testified as experts in the fields of psychology and psychiatry at the evidentiary hearing determined that Lewis met the comprehensive statutory definition of mental retardation," the court wrote.<sup>3</sup> Lewis scored 72 on a state-administered IQ test, but her high adaptive functioning abilities, including graduating from high school and earning a nursing certificate, made it impossible for psychologists to conclude that she really was intellectually disabled.

James Rocap III, the Washington, D.C., lawyer who represented Lewis in the post-conviction proceeding, says the Virginia court ignored the nuances of Lewis' intellectual disability. "There has to be a much higher level of appreciation in courts of what low-level functioning is, even if it's not specifically mental retardation," he says.

\* Advocacy groups prefer the term "intellectually disabled" to the former usage, "mentally retarded." A new federal statute changes the terminology in existing federal law. Court cases to date use the former term.

*Continued from p. 974*

in 1987, the court in *McCleskey v. Kemp* rejected a challenge from Georgia that contended the death sentence was disproportionately imposed for murders in which the victim was white.<sup>16</sup>

## Death Procedures

Supreme Court decisions upholding the death penalty did not eliminate legal challenges but only channeled them into increasingly narrow questions about the scope of the death penalty and the procedures for imposing it. As capital trials became more

complex, both the court and Congress sought to speed up post-conviction challenges with new limits on the use of federal habeas corpus. At the same time, the advent of DNA testing gave death penalty critics a new way to raise doubts about capital convictions.

Despite the crosscurrents, public opinion remained fairly stable in support of capital punishment, but only by a narrow margin when paired with the alternative of life imprisonment without parole.

The complexity of the bifurcated capital trial with separate sentencing hearing stemmed from the Supreme Court's decision in 1978 that jurors had

to be free to consider any potentially mitigating evidence in a defendant's favor. The court gave prosecutors a comparable advantage in 1991 with a decision to allow "victim impact" statements in the sentencing phases.

Other decisions set some limits on a state's definition of aggravating factors, requiring some degree of precision in the statutory language. Another ruling required that jurors be told of the alternative of a life-without-parole sentence in states that provided that option. Together, the decisions made sentencing hearings longer and more open-ended and appellate review more difficult and less certain.<sup>17</sup>

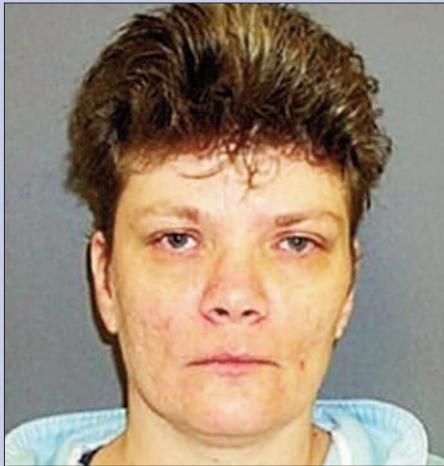


Terrica Redfield, a staff attorney at the Southern Human Rights Center in Atlanta, says jurors also need a better understanding of intellectual disability. "The jurors just don't understand what it means to be mildly retarded," Redfield says. "They think if you can sell drugs, you're not mentally retarded."

For her part, Margaret Nygren, executive director of AAIDD, has concerns with legislating the definition at all. "By [freezing] in time a definition, states run into trouble," says Nygren. "The real challenge of the definition is that scientific understanding changes over time."

Some states use just a portion of the AAIDD definition or place different levels of importance on IQ or adaptive functioning abilities. Texas goes as far as to have a separate set of the questions, known as the Briseno standard, that ask psychologists to determine whether the defendant has demonstrated leadership abilities or planning skills, whether their families thought the defendant was mentally retarded during development, or whether the defendant can lie.<sup>4</sup>

John Blume, a law professor and director of the Death Penalty Project at Cornell University who has studied implementation of the *Atkins* decision, says Texas' definition is inconsistent with the clinical standard. "There are people being sentenced to death in Texas where any rational clinician would say the defendant is mentally retarded."<sup>5</sup>



*Teresa Lewis was executed on Sept. 23, 2010. Her lawyers had argued that her trial counsel had not introduced evidence she was mentally retarded.*

AP Photo

The outcome in the *Atkins* case itself illustrates the difficulties of applying the ruling. Daryl Atkins, a high school dropout from Hampton, Va., with an IQ of 59, had been sentenced to death in April 1998 after his conviction for the carjacking-killing of a 21-year-old Air Force mechanic outside Hampton in August 1996. Psychologists gave conflicting and inconclusive testimony on whether Atkins was mentally retarded.

Atkins' case returned to Virginia courts after the Supreme Court ruling for a new hearing to determine whether he was mentally retarded. But the issue was never re-

solved. Instead, evidence emerged that the prosecution had improperly withheld evidence at the time of his trial. Based on that evidence, York County-Poquoson Circuit Court Judge Prentis Smiley Jr. commuted Atkins' sentence on Jan. 16, 2008, to life imprisonment.

— Maggie Clark

<sup>1</sup> The citation is 536 U.S. 304 (2002). For an account, see Thomas G. Walker, *Eligible for Execution: The Story of the Daryl Atkins Case* (2009).

<sup>2</sup> "Definition of Intellectual Disabilities," American Association on Intellectual and Developmental Disabilities, [www.aamr.org/content\\_100.cfm?navID=21](http://www.aamr.org/content_100.cfm?navID=21).

<sup>3</sup> *Lewis v. Warden*, Virginia Supreme Court, June 6, 2007, [www.courts.state.va.us/opinions/opnscvwp/1042743s.pdf](http://www.courts.state.va.us/opinions/opnscvwp/1042743s.pdf).

<sup>4</sup> *Ex Parte Briseno*, Court of Criminal Appeals of Texas, Feb. 11, 2004, [www.cca.courts.state.tx.us/opinions/29cs81903a.htm#N\\_44](http://www.cca.courts.state.tx.us/opinions/29cs81903a.htm#N_44).

<sup>5</sup> See John H. Blume, Sherri Lynn Johnson and Christopher Seeds, "An Empirical Look at *Atkins v. Virginia* and Its Application in Capital Cases," *The Tennessee Law Review*, April 1, 2009, <http://scholarship.law.cornell.edu/facpub/7>.

The use of federal habeas corpus to challenge state criminal convictions stemmed from Supreme Court decisions in the 1950s and '60s. By the late 1980s, the court began restricting habeas corpus somewhat. Congress took over the effort with a 1996 law appealingly titled the Antiterrorism and Effective Death Penalty Act.

The habeas corpus portions of the law included two major restrictions. Inmates would generally be limited to a single habeas corpus proceeding brought within one year of the final action on a direct appeal. And federal courts would be required to defer to state court findings on constitutional issues unless they

clearly conflicted with established Supreme Court precedent. Applying those restrictions, however, engendered complex legal challenges that took time to resolve even if the inmate's claim ultimately failed.

