

*The “Issues Resources Guide” is designed to aid you in parsing through the supplementary materials and articles related to each case narrative. Below you will find the abstracts or summarizing excerpts of select articles for your reference.*

## **RACE AND THE DEATH PENALTY**

### ***GENERAL ACCOUNTING OFFICE REPORT: DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES***

*Lowell Dodge, Director, Administration of Justice Issues*

The Anti-Drug Abuse Act of 1988 requires us to study capital sentencing procedures to determine if the race of either the victim or the defendant influences the likelihood that defendants will be sentenced to death. We did an evaluation synthesis- a review and critique of existing research- on this subject to fulfill the mandate. This report provides a summary of our findings and a discussion of our approach and data limitations.

### ***EXPLAINING DEATH ROW'S POPULATION AND RACIAL COMPOSITION***

*John Blume, Theodore Eisenberg, Martin T. Wells*

Twenty-three years of murder and death sentence data show how murder demographics help explain death row populations. Nevada and Oklahoma are the most death-prone states; Texas's death sentence rate is below the national mean. Accounting for the race of murderers establishes that black representation on death row is lower than black representation in the population of murder offenders. This disproportion results from reluctance to seek or impose death in black defendant-black victim cases, which more than offsets eagerness to seek and impose death in black defendant-white victim cases. Death sentence rates in black defendant-white victim cases far exceed those in either black defendant-black victim cases or white defendant-white victim cases. The disproportion survives because there are many more black defendant-black victim murders, which are underrepresented on death row, than there are black defendant-white victim murders, which are overrepresented on death row.

### ***CROSSING RACIAL BOUNDARIES: A CLOSER LOOK AT THE ROOTS OF RACIAL BIAS IN CAPITAL SENTENCING WHEN THE DEFENDANT IS BLACK AND THEN VICTIM IS WHITE***

*William J Bowers, Marla Sandys, Thomas W Brewer*

In 1976, the United States Supreme Court assumed in *Gregg v. Georgia* and companion cases that the reformed capital statutes of Georgia, Florida, and Texas would remedy the ills, including the risk of racial bias in sentencing that made the application of the death penalty unconstitutional according to *Furman V. Georgia*. Yet studies of sentencing outcome, notably research that expressly focused on the states whose statutes the Gregg court endorsed, revealed that the pernicious influence of race in capital sentencing lingered on, most conspicuously so, in the racial boundary crossing black-defendant/white-victim cases.

*THE RELATIONSHIP BETWEEN RACE, ETHNICITY, AND SENTENCING OUTCOME: A META-ANALYSIS OF SENTENCING RESEARCH*

*Ojmarrh Mitchell, Doris L MacKenzie*

A tremendous body of research has accumulated on the topic of racial and ethnic discrimination in sentencing. These studies have produced seemingly divergent findings. The purpose of this research is to conduct an objective, comprehensive, and systematic review of the literature regarding the relationship between race/ethnicity and sentencing outcomes using quantitative methods (i.e., meta-analysis), which remedy many of the shortcomings inherent in the extant qualitative (narrative) reviews. Further, this research goes beyond simply addressing the question of whether there is unwarranted racial/ethnic sentencing disparity, but also addresses the question of *why* this body of research produces such inconsistent findings..

*LOOKING DEATHWORTHY: PERCEIVED STEREOTYPICALITY OF BLACK DEFENDANT PREDICTS CAPITAL SENTENCING OUTCOMES*

*Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson*

Researchers previously have investigated the role of race in capital sentencing, and in particular, whether the race of the defendant or victim influences the likelihood of a death sentence. In the present study, we examined whether the likelihood of being sentenced to death is influenced by the degree to which a Black defendant is perceived to have a stereotypically Black appearance. Controlling for a wide array of factors, we found that in cases involving a White victim, the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death.

*THE CONVERGENCE OF RACE, ETHNICITY, GENDER, AND CLASS ON COURT DECISION-MAKING: LOOKING TOWARD THE 21<sup>ST</sup> CENTURY*

*Marjorie S. Zatz*

Substantial attention has been paid in recent years to the effects of race and gender on criminal justice processing and sanctioning. Far less consideration has been given to the multiple and often subtle ways in which race, ethnicity, gender, and class converge to influence decision making and to the competing and shifting demands that shape this process.

*THIRTY YEARS OF SENTENCING REFORM: THE QUEST FOR A RACIALLY NEUTRAL SENTENCING PROCESS*

*Cassia C. Spohn*

As we approach the 21st century, the issue of racial discrimination in sentencing continues to evoke controversy and spark debate. ...Forty recent and methodologically sophisticated studies investigating the linkages between race/ethnicity and sentence severity are reviewed; included

are 32 studies of sentencing decisions in State courts and eight studies of sentence outcomes at the Federal level. The findings of these studies suggest that race and ethnicity do play an important role in contemporary sentencing decisions. Black and Hispanic offenders—and particularly those who are young, male, or unemployed—are more likely than their white counterparts to be sentenced to prison; in some jurisdictions, they also receive longer sentences or differential benefits from guideline departures than do similarly situated white offenders....

*BLACK STRIKES- A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE*

*Richard Bourke, Joe Hingston, Joel Devine*

While empanelling juries in serious felony trials the prosecutor may, at his or her discretion, use a limited number of “peremptory challenges” to strike prospective jurors from the panel. Data was collected from 390 felony jury trials prosecuted by the District Attorney’s Office of Jefferson Parish, Louisiana between 1994 and 2002. The rate at which prosecutors used their challenges to strike jurors was examined against the race of the jurors struck or accepted. Prosecutors chose to strike black prospective jurors at more than three times the rate of whites. Chi square testing demonstrated a highly significant racial disparity in the use of peremptory strikes by the Jefferson Parish District Attorney’s Office.

## REPRESENTATION IN CAPITAL CASES

### *MUTING GIDEONS' TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS*

*Allan K. Butcher and Michael K. Moore, State Bar of Texas*

To determine the status of indigent criminal defense in Texas, the State Bar Committee conducted three mail surveys over a four year period using the total design. The initial survey, using both open and closed ended questions, gathered the opinions of criminal defense attorneys in the state. The State Bar of Texas identified approximately 6,000 individuals who practiced criminal defense law as all or part of their law practice. In 1995, questionnaires were sent to a random sample of 3,000 attorneys from this population and we received 1,376 usable responses (46 percent response rate). A second survey was sent to every prosecutor (n=1942) in the state in 1997 and we received 1,113 usable surveys (57 percent response rate). Our final questionnaire was mailed to every judge having criminal jurisdiction (n=846). This survey yielded 494 usable responses for a response rate of 58.4 percent. It is our aim here to offer a collective assessment of the status of indigent criminal defense in Texas. While it may be impossible to evaluate every aspect of such a large and diverse state as Texas, we intend for this report to provide a comprehensive lay of the land as it pertains to legal representation of the poor.

### *COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS*

*The U.S. Department of Justice*

The U.S. Department of Justice (DOJ) is committed to the principle that all Americans should have equal access to quality legal defense. The *Compendium of Standards for Indigent Defense Systems* brings together standards from a wide variety of sources and shows the different ways in which they address practice and procedure: administration of defense systems, attorney performance, capital case representation, appellate services, and juvenile justice defense. Included are standards and rules issued by national organizations; by state agencies and special interest groups, including bar associations, public defender organizations, and state high courts; and by local court systems.

### *FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION*

*Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States*

This report responds to judicial and congressional concerns about the cost of providing representation in federal death penalty cases. Congress revived the death penalty for federal crimes in 1988, authorizing capital punishment for "drug kingpin" murders. In 1994, Congress expanded to fifty the number of federal crimes punishable by death. The portion of the Defender Services appropriation allocated to federal death penalty cases has increased over the past

decade, especially since fiscal year (FY) 1995. Federal death penalty cases consumed almost six percent of the Defender Services obligations for payments to panel attorneys for fiscal year 1997, although they comprised approximately 0.3 percent of the caseload.