Death penalty opponents had long used the risk of a wrongful execution as one of their arguments, but with limited contemporary evidence as substantiation. The advent of DNA testing as forensic evidence beginning in the late 1980s, however, helped dramatize the wrongful-conviction issue. In 1993, Kirk Bloodsworth became the first death row inmate to win release through DNA testing after an analysis of evi-

dence cleared him of the rape-murder of a 9-year-old girl in Maryland eight years earlier. Today, the Death Penalty Information Center says DNA testing has figured in 17 out of the 139 exonerations it counts since 1973.<sup>18</sup>

The "innocence issue" gained sufficient force that in Illinois, a pro-death penalty Republican governor, George Ryan, declared a moratorium on executions in 2000 pending a study of the state's procedures. After the commission found death sentences imposed disproportionately on the poor and ethnic or racial minorities, Ryan decided — days before leaving office in January 2003 — to commute the

# Did Texas Execute an Innocent Man?

*Experts are reexamining the fire that killed Cameron Willingham's daughters.*

Cameron Todd Willingham was convicted of capital murder, sentenced to death and executed in Texas on Feb. 17, 2004, for the deaths of his three young daughters in a house fire that a fire marshal said was deliberately set. Now, in a case that has attracted national attention, a state commission is conducting a politically charged review of the testimony in the August 1992 trial that death penalty critics say could effectively show that Texas executed an innocent man.<sup>1</sup>

The Texas Forensic Science Commission is scheduled to meet on Nov. 19 to continue reviewing now sharply disputed testimony by a deputy state fire marshal depicting the Dec. 23, 1991, fire at Willingham's home in the small central Texas town of Corsicana as arson. Manuel Vasquez testified that the pattern of the fire indicated the use of a liquid accelerant — such as the charcoal lighter fluid found on the porch of the home.

Willingham's three daughters — Amber, 2, and 1-year-old twins Karmon and Kameron — perished in the fire. Willingham, who said he tried to rescue the girls, suffered burns of disputed severity: superficial, according to the prosecution; more serious, according to the defense and the latter-day critics of the trial. His wife, Stacy Kuykendall, was not home at the time.

The prosecution depicted Willingham as an abusive husband and father who killed the children he had never wanted — a theory sharply challenged at trial and since. Willingham maintained his innocence and, against his lawyer's advice, rejected a plea bargain calling for a life prison sentence. He continued to maintain his innocence until his execution by lethal injection.<sup>2</sup>

Shortly before the scheduled execution, Willingham's lawyers asked the state's Board of Pardon and Parole for clemency based on testimony from a national fire expert, Gerald Hurst, sharply challenging Vasquez's methods in concluding that the fire was deliberately set. Since then, other fire experts have similarly disputed Vasquez's forensic methods.

The controversy went national with the *Chicago Tribune's* critical dissection of the trial published within a year of the execution in December 2004.<sup>3</sup> The story quoted Edward Cheever, a deputy state fire marshal who had assisted in the original investigation, as agreeing that examiners had used methods no longer accepted as valid. Gov. Rick Perry, who had declined to intervene before the execution, responded to the increasing controversy by supporting legislation in 2005 to create a nine-member state commission to review the use of forensic testimony in criminal trials.<sup>4</sup>

Four years later, just as the forensic science commission was about to take up the Willingham case, Perry abruptly removed three gubernatorial appointees to the commission on Sept. 30, 2009. His three replacements included a strongly conservative district attorney, John Bradley, as chairman.<sup>5</sup>

Taking over the Willingham case, Bradley issued a draft report in July 2010 essentially rejecting the critique of the forensic testimony and proposing to end the review. Commission members refused to accept the report in September. The review resumed in a meeting on Oct. 15, where tempers flared after Bradley called Willingham "a guilty monster." In his draft report,

sentences of the state's 156 death row inmates to life imprisonment.

The Supreme Court returned to broadly phrased death penalty cases in three cases in the first decade of the 21st century. The court in 2002 prohibited the execution of a mentally retarded offender; three years later, the court similarly prohibited the execution of juvenile offenders. Dissenting justices in both cases accused the majority of substituting their views for those of legislative bodies.

Despite the criticism, the court in 2008 followed the same approach in prohibiting the death penalty for rape of a minor. The ruling appeared further to limit the death penalty to homicides or a few other offenses, including espionage, treason, terrorism or drug-kingpin activity. Despite the controversy, the three

rulings had only limited impact. Each of the decisions, in fact, was based on the small number of death sentences actually imposed in each category.<sup>19</sup>

Beginning in the 1980s, lethal injection began to displace the gas chamber as the dominant method of execution. The technique entailed use of three drugs that in sequence sedated and then paralyzed the inmate and then brought about cardiac arrest. Advanced as both more humane and more certain, the method was nearly universal in death penalty states by the early 2000s.

In time, however, lethal injection generated legal challenges and a de facto moratorium after the Supreme Court agreed in 2007 to resolve the issue in a case brought by two Kentucky inmates. They claimed that, as applied in

Kentucky, the risk of improper administration of the sedative brought about a risk of unacceptable pain that would amount to cruel and unusual punishment. By a 7-2 vote, however, the court rejected the claim, giving states a green light to resume executions thereafter.<sup>20</sup>

## Death Doubts

Death penalty critics increasingly turned to pragmatic arguments in the 2000s to make their case against capital punishment. New studies published as state and local governments faced budget crunches put the additional costs of capital cases in the tens or even hundreds of millions of dollars. Well-documented investigations by

Bradley had said the commission had no authority to investigate or express opinions on a defendant's guilt or innocence.<sup>6</sup>

In the meantime, Willingham's family had initiated an unusual, separate procedure known as a "court of inquiry" to challenge the conviction and sentence. A hearing was held before Travis County Judge Charlie Baird in Austin on Oct. 14, but a state appeals court put further proceedings on hold in response to a motion by Navarro County District Attorney R. Lowell Thompson, whose office originally prosecuted Willingham.<sup>7</sup>

With the commission set to reconvene at its regularly scheduled meeting on Nov. 19, national experts and advocates disagree about what the new investigations show. The evidence compiled since the execution "has led to the inescapable conclusion that Willingham did not set the fire for which he was executed," the Innocence Project declares on its website. Kent Scheidegger, legal director of the pro-law enforcement Criminal Justice Legal Foundation in Sacramento, Calif., disagrees. "I don't think that will be definitively proven either way," Scheidegger says. "I think there's strong reason to believe that he was actually guilty."