*INDIGENT DEFENSE & CAPITAL CASE REPRESENTATION MEMORANDUM*

*Madelynn Herman*

This memorandum updates the September 1, 1995, memorandum IS95-1061 "Standards of Qualification for Attorneys to Handle Capital Cases on Behalf of Indigent Defendants," by Catherine Gill. The information was compiled from a Lexis statute and rules search, a Court2Court listserv survey, as well as information gathered from various indigent defense organizations. State links to on-line statutes, court rules, or public defender agencies have been provided where available. A list of resources to relevant on-line publications is also provided.

*VOLUNTEER LAWYERS AND THEIR EXTRAORDINARY ROLE IN THE DELIVERY OF JUSTICE TO DEATH ROW PRISONERS*

*Robin M. Maher*

This article discusses the lack of federal funding and qualified legal representation for Death Row inmates, both at trial and in appeals. To address these issues, the American Bar Association adopted a set of guidelines for appointing Defense Counsel in Capital Cases.

*COUNSEL FOR THE POOR: THE DEATH PENALTY NOT FOR THE WORST CRIME BUT FOR THE WORST LAWYER*

*Stephen B. Bright*

Providing the best quality representation to persons facing loss of life or imprisonment should be the highest priority of legislatures, the judiciary, and the bar. However, the reality is that it is not. So long as the substandard representation that is seen today is tolerated in the criminal courts, at the very least, this lack of commitment to equal justice should be acknowledged and the power of courts should be limited. So long as juries and judges are deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death. Otherwise, the death penalty will continue to be imposed, not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.

*FOLLY BY FIAT: PRETENDING THAT DEATH ROW INMATES CAN REPRESENT THEMSELVES IN STATE CAPITAL POST-CONVICTION PROCEEDINGS*

*Clive A. Stafford Smith & Remy Voisin Starns*

It is the thesis of this article that the Eighth Amendment is violated by any state that refuses this fundamental right (to automatically provide for counsel in state postconviction proceedings for death row inmates). It is the aim of the article to provide a blueprint to challenge any state that remains recalcitrant on this issue.

*GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE  
A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO  
COUNSEL IN CRIMINAL PROCEEDINGS*

During the 40th anniversary of the U.S. Supreme Court's decision in *Gideon v. Wainwright* (which established the right to counsel in state court proceedings for indigents accused of serious crimes), the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants held a series of public hearings to examine whether Gideon's promise is being kept. Throughout 2003, extensive testimony was received from expert witnesses familiar with the delivery of indigent defense services in 22 states representing a wide cross-section of regions, populations, and delivery systems. This comprehensive report represents the culmination of a painstaking analysis of hundreds of pages of testimony compiled from the hearings, leading to the inescapable conclusion that, forty years after Gideon, the promise of equal justice for the poor remains unfulfilled in this country.

*ASSEMBLY LINE JUSTICE- MISSISSIPPI'S INDIGENT DEFENSE CRISIS*

*Sarah Geraghty & Miriam Gobara*

This report chronicles the experiences of poor Mississippians who are charged with a crime and do not have the means to hire a lawyer to defend them. It contains accounts of legal representation so deficient as to make a mockery of the concept of equal justice under the law. The report also highlights the hidden costs to counties and taxpayers that inevitably accompany an outdated and broken-down system of justice.

## INNOCENCE AND THE DEATH PENALTY

### *EXONERATIONS IN THE US 1989-2003*

*Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil*

This is a report on a study of exonerations in the United States from 1989 through 2003. We discuss all exonerations that we have been able to locate that occurred in that fifteen-year period, and that resulted from investigations into the particular cases of the exonerated individuals. Overall, we found 340 exonerations, 327 men and 13 women; 144 of them were cleared by DNA evidence, 196 by other means. With a handful of exceptions, they had been in prison for years. More than half had served terms of ten years or more: 80% had been imprisoned for at least five years. As a group, they had spent more than 3400 years in prison for crimes in which they should never have been convicted- an average of more than ten years each.