*Cameron Todd Willingham was convicted of setting a house fire that killed his three daughters and executed in Texas in 2004. Critics of the arson investigation say he may be proved innocent.*

Texas Moratorium Network

<sup>1</sup> For recent comprehensive accounts, see David Grann, "Trial by Fire: Did Texas execute an innocent man?," *The New Yorker*, Sept. 7, 2009, [www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann); "Death by Fire," "Frontline," Oct. 19, 2010, [www.pbs.org/wgbh/pages/frontline/death-by-fire/](http://www.pbs.org/wgbh/pages/frontline/death-by-fire/). The website includes the complete program along with extensive other material. A Wikipedia entry includes citations to other coverage: [http://en.wikipedia.org/wiki/Cameron\\_Todd\\_Willingham](http://en.wikipedia.org/wiki/Cameron_Todd_Willingham). For an opposite view of the case, see materials on the blog *Homicide Survivors* (<http://homicidesurvivors.com/categories/Cameron%20Todd%20Willingham.aspx>).

<sup>2</sup> The full transcript of the trial is available on the website of the Innocence Project, the New York City-based center that has taken up the case: [www.innocenceproject.org/Content/Cameron\\_Todd\\_Willingham\\_Wrongfully\\_Convicted\\_and\\_Executed\\_in\\_Texas.php](http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Wrongfully_Convicted_and_Executed_in_Texas.php).

<sup>3</sup> See Stevie Mills and Maurice Possley, "Man executed on disproved forensics," *Chicago Tribune*, Dec. 9, 2004, p. 1; the *Tribune* has continued extensive coverage of the case.

<sup>4</sup> Texas Code of Criminal Procedure, Article 38.01, <http://law.onecle.com/texas/criminal-procedure/38.01.00.html>.

<sup>5</sup> See Christy Hoppe, "Perry ousts officials before arson hearing," *The Dallas Morning News*, Oct. 1, 2009, p. 1A.

<sup>6</sup> See Erin Mulvaney, "Leader's remarks criticized," *The Dallas Morning News*, Oct. 16, 2010, p. A2; Jennifer Emily, "Panel bucks chief, rejects arson report," *ibid.*, Sept. 18, 2010, p. A1. The draft report can be found on the Texas Forensic Science Commission's website: [www.fsc.state.tx.us/documents/D\\_Willingham\\_Recommendationsfor7.23.10Mtg.pdf](http://www.fsc.state.tx.us/documents/D_Willingham_Recommendationsfor7.23.10Mtg.pdf).

<sup>7</sup> See Adam Liptak, "Family's Effort to Clear Name Frames Debate on Executions," *The New York Times*, Oct. 15, 2010, p. 17.

— Kenneth Jost

journalists and others pointed to eight executions despite strong doubts about the guilt of the condemned inmate.

The pragmatic arguments helped spur two states, New Jersey and New Mexico, to eliminate their largely unused death penalty laws. The federal government and some states also passed laws aimed at guarding against the risk of wrongful convictions or executions.<sup>21</sup> Polls, however, continued to register majority support for capital punishment.

Economic costs emerged as part of the death penalty debate as early as 1988, when the *Sacramento Bee* in California estimated the state could save \$90 million by abolishing the death penalty. Five years later, a study led by Philip Cook, a public policy research professor at Duke University in Durham, N.C.,

concluded that North Carolina paid an extra \$329,000 for each capital trial.

New studies in each state put higher price tags on death penalty procedures. The California commission in 2008 concluded that simply housing the state's death row population cost an extra \$60 million compared to the cost of holding them in conventional, maximum-security facilities. Cook revisited the issue in a study published in fall 2009 that estimated North Carolina could save nearly \$11 million a year by abolishing capital punishment.<sup>22</sup>

Investigative reports by newspapers also played a part in fortifying claims of wrongful executions. The *Houston Chronicle*, for example, in 2005 cast doubt on the guilt of Ruben Cantu, executed in 1993 for a killing in an attempted rob-

bery in San Antonio eight years earlier. The *Chronicle* cited a recanting by an eyewitness who said police pressured him to identify Cantu along with admissions of possible error by the prosecutor, judge and jury forewoman. A year later, the *Chicago Tribune* cited a dubious identification and inconclusive forensic evidence in questioning the guilt of another Texas inmate, Carlos DeLuna, executed in 1989 for a fatal stabbing in a convenience store holdup.

Authorities, however, have generally defended their actions in the face of the belated innocence claims. The new prosecutor in San Antonio, for example, reaffirmed Cantu's guilt after a reinvestigation. Similarly, the St. Louis prosecutor's office frustrated death penalty opponents by rejecting after a new

review claims by the NAACP Legal Defense Fund that Larry Griffin had been wrongly convicted and executed in 1995 for a drive-by shooting in 1981.

But the *Tribune's* 2004 investigation of the execution of a Texas man, Cameron Todd Willingham, for the house fire that killed his three children has prompted a still ongoing review of testimony by forensic experts that the fire was deliberately set, not accidental as Willingham claimed.<sup>23</sup>

The cost and innocence issues helped opponents of capital punishment win legislative passage of death penalty repeals in New Jersey and New Mexico. New Jersey's action marked the first legislative repeal of capital punishment since the Supreme Court upheld revised death penalty laws in 1976. In signing the bill on Dec. 17, 2007, Democratic Gov. John Corzine said the action would end "state-endorsed killing." The night before, he had commuted the sentences of eight death row inmates to life imprisonment.

New Mexico became the second repeal state when Democratic Gov. Bill Richardson, a onetime death penalty supporter, signed a similar measure on March 18, 2009, citing what he called "the reality" that the death penalty system "can never be perfect." In two other states, Massachusetts and New York, death penalty laws were ruled unconstitutional by state courts, and reenactment measures failed in the legislature.<sup>24</sup>

The Death Penalty Information Center sought to buttress public doubts about capital punishment with the results of a poll of police chiefs in October 2009 that questioned many of the arguments for the death penalty. A majority of the randomly selected respondents said that debates about the death penalty distracted legislators from focusing on "real solutions" to crime problems. Only one-third — 37 percent — said they thought the death penalty significantly reduced the number of homicides.

In surveys conducted the same month, however, the Gallup Organization found

public support for the death penalty still strong, with a 2-1 margin (65 percent to 31 percent) favoring capital punishment for murder. Most respondents (57 percent) said capital punishment was administered fairly, and a near majority (49 percent) said the death penalty was not imposed often enough.<sup>25</sup> ■

## CURRENT SITUATION

### Paying for Lawyers

Two Southern states are being challenged in court to provide better representation for capital defendants or death row inmates through legal offices that critics say the states, Georgia and Mississippi, have systematically underfunded.

Meanwhile, death row inmates in North Carolina are invoking a one-year-old state law to try to persuade courts to reduce their sentences to life imprisonment because of alleged racial bias in their original trials. They are supporting their pleas with a study by two Michigan State University law professors that shows prosecutors are more than twice as likely to strike African-Americans as whites from serving on capital juries.