### *PROOF BEYOND ALL POSSIBLE DOUBT: IS THERE A NEED FOR A HIGHER BURDEN OF PROOF WHEN THE SENTENCE MAY BE DEATH?*

*Judge Leonard B. Sand and Danielle L. Rose*

In this Essay, we elaborate upon the meaning of the beyond all possible doubt standard, explain why and how it should be included in the jury's capital deliberation, and explore the possible effects of its integration. Although, for the sake of simplicity, we write this Essay in the context of the FDPA, we believe that this proposal has equal resonance in state capital prosecutions and sentencing statutes.

### *ACCURACY OF EYEWITNESS MEMORY FOR PERSONS ENCOUNTERED DURING EXPOSURE TO HIGHLY INTENSE STRESS- INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 2004*

*Charles A. Morgan III, Gary Hazlett, Anthony Doran, Stephan Garrett, Gary Hoyt, Paul Thomas, Madelon Baranoski, Steven M. Southwick*

In the present study, accuracy of suspect recognition after high-stress and low-stress interrogation was assessed. Although some investigators have evaluated eyewitness memory in subjects who have personal, compared to vicarious, exposure to stress, there do not appear to be any empirical studies that have critically evaluated the relationship between realistic high-intensity stress and the accuracy of eyewitness recognition. In a study comparing the eyewitness testimonies of children who directly versus indirectly experienced a painful medical inoculation, Lindberg, Jones, McComas Collard, and Thomas (2001) reported that those with direct and personal experience exhibited increased production of flashbulb-like memories. Similarly, Yuille et al. (1994) reported that adult police trainees who directly participated in stressful role plays exhibited increased accuracy of eyewitness memory and resistance to decay over time compared to fellow trainees who simply observed the role plays. Although the data from these investigations support the idea that eyewitness memory is better if the stress has personal relevance, the intensity of the stress experienced by subjects was not of a magnitude such

as that experienced by victims of trauma. As such, the data from these studies may not be applicable to understanding the nature of memory for traumatic events. Because preclinical and human neurobiological experiments have shown that increased levels of arousal and adrenalin may enhance memory, we hypothesized that eyewitness accuracy rates would be higher for the high-stress interrogation compared to low-stress interrogation.

### *EYEWITNESS TESTIMONY*

*Gary L. Wells & Elizabeth A. Olson*

The criminal justice system relies heavily on eyewitness identification for investigating and prosecuting crimes. Psychology has built the only scientific literature on eyewitness identification and has warned the justice system of problems with eyewitness identification evidence. Recent DNA exoneration cases have corroborated the warnings of eyewitness identification researchers by showing that mistaken eyewitness identification was the largest single factor contributing to the conviction of these innocent people. We review major developments in the experimental literature concerning the way that various factors relate to the accuracy of eyewitness identification. These factors include characteristics of the witness, characteristics of the witnessed event, characteristics of testimony, lineup content, lineup instructions, and methods of testing. Problems with the literature are noted with respect to both the relative paucity of theory and the scarcity of base-rate information from actual cases.

### *THE PROBLEM OF FALSE CONFESSIONS IN THE POST-DNA WORLD*

*Steven A. Drizin & Richard A. Leo*

In this Article, we analyze 125 recent cases of proven interrogation-induced false confessions (i.e., cases in which indisputably innocent individuals confessed to crimes they did not commit) and how these cases were treated by officials in the criminal justice system. This Article has three goals. First, we provide and analyze basic demographic, legal and case-specific descriptive data from these 125 cases. Second, we analyze the role that false confession evidence played in these cases and how the defendants in these cases were treated by the criminal justice system. Third, this article suggests that several promising policy reforms particularly mandatory electronic recording of police interrogations, will minimize the number of false confessions and thereby inject a much needed dose of justice into the American criminal justice system.

### *WHY PEOPLE WAIVE THEIR MIRANDA RIGHTS: THE POWER OF INNOCENCE*

*Saul M. Kassin and Rebecca J. Norwick*

In a laboratory experiment, 72 participants who were guilty or innocent of a mock theft were apprehended for investigation. Motivated to avoid prosecution and trial, they were confronted by a neutral, sympathetic, or hostile male “detective” who sought a waiver of their Miranda rights. Later, 72 other participants watched videotapes of these sessions and answered questions about the detective and suspect. Strikingly, results showed that although the detective’s demeanor had no effect, participants who were truly innocent were significantly more likely to sign a waiver



than those who were guilty. Naively believing in the power of their innocence to set them free, most waived their rights even in the hostile detective condition, where the risk of interrogation was apparent. The conceptual and policy implications of these results are discussed.

*I'D KNOW A FALSE CONFESSION IF I SAW ONE: A COMPARATIVE STUDY OF COLLEGE STUDENTS AND POLICE INVESTIGATORS*

*Saul M. Kassin, Christian A. Meissner, and Rebecca J. Norwick*

College students and police investigators watched or listened to 10 prison inmates confessing to crimes. Half the confessions were true accounts; half were false- concocted for the study. Consistent with much recent research, students were generally more accurate than police, and accuracy rates were higher among those presented with audiotaped than videotaped confessions. In addition, investigators were significantly more confident in their judgments and also prone to judge confessors guilty. To determine if police accuracy would increase if this guilty response bias were neutralized, participants in a second experiment were specifically informed that half the confessions were true and half were false. This manipulation eliminated the investigator response bias, but it did not increase accuracy or lower confidence. These findings are discussed for what they imply about the post-interrogation risks to innocent suspects who confess....

*THE PSYCHOLOGY OF CONFESSIONS*

*Saul M. Kassin and Gisli H. Gudjonsson*

Drawing on individual case studies, archival reports, correlational studies, and laboratory and field experiments, this monograph scrutinizes a sequence of events during which confessions may be obtained from criminal suspects and used as evidence. First, we examine the preinterrogation interview, a process by which police target potential suspects for interrogation by making demeanor-based judgments of whether they are being truthful....Second, we examine the Miranda warning and waiver, a process by which police apprise suspects of their constitutional rights to silence and to counsel....Third, we examine the modern police interrogation, a guilt-presumptive process of social influence during which trained police use strong, psychologically oriented techniques involving isolation, confrontation, and minimization of blame to elicit confessions. Fourth, we examine the confession itself, discussing theoretical perspectives and research on why people confess during interrogation. Fifth, we examine the consequences of confession evidence as evaluated by police and prosecutors, followed by judges and juries in court.

*CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL*

*United States Department of Justice*

The principal purpose of the study, initiated in June 1995, was to identify and review cases in which convicted persons were released from prison as a result of posttrial DNA testing of

evidence. As of early 1996, researchers had found 28 such cases: DNA test results obtained subsequent to trial proved that, on the basis of DNA evidence, the convicted persons could not have committed the crimes for which they were incarcerated. The study also involved a survey of 40 laboratories that conduct DNA testing.

*DEPARTMENT OF JUSTICE REPORT: THE FUTURE OF FORENSIC DNA TESTING*  
*United States Department of Justice*

The principal assignment given to the Research and Development Working Group was to identify the most likely technical advances in the forthcoming decade and to assess the impact that these would have on forensic DNA analysis. We were asked to consider 5- and 10-year periods, to which we have added a 2-year forecast. Accordingly, we have taken as our future milestones the beginnings of the years 2002, 2005, and 2010.

*LOST LIVES: MISCARRIAGES OF JUSTICE IN CAPITAL CASES*  
*Samuel R. Gross*

In case after case, erroneous conviction for capital murder has been proven. I contend that these are not disconnected accidents, but systematic consequences of the nature of homicide prosecution in general and capital prosecution in particular- that in this respect, as in other, death distorts and undermines the course of the law. There are three factual premises behind the argument that capital convictions of innocent defendants are vanishingly rare. The first is that erroneous convictions are rare in criminal prosecutions of any sort, and that their danger is greatly exaggerated. The second premise is that, on the whole, homicides are easier to solve than most other violent felonies. The third premise is that homicides get far more attention than other crimes- which suggests that errors will be less likely in these cases because they are examined with much more care than others.