In Georgia, Republican Gov. Sonny Perdue is considering a request by the state's public defender system office for a special legislative session to address funding problems that date from the agency's \$2 million defense of Brian Nichols for the deadly shootings in the Fulton County Courthouse in 2005.<sup>26</sup>

The state's Public Defender Council voted 7-4 in October to request the special session after members of the 12-lawyer Georgia Capital Defender Office testified they were unable to provide adequate representation for capital defendants assigned to the office.

Georgia created a statewide public defender system with the separate capital defender office in 2003 to try to remedy the underrepresentation of indigent defendants, especially in death penalty cases. "It was a great structural improvement," says Maher, of the ABA's Death Penalty Representation Project. But the office was drained financially by having to spend more than \$2 million to defend Nichols in the 2005 courthouse shooting case.

The office has also been pinched by the legislature's siphoning off funds from court fees and surcharges supposedly dedicated to the defender system. With the office short of staff and short of funds to pay private attorneys, at least two defendants have been forced to accept representation by defenders who say they cannot handle the cases. Both cases have been delayed while defendants challenged the moves in court. "The system has collapsed," Maher says.

Perdue's office was initially unreceptive to the plea for a special legislative session. Bert Brantley, a spokesman for the Republican chief executive, noted that the cost of a special session "would likely exceed the amount the council would request, much less receive."

Funding and other issues have similarly bedeviled Mississippi's Office of Post Conviction Capital Counsel since its creation in 2000 after a state Supreme Court ruling guaranteeing death row inmates the right to a lawyer in challenging their convictions or sentences.<sup>27</sup>

As in Georgia, Maher calls the creation of the new office "a structural improvement" but says it immediately encountered problems. "The state did not fund the office, did not staff the office and interfered with the director of the office," Maher says.

The law creating the office provided for the director to be appointed by the state's chief justice. The first director was effectively forced to resign after complaining of understaffing, according to a petition now pending with the Mississippi Supreme

*Continued on p. 982*



# At Issue:

## *Should capital punishment be abolished in the United States?*



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WRITTEN FOR *CQ RESEARCHER*, NOVEMBER 2010

**i**t is past time to end the free ride that the death penalty has been given for years and start to examine it like any other government program in terms of costs and returns.

Per person, the death penalty is probably one of the most expensive state programs, and it produces no measurable gain in public safety. While states were spending millions of dollars on a single capital case, the average police budget had to be cut by 7 percent this year. States are letting prisoners go early, curtailing ambulance services and closing schools. Programs that clearly benefit the safety of society are being slashed because of the budget crisis, but death penalty expenditures continue to rise.

Some say you can't put a price on justice, but you can put a price on programs that actually lower crime. Cities like New York and Washington have been enormously successful in cutting murder rates without the death penalty through programs like community policing and new technologies that focus on high-crime areas. States have a choice: They can execute perhaps one person per year at a cost of \$10 million, or use the same money to hire 200 police officers.

The death penalty is not needed and is not regularly carried out in most of the country. Over 80 percent of our executions are in the South, mostly in a few states. Over 99 percent of murders do not result in an execution. Those cases that do end in a death sentence are often overturned and, when done over with a fair trial, frequently result in a life sentence anyway.

The costs of the death penalty are not only measured in dollars spent. Executions can't be undone, and they risk innocent lives. More than 135 people have been freed from death row and exonerated since the death penalty was reinstated. The death penalty divides the community by distinguishing between "worthy" and "unworthy" victims, with the difference often falling along racial and economic lines.

The selection of who lives and who dies cannot be rationally explained. Just this year, an organized-crime boss got off with time served after seven years for 11 murders, while a grandmother with a 72 I.Q. was executed. Replacing the death penalty with a maximum sentence of life in prison without parole, and using the resources saved to reduce crime, is simply a matter of responsible government.



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WRITTEN FOR *CQ RESEARCHER*, NOVEMBER 2010

**t**he American people remain solidly in support of capital punishment. Three-quarters of the people believe it should be imposed at least as often as it is at present, according to a recent Gallup Poll, and this number has remained rock steady over the 10 years Gallup has been asking the question. The horrible murders in Connecticut of Jennifer Hawke-Petit and her daughters illustrate why. For some crimes, anything less is a gross miscarriage of justice.

In addition, the preponderance of evidence supports what common sense has always told us — the death penalty has a deterrent effect and saves innocent lives when it is actually enforced. The studies showing deterrence have been criticized, but the criticisms have been answered, and their conclusion still stands.

Having failed to convince the people of their position on grounds of justice, the opponents of the death penalty are now resorting to a cost argument. The death penalty takes so long and costs so much for the few executions actually carried out, the argument goes, that we should simply throw in the towel and give up, sacrificing justice to expediency.

The argument assumes that long delays and exorbitant costs are an inherent part of the death penalty. They are not. Much of the delay can be eliminated with the proper reforms, and much of the cost can be cut at the same time. For example, John Allen Muhammad, the D.C. Sniper, was executed less than six years from the date of sentence. That is not uncommon in Virginia, a state that has taken reform of its death penalty reviews seriously. Capital cases are complex, to be sure, but this case was as complex as they come, and it was thoroughly reviewed in a quarter of the time a capital case takes in California.

Most of the delay and expense reviewing capital cases has nothing to do with questions of actual guilt or innocence. It is the choice of sentence for a clearly guilty murderer that is litigated over and over in court after court. We can eliminate much expense and delay by having only one full review for the penalty and limiting all further reviews to claims with a substantial bearing on actual innocence.

As President Bill Clinton said in a different context many years ago, "Mend it; don't end it."

# DEATH PENALTY DEBATES

*Continued from p. 980*

Court filed by lawyers from the office representing 15 inmates whose post-conviction challenges were rejected. Some of the post-conviction pleas failed because of missed deadlines due to understaffing, according to the petition.

The law was amended in 2009 to give the governor the power to appoint the director, but funding and staffing problems persist, according to the petition, originally filed before a trial judge in Jackson, the state capital. By assigning the office more cases than the staff can competently represent, the petition claims, the state has acted "to neutralize [the inmates'] post-conviction representation."

The state won an initial ruling in May to dismiss the petition, and the inmates appealed to the state high court. The state attorney general's office again moved to dismiss the case, arguing in part that it amounted to an effort to relitigate post-conviction challenges already rejected.

In North Carolina, 152 of the state's 159 death row inmates filed bias claims by the August deadline set under the state's Racial Justice Act, enacted in 2009. The law requires judges to reduce a death sentence to life imprisonment if race was "a significant factor" in the death sentence.

Lawyers from the Capital Defense Litigation Group in Durham based the pleas in part on a study by Barbara O'Brien and Catherine Grosso, professors at the Michigan State University College of Law. Among the 159 death row inmates, the professors found, 31 were tried by all-white juries and another 38 had only one per-

son of color on the jury. The study also found that a defendant was more than twice as likely to be sentenced to death in cases with at least one white victim than if the case did not involve a white victim.

The state's prosecutors opposed passage of the law, but are now voicing confidence the racial bias claims will be rejected. "I feel very confident that race has not played a role in imposing the death penalty," Peg Dorer, director of the North Carolina Conference of District Attorneys, said.<sup>28</sup>



*Anti-death penalty activist Delia Perez Meyer, whose brother has been on death row in Texas for 11 years, demonstrates at the U.S. Supreme Court in June 2009. Meyer joined the anti-capital punishment movement after her brother, Louis Castro Perez, was falsely accused of murdering three of his best friends.*

## Debating Changes?

Death penalty supporters look to Republican gains in gubernatorial and legislative elections to boost efforts to streamline capital punishment, but opponents expect to continue to argue cost and other issues to try to narrow or abolish the practice in some states.

The Republican gains — six governorships and at least 680 state legislative seats — are seen as generally strengthening pro-law enforcement sentiments in state capitals even if the GOP gains came from exploiting economic issues, not law and order. Except for some limited clashes in Cal-

ifornia and Connecticut, capital punishment went all but unaddressed in state races. "It was a non-issue," says Burns with the national district attorneys' group.

Even so, both Burns and the Criminal Justice Legal Foundation's Scheidegger say the election results improve the prospects for some pro-death penalty reforms. "Generally speaking, we're going to have legislatures across the country that are more favorable to the death penalty," says Scheidegger. "We'll have a better chance to get procedural reforms

enacted, and the other side will have less chance for their proposals."

Burns says he expects legislation in several states aimed at reducing the time from imposition of a death sentence to the actual execution. But he also envisions possible proposals in some states "to take the death penalty off the table if there can't be an appropriate way to carry it out."

From the opposite perspective, Dieter with the Death Penalty Information Center emphasizes that voters elected death penalty

opponents and critics in some states despite the Republican tide. "These elections showed that voters do not vote solely or even principally on the death penalty," Dieter says. Capital punishment, he argues, "is not the third rail" of state politics.

In fact, Democrats Jerry Brown in California and Daniel Malloy in Connecticut won gubernatorial contests despite criticism of their death penalty views by their GOP opponents. (Malloy favors abolishing the death penalty; Brown has opposed it in the past, but enforced the law as state attorney general.) In a third race, Democrat Martin O'Malley was reelected governor

AFP/Getty Images/Tim Sloan

in Maryland after a campaign with little mention of his moratorium on death sentences in the state. And Kansans elected a Republican governor, Sam Brownback, who opposes the death penalty.

Dieter says death penalty opponents will continue to argue against capital punishment on economic grounds. The death penalty is “costing a large amount,” but “not giving the public safety,” Dieter says. “That’s a program that any state official is going to look at closely.”

The cost issue was an important factor in New Mexico’s decision to abolish the death penalty in 2009. It also figured in abolition efforts that passed in one but not both legislative chambers in Colorado, Montana and New Hampshire, according to Sarah Hammond, director of the criminal justice program at the National Conference of State Legislatures in Denver. “We’re seeing states focus more on it in terms of economic issues instead of emotional issues,” she says.

Apart from New Mexico’s abolition bill, the most important death penalty legislation from the previous two-year cycle was North Carolina’s Racial Justice Act, which requires commuting a death sentence if racial bias is shown to be “a significant factor” in the sentence. Similar measures were considered but not enacted in other states. Kentucky is the only other state with a similar law, but it has gone largely unused because it provides for challenges before trial instead of after a verdict.

Other new death penalty laws addressed narrow issues. Florida made it a capital offense for someone subject to a domestic violence protective order to murder the person who obtained the order. Virginia provided the death penalty for the killing of firefighters or auxiliary police officers. Oklahoma gave corrections officials greater discretion in choice of drugs for lethal injections.<sup>29</sup>

Burns and Scheidegger both say public discontent with the protracted delays after imposition of a death sentence will aid legislators in pushing streamlining proposals. “Everyone agrees the present system is unacceptable,” Scheidegger says.

“We’re swinging back to an environment where legislators will be receptive to the argument that if the death penalty is obstructed, we should get rid of the obstructions instead of getting rid of the death penalty,” Scheidegger says.

But death penalty expert Streib doubts that efforts to speed executions will succeed. “If we are concerned about catching mistakes, then we want to be very, very careful,” says Streib. “I don’t see us changing that.” ■

## OUTLOOK

### ‘Tinkering’ With Death

In the three years since the killings of his wife and two daughters, Dr. William Petit has unreservedly called for the death penalty for the two men accused of the slayings: Steven Hayes and Joshua Komisarjevsky. But as he spoke on the courthouse steps after Hayes’ death sentence on Nov. 8, Petit bristled at the notion that the decision could bring “closure” for him.

“I don’t think there’s ever closure. I think whoever came up with that concept is an imbecile, whoever they are,” Petit said with television cameras rolling. The killings had left “a hole with jagged edges,” he explained, “and over time, the edges may smooth out a little bit, but the hole in your heart, the hole in your soul is still there, so there’s never closure.”

Hayes is due to be formally sentenced on Dec. 2. Co-defendant Komisarjevsky faces trial early in 2011.

But for either man, an execution — if ever carried out — likely lies years in the future, after a long course of appeals and post-conviction challenges.

The delays, often stretching over decades, frustrate death penalty supporters and anger many in the public. “It makes a mockery of the system,” says Burns with the district attorneys’ group.

Delay, however, is built into the system — from the open-ended sentencing hearing required under Supreme Court precedent to the full round of appeals and state and federal post-conviction challenges available to any defendant. And an adversary system premised on zealous legal representation for those accused of crimes can be rushed only so far. “I don’t see death penalty attorneys trying to speed up the system,” says law professor Streib. “They’re trying to keep their clients alive as long as possible.”

Law enforcement advocates still expect procedural obstacles to be surmounted over time. “Over the long term, as deterrence becomes clear, we will eventually get to the point of breaking down those barriers,” Scheidegger of the Criminal Justice Legal Foundation says.

Death penalty opponents see an opposite trend. “The momentum is in favor of abolition,” says Redfield, representing the criminal defense lawyers’ group. “The more that people think about it, the more they will see this is not in anybody’s interest. It costs too much. It doesn’t deter anybody.”

Supreme Court Justice Stevens reflected that latter view when he called for reconsidering the death penalty in his separate opinion in the lethal injection case in 2008. A decade-and-a-half earlier, another liberal justice, Harry A. Blackmun, had similarly renounced the death penalty as his time on the court was about to end.