## LEGAL REMEDIES AVAILABLE TO DEATH SENTENCED INDIVIDUALS

### *MINIMIZING RISK- A BLUEPRINT FOR DEATH PENALTY REFORM IN TEXAS*

*Texas Defender Services*

This report attempts to apply the lessons that Illinois has learned to a system that is subject to minimal governmental scrutiny in Texas, and to propose a series of reforms that would reduce the risk of wrongful convictions or arbitrary death sentences.

### *JUDGES AND THE POLITICS OF DEATH: DECIDING BETWEEN THE BILL OF RIGHTS AND THE NEXT ELECTION IN CAPITAL CASES*

*Stephen B. Bright and Patrick J. Keenan*

Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases -- with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court. This raises serious questions about the independence and integrity of the judiciary and the ability of judges to enforce the Bill of Rights and otherwise be fair and impartial in capital cases.

### *JUDICIAL POLITICS, DEATH PENALTY APPEALS, AND CASE SELECTION: AN EMPIRICAL STUDY*

*John Blume & Theodore Eisenberg*

Judges selected by partisan elections are believed to be subject to greater political pressure than are judges with greater independence. Studying case outcomes to test this belief requires accounting for case selection, the process through which cases are selected for litigation. This article used two large death penalty case databases to explore the effects of judicial politics and case selection on grants of relief from death penalties. We find no substantial system-wide evidence that state judicial election methods affect case outcomes. But individual states' experiences confirm the death penalty's politically charged character. Accounting for case selection, as measured by states' rates of obtaining death penalty in murder cases, helps explain the pattern of relief from death sentences in one data base but not in the other. This could be interpreted as evidence that the federal judiciary processes death penalty cases under less political pressure than state judges. We also find that states with large death rows are not necessarily the states that pursue capital punishment most vigorously. California and Texas have large death rows. But California obtains death penalties at a lower rate per murder than any other major death penalty state. And Texas' death-obtaining rate is not noticeably different from that in other states with capital punishment.

*FORCES INFLUENCING CAPITAL PUNISHMENT DECISION MAKING IN STATE  
SUPREME COURTS*

*Melinda Gann Hall and Paul Brace*

The political nature of the imposition of the death penalty in state supreme courts is explored within the context of decision-making models that include judge-related and case-related forces as well as contextual variables. Pooled probit analysis is used to examine the votes of Supreme Court justices in six states in the death penalty decisions issued by these courts. Justices' personal attributes, victim characteristics, and crime characteristics are all found to exert a statistically discernable effect on judicial voting in capital cases. In essence, judgments of death in the US continue to reflect strong political as well as legal considerations. Who reviews a case can quite literally mean the difference between life imprisonment and death in capital cases, even with case features controlled.

*IS FAIRNESS IRRELEVANT? THE EVISCERATION OF FEDERAL HABEAS CORPUS  
REVIEW AND LIMITS ON THE ABILITY OF STATE COURTS TO PROTECT  
FUNDAMENTAL RIGHTS*

*Stephen B. Bright*

The purpose, scope, and wisdom of federal habeas corpus review has long been debated. Traditionally, habeas corpus review has existed to correct violations of constitutional rights, not to relitigate issues of guilt or innocence. However, in proposing restrictions on habeas corpus review in 1970, Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit raised the question of whether innocence was a proper consideration in the collateral review of criminal judgments. He answered the question in the affirmative, proposing that, with certain exceptions, habeas corpus relief should be granted only when the prisoner could establish a constitutional violation and make a colorable claim of innocence.... Today, in light of the drastic restrictions on habeas corpus review that have recently become law, it is appropriate to ask a different question: whether fairness is irrelevant to the processes by which the loss of life and liberty is determined.