“From this day forward, I shall no longer tinker with the machinery of death,” Blackmun wrote in dissenting from the court’s otherwise routine denial of



review in a capital case in 1994. Despite two decades of efforts by the court to ensure fairness, Blackmun wrote, “the death penalty remains fraught with arbitrariness, discrimination . . . and mistake.”<sup>30</sup>

In both of the cases, Justice Scalia disagreed, mocking his colleagues for substituting their view for the popular will. “Convictions in opposition to the death penalty are often passionate and deeply held,” Scalia wrote in the 1994 case. “That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority’s views upon the people.”<sup>31</sup>

However emotional, this debate is more theoretical than real in much of the country. Since 1976, three states — Texas, Virginia and Oklahoma — have accounted for more than half of the executions in the United States, while 16 states and the District of Columbia have carried out none.

Within states, the concentration of death sentences is even greater, according to data compiled by Frank Baumgartner, an anti-death penalty professor of political science at the University of North Carolina-Chapel Hill. Out of 3,146 counties, only 454 — roughly one-seventh — have carried out executions. Harris County (Houston) alone accounts for 115 executions, more than any state except Texas.<sup>32</sup>

Scheidegger attributes the geographic concentration in part to “abolitionist” sentiment on courts in some states and federal circuits that results in rulings effectively thwarting death penalty laws. Whatever the cause, death penalty opponents say the pattern shows that capital punishment remains as arbitrary as the Supreme Court found it to be in its 1972 *Furman* decision striking down all existing death sentences.

For his part, Streib expects death sentences to continue to decline even if polls continue to show majority support for the death penalty in theory. He notes that polls also show a near majority would be “satisfied” with life imprisonment without parole in what are now capital cases.

More broadly, Streib calls the debate “fairly irrelevant” to the criminal justice system. “It’s less than one-half of 1 percent of all people arrested for murder who are executed,” Streib says. “It’s a great debating point, but it is just irrelevant in the whole criminal justice process.” ■

## Notes

<sup>1</sup> Background drawn in part from ongoing coverage by William Glaberson in *The New York Times*, including these stories: “Jurors Vote for Death in Connecticut Trial,” Nov. 9, 2010, p. A1; and “Man Is Found Guilty on 16 Counts in Connecticut Triple-Murder Trial,” Oct. 6, 2010, p. A25.

<sup>2</sup> Quoted in William Glaberson, “Cheshire Case

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<sup>3</sup> See “Death Sentences and Execution, 2009,” Amnesty International, [www.amnesty.org/en/library/asset/ACT50/001/2010/en/17348b70-3fc7-40b2-a258-af92778c73e5/act500012010en.pdf](http://www.amnesty.org/en/library/asset/ACT50/001/2010/en/17348b70-3fc7-40b2-a258-af92778c73e5/act500012010en.pdf).

<sup>4</sup> See David Grann, “Trial by Fire: Did Texas execute an innocent man?” *The New Yorker*, Sept. 7, 2009, [www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann).

<sup>5</sup> The decision is *Baze v. Rees*, 553 U.S. 535 (2008), [www.supremecourt.gov/opinions/07pdf/07-5439.pdf](http://www.supremecourt.gov/opinions/07pdf/07-5439.pdf).

<sup>6</sup> Stuart Banner, *The Death Penalty: An American History* (2002), p. 114.

<sup>7</sup> For a good journalistic overview of the scholarship, see Adam Liptak, “Does Death Penalty Save Lives? A New Debate,” *The New York Times*, Nov. 18, 2007, sec. 1, p. 1, [www.nytimes.com/2007/11/18/us/18deter.html?pagewanted=all&\\_r=1&sq=does%20the%20death%20penalty%20save%20lives&st=cse&scp=1](http://www.nytimes.com/2007/11/18/us/18deter.html?pagewanted=all&_r=1&sq=does%20the%20death%20penalty%20save%20lives&st=cse&scp=1). The website version includes hyperlinks to several of the major articles. Some background drawn from article.

<sup>8</sup> Banner, *op. cit.*, pp. 279-281.

<sup>9</sup> John Donohue and Justin J. Wolfers, “The Death Penalty: No Evidence for Deterrence,” in Joseph E. Stiglitz, et al. (eds.), *The Economists’ Voice: Top Economists Take On Today’s Problems* (2008), p. 255.

<sup>10</sup> “Report and Recommendations on the Administration of the Death Penalty in California,” California Commission on the Fair Administration of Justice, June 30, 2008, [www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf](http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf). For coverage, see Maura Dolan, “Death row report sees failed system,” *Los Angeles Times*, July 1, 2008, p. A1.

<sup>11</sup> The case is *Wiggins v. Smith*, 539 U.S. 510 (2003). Bruck is quoted in Charles Lane, “Death Penalty of Md. Man Is Overturned,” *The Washington Post*, June 27, 2003, p. A1.

<sup>12</sup> The decision is *State v. Gamble*, Ala. Ct. Crim. App., Oct. 1, 2010, [www.schr.org/files/post/Gamble%20CCA%20Rule%2032%20Opinion%20affirming%20IAC%2010-01-10.pdf](http://www.schr.org/files/post/Gamble%20CCA%20Rule%2032%20Opinion%20affirming%20IAC%2010-01-10.pdf). Lawyers for the Southern Center for Human Rights represented Gamble. See “SCHR Wins Reversal of Death Sentence for Alabama Prisoner LaSamuel Gamble,” Oct. 18, 2010, [www.schr.org/action/resources/schr\\_wins\\_reversal\\_of\\_death\\_sentence\\_for\\_alabama\\_death\\_row\\_prisoner\\_lasamuel\\_gamble](http://www.schr.org/action/resources/schr_wins_reversal_of_death_sentence_for_alabama_death_row_prisoner_lasamuel_gamble).

## About the Author



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<sup>13</sup> For a comprehensive history, see Banner, *op. cit.* Historical overviews can be found in Matthew B. Robinson, *Death Nation: The Experts Explain American Capital Punishment* (2008), pp. 14-51; Victor L. Streib, *Death Penalty in a Nutshell* (3d ed.) (2008), pp. 1-8.

<sup>14</sup> The citation is 408 U.S. 238 (1972). For an overview of the Supreme Court's death penalty cases, see David Savage, *CQ Press Guide to the U.S. Supreme Court* (5th ed.) (2010), Vol. 1, pp. 764-773.

<sup>15</sup> The citation is 428 U.S. 153 (1976). The decisions striking down mandatory death penalty laws are *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>16</sup> The citation is 481 U.S. 279 (1987). Names and citations for other cases can be found in Savage, *op. cit.*

<sup>17</sup> The major decisions are *Lockett v. Ohio*, 438 U.S. 586 (1978) (mitigating evidence), and *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim impact statements).

<sup>18</sup> For background, see Kenneth Jost, "DNA Databases," *CQ Researcher*, May 28, 1999, pp. 449-472.

<sup>19</sup> The decisions are *Kennedy v. Louisiana*, 554 U.S. -- (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). For accounts of each case, see the respective yearly editions of Kenneth Jost, *The Supreme Court Yearbook*.

<sup>20</sup> The decision is *Baze v. Rees*, *op. cit.* For an account, see Jost, *The Supreme Court Yearbook 2007-2008*.

<sup>21</sup> For background, see Steve Weinberg, "Wrongful Convictions," *CQ Researcher*, April 17, 2009, pp. 345-372.

<sup>22</sup> For the recent studies, see California Commission, *op. cit.*; Philip J. Cook, "Potential Savings from Abolition of the Death Penalty in North Carolina," *American Law and Economics Review*, Vol. 11, Issue 2 (2009), pp. 498-529.

<sup>23</sup> For original story reopening case, see Stevie Mills and Maurice Possley, "Man executed on disproved forensics," *Chicago Tribune*, Dec. 9, 2004, p. 1.

<sup>24</sup> Corzine quoted in Deborah Howlett, "Death row disappears as Corzine signs bill," *The (Newark) Star-Ledger*, Dec. 18, 2007, p. 1; Richardson quoted in "Richardson Signs Bill Abolishing Death Penalty," *Albuquerque Journal*, March 13, 2009, p. 1.

<sup>25</sup> See Death Penalty Information Center, "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis," October 2009, [www.deathpenaltyinfo.org/documents/Costs](http://www.deathpenaltyinfo.org/documents/Costs)

## FOR MORE INFORMATION

**American Association of Intellectual and Developmental Disabilities**, 501 Third St., N.W., Suite 200, Washington, DC 20001; (202) 387-1968; [www.aamr.org](http://www.aamr.org). Promotes progressive policies for people with intellectual and developmental disabilities.

**American Bar Association Death Penalty Representation Project**, 740 15th St., N.W., Washington, DC 20005; (202) 662-1734; [new.abanet.org/DeathPenalty/RepresentationProject](http://new.abanet.org/DeathPenalty/RepresentationProject). Recruits competent volunteer attorneys for death row inmates.

**Criminal Justice Legal Foundation**, P.O. Box 1199, Sacramento, CA 95816; [www.cjlf.org](http://www.cjlf.org); (916) 446-0345. Public interest law organization seeking legal balance between crime victims and the criminally accused.

**Death Penalty Information Center**, 1101 Vermont Ave., N.W., Suite 701, Washington, DC 20005; (202) 289-2275; [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org). Offers analysis and information on issues concerning capital punishment.

**Innocence Project**, 100 Fifth Ave., Third Floor, New York, NY 10011; (212) 364-5340; [www.innocenceproject.org](http://www.innocenceproject.org). Litigation and public policy organization seeking exoneration for the wrongfully convicted.

**National Association of Criminal Defense Lawyers**, 1150 18th St., N.W., Suite 950, Washington, DC 20036; (202) 872-8600; [www.criminaljustice.org](http://www.criminaljustice.org). Works with criminal defense lawyers to ensure justice and due process for all those accused.

**National Conference of State Legislatures**, 444 N. Capitol St., Suite 515, Washington, DC 20001; (202) 624-5400; [www.ncsl.org](http://www.ncsl.org). Provides research and technical assistance to state legislators and their staffs.

**National District Attorneys' Association**, 99 Canal Center Plaza, Suite 510, Alexandria, VA 22314; (703) 549-9222; [www.ndaa.org](http://www.ndaa.org). Professional organization representing criminal prosecutors around the world.

**Southern Human Rights Center**, 83 Poplar St., N.W., Atlanta, GA 30303; (404) 688-1202; [www.schr.org](http://www.schr.org). Provides legal representation for people facing the death penalty.

RptFinal.pdf; Gallup, "Death Penalty," [www.gallup.com/poll/1606/death-penalty.aspx](http://www.gallup.com/poll/1606/death-penalty.aspx) (visited Nov. 5, 2010).

<sup>26</sup> For coverage, see Bill Rankin, "Defender agency seeks special session for funds," *The Atlanta Journal-Constitution*, Nov. 2, 2010, p. 1B. Some background drawn from Adam Liptak, "Poor Defendants and a Strained State Budget Cross Paths in Georgia," *The New York Times*, July 6, 2010, p. A13. The Supreme Court declined to hear the case referenced in Liptak's story. See also Andria Simmons, "A murder trial caught up in a legal quandary," *The Atlanta Journal-Constitution*, Oct. 9, 2010, p. 5B.

<sup>27</sup> For coverage, see Jimmie E. Gates, "State's legal help for death row inmates called a failure," *The Clarion-Ledger* (Jackson, Miss.), Oct. 19, 2010.

<sup>28</sup> Quoted in Nathan Koppel, "Death Penal-

ty Goes on Trial in North Carolina," *The Wall Street Journal*, Sept. 20, 2010, p. A6.

<sup>29</sup> See Death Penalty Information Center, "Recent Legislative Activity," [www.deathpenaltyinfo.org/recent-legislative-activity](http://www.deathpenaltyinfo.org/recent-legislative-activity); National Conference of State Legislatures, "Samples of Recently Enacted Capital Punishment Legislation," [www.ncsl.org/default.aspx?tabid=21019](http://www.ncsl.org/default.aspx?tabid=21019).

<sup>30</sup> See *Collins v. Collins*, 510 U.S. 1114 (1994) (Blackmun, J., dissenting from denial of certiorari). For coverage, see Linda Greenhouse, "Death Penalty Is Renounced by Blackmun," *The New York Times*, Feb. 23, 1994, p. A1.

<sup>31</sup> *Collins v. Collins*, *op. cit.* (Scalia, J., concurring).

<sup>32</sup> Frank R. Baumgartner, "The Geography of the Death Penalty," Oct. 17, 2010, [www.unc.edu/~fbaum/Innocence/NC/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf](http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf).

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A professor at UCLA Law School traces with relative objectivity the legal, political and cultural history of the death penalty through the end of the 20th century. For a longer history by a confirmed opponent, see Hugo Bedau, *The Death Penalty in America* (Oxford University Press, 4th ed., 1997).

Baumgartner, Frank R.; Suzanna [Linn] DeBoef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence*, Cambridge University Press, 2008.

The authors trace and analyze the "new" innocence argument against the death penalty, which they say has been "so effective in changing U.S. public opinion and public policy." Baumgartner is now a professor of political science at the University of North Carolina-Chapel Hill; Linn a professor at Pennsylvania State University, Boydston an assistant professor at the University of California-Davis.

Parrish, Michael E., *The Supreme Court and Capital Punishment: Judging Death*, CQ Press, 2010.

A professor of history at the University of California-San Diego uses excerpts from Supreme Court decisions and other documentary materials to trace the history of the court's death penalty jurisprudence from its limited role before the 20th century through the Due Process Revolution, abolition and reinstatement.

Rivkind, Nina, and Steven F. Shatz, *Cases and Materials on the Death Penalty* (3d ed.), West Group, 2009.

The law school casebook comprehensively covers death penalty law, primarily through Supreme Court decisions from the early 20th century to the present day.

Streib, Victor L., *Death Penalty in a Nutshell* (3d ed.), Thomson/West, 2008.

A professor at Ohio Northern University's Petit College of Law opens with a historical overview followed by chapters on

substantive criminal law, trial procedures, post-trial procedures and special issues, including racial bias.

Walker, Thomas G., *Eligible for Execution: The Story of the Daryl Atkins Case*, CQ Press, 2009.

A political science professor at Emory University chronicles the case that led to the Supreme Court's decision prohibiting execution of offenders with intellectual disabilities. A companion website (<http://walker.cqpress.com>) includes bibliographic information and links to case documents and commentary discussing the decision.

### Articles

Grann, David, "Trial by Fire: Did Texas execute an innocent man?" *The New Yorker*, Sept. 9, 2009, [www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann).

The article critically dissects the conviction and death sentence received by Cameron Todd Willingham for the deaths of his three young children in a house fire deemed to have been deliberately set based on what is now disputed forensic testimony. For an opposite view of the case, see materials on the blog *Homicide Survivors* (<http://homicidesurvivors.com/categories/Cameron%20Todd%20Willingham.aspx>).

### On the Web

**The Death Penalty Information Center**, which opposes capital punishment, maintains a comprehensive database with information on executions in the United States since 1976, methods of execution, demographics of the executed and state-by-state counts ([www.deathpenaltyinfo.org/executions](http://www.deathpenaltyinfo.org/executions)). The data are generally accepted as authoritative except for the center's compilation of death-row inmates described as "exonerated" because of reversals of their sentences. The center updates the site regularly.

**The Criminal Justice Legal Foundation** lists a variety of resources from a pro-death penalty perspective on a page on its website ([www.cjlf.org/deathpenalty/DPinformation.htm](http://www.cjlf.org/deathpenalty/DPinformation.htm)). The materials include a critique written in 2001 of the Death Penalty Information Center's "innocence" list. **The National District Attorneys Association** publishes a monthly compilation of news clips of interest to prosecutors, including death-penalty developments ([www.ndaa.org/](http://www.ndaa.org/)).

**The American Bar Association Death Penalty Representation Project** site includes extensive resources pertaining to the representation of capital defendants and death row inmates (<http://new.abanet.org/DeathPenalty/RepresentationProject/Pages/Resources.aspx>). The site also includes links to other organizations that either oppose capital punishment or are critical of the death penalty as implemented in the United States.

# The Next Step:

## *Additional Articles from Current Periodicals*

### **Costs**

**“Debating the Cost of Capital Punishment,”** *Idaho State Journal*, Jan. 31, 2010, p. H6.

Many cash-strapped states are reconsidering the high costs of sentencing prisoners to the death penalty.

**Mintz, Charlie, “Are Capital Punishment’s Financial Costs Worth It?”** *East Bay (California) Express*, Aug. 18, 2010.

A new study suggests that the administration of the death penalty is far more expensive than life in prison.

**Wilson, Betsy, “Illinois Can’t Afford the Costs,”** *St. Louis Post-Dispatch*, Jan. 29, 2010, p. A15.

Illinois taxpayers derive no benefit from the state spending millions of dollars annually on the death penalty.

**Young, JoAnne, “Death Penalty Costs Debated,”** *Lincoln (Nebraska) Journal Star*, Jan. 21, 2010, p. B1.

Nebraska state senators have rejected a proposal to determine the costs of carrying out the death penalty in the state.

### **Deterrence**

**Garland, David, “Five Myths About the Death Penalty,”** *St. Paul (Minnesota) Pioneer Press*, July 29, 2010.

The fact that many prisoners on death row wait for as long as 30 years before being executed does not make for sure or swift deterrence.

**MacQuarrie, Brian, “N.H. Trial Fuels Death Penalty Debate,”** *The Boston Globe*, Nov. 14, 2010, p. A1.

A New Hampshire state representative says the death penalty might deter criminals who take time to plan their actions.

**Romboy, Dennis, “Does the Death Penalty Deter?”** *Deseret (Utah) Morning News*, June 11, 2010.

There is no clear-cut answer as to whether the death penalty deters someone from killing someone else.

### **Legal Representation**

**Bath, Alison, “Louisiana Death Penalty: An Eye for an Eye or Ineffective?”** *The Times (Louisiana)*, Dec. 3, 2009.

More qualified legal representation for Louisiana death row inmates has contributed to an increase in exonerations and sentence reversals.

**Bluestein, Greg, “Ga. Capital Cases End Up in US Supreme Court,”** *The Boston Globe*, Sept. 18, 2010, p. A12.

Prosecutors admit that a capital defendant in Georgia was limited in his legal representation due to a funding shortfall.

**Lynch, John, “Public Defender: Paying Private Lawyer Flouts Law,”** *Arkansas Democrat-Gazette*, March 13, 2010.

The Arkansas state legislature has created a public defender commission to provide quality control over attorneys appointed to defend those facing capital crimes.

### **Life Without Parole**

**“Fewer Death Sentences in Alabama, Nation,”** *Birmingham (Alabama) News*, Jan. 5, 2010, p. 1A.

More and more juries are viewing life without parole as sufficient punishment for capital crimes.

**Batheja, Aman, “Death Sentences Have Dropped Sharply After Life Without Parole Became Possible,”** *Fort Worth (Texas) Star-Telegram*, Nov. 15, 2009, p. B1.

More Texas juries are waiving the death penalty since life without parole became an option in 2005.

**Coolidge, Sharon, and Jon Craig, “Board Votes for Mercy for Killer,”** *Cincinnati Enquirer*, May 19, 2010.

The Ohio Parole Board has recommended life without parole for a man convicted of fatally beating his on-again, off-again girlfriend.

**Egelko, Bob, “Support Remains Strong for Capital Punishment,”** *The San Francisco Chronicle*, July 22, 2010, p. C1.

Californians maintain solid support for the death penalty when it comes to especially heinous crimes, but they are divided on whether life in prison without parole is a better option for most first-degree murder.

### **CITING CQ RESEARCHER**

Sample formats for citing these reports in a bibliography include the ones listed below. Preferred styles and formats vary, so please check with your instructor or professor.

#### MLA STYLE

Jost, Kenneth. “Rethinking the Death Penalty.” *CQ Researcher* 16 Nov. 2001: 945-68.

#### APA STYLE

Jost, K. (2001, November 16). Rethinking the death penalty. *CQ Researcher*, 11, 945-968.

#### CHICAGO STYLE

Jost, Kenneth. “Rethinking the Death Penalty.” *CQ Researcher*, November 16, 2001, 945-968.

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