## PUBLIC OPINION AND THE DEATH PENALTY

### *PUBLIC OPINION AND THE DEATH PENALTY*

*Neil Vidmar and Phoebe Ellsworth*

The purpose of this article is to assess public attitudes toward capital punishment by examining public opinion polls and other social science studies bearing on this issue. One goal is to provide legislative and judicial decision makers with a sounder social science base for evaluating public opinion about the death penalty. Another goal is to note the gaps in our knowledge of this subject, and to frame the sort of questions that need to be asked in future research. The major thesis of the article is that merely noting general levels of support for or against capital punishment will not necessarily give us the kind of information needed to judge what the public really wants with regard to the death penalty or whether those wants are based on constitutionally acceptable standards of morality. Rather, we must consider attitudes' toward capital punishment as it is to be applied to specific circumstances and conditions. Furthermore, we must consider these attitudes in the context of other attitudes and values that they hold.

### *PUBLIC OPINION, THE DEATH PENALTY, AND THE EIGHTH AMENDMENT: TESTING THE MARSHALL HYPOTHESIS*

*Austin Sarat and Neil Vidmar*

Justice Marshall's concurring opinion in *Furman v Georgia* rested in part on a theory which evaluated the characteristics and importance of public opinion as an element in deciding the constitutionality of the death penalty. Unlike most constitutional arguments, Marshall's hypothesis is empirically testable, and the present article contains the findings of one such empirical test. The results of this test may help to clarify the proper role for public opinion and thereby refocus the issues in this evolving area of the law.

### *PUBLIC OPINION, POLITICAL IDEOLOGY, AND THE DEATH PENALTY: A STATE-LEVEL ANALYSIS*

*Donald Jacobsen*

The retention of capital punishment in 38 U.S. states makes the United States an anachronism in the modern world. Indeed, of the 30 member states of the Organization for Economic Cooperation and Development, only the United States, Japan and the Republic of Korea retain the use of the death penalty. All 44 member states of the Council of Europe have abolished capital punishment, save Armenia, which is in the process of approving a new, post-Soviet penal code which will do so. All 13 members of the European Union have likewise abolished. Simply put, the United States is the only industrialized Western democracy which retains the use of the death penalty. What factors lead to the retention and use of the death penalty in those U.S. states which still practice it?

*WHY DO WHITE AMERICANS SUPPORT THE DEATH PENALTY?**Joe Soss, Laura Langbein, and Alan R. Metelko*

This article explores the roots of white support for capital punishment in the US. Our analysis addresses individual-level and contextual factors, paying particular attention to how racial attitudes and racial composition influence white support for capital punishment. Our findings suggest that white support hinges on a range of attitudes wider than prior research has indicated, including social and governmental trust and individualist and authoritarian values. Extending individual-level analyses, we also find what white responses to capital punishment are sensitive to local context. Perhaps most important, our results clarify the impact of race in two ways. First, racial prejudice emerges here as a comparatively strong predictor of white support for the death penalty. Second, black residential proximity functions to polarize white opinion along lines of racial attitude. As the black percentage of county residents rises, so too does the impact of racial prejudice on white support for capital punishment.

*UPDATE: AMERICAN PUBLIC OPINION ON THE DEATH PENALTY-IT'S GETTING PERSONAL**Samuel R. Gross*

Americans' views on capital punishment have stabilized. In 1994, when Professor Phoebe Ellsworth and I published a review of research on death penalty attitudes in the US, we began by noting that "support for the death penalty is at a near record high." That finding, like most of the others we reported, has not changed. Nonetheless, it is interesting to pause and review the data on public opinion on the death penalty that have accumulated over the past several years. Stability is less dramatic than change but it may be equally important, and there is some news to report. Recent studies shed more light on the reasons why Americans favor or oppose the death penalty, reinforce earlier findings that their views may be less predictable in concrete cases than they seem in the abstract, and hint at how these attitudes might someday change.

## **JUVENILES AND THE DEATH PENALTY**

### *THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES*

*Victor Streib*

The solitary goal of these reports is to collect in one place the best available data and information on the death penalty for juvenile offenders. It is left to other documents and to other organizations to argue about the pros and cons of this practice, with the hope that these data will inform those arguments and deliberations. Therefore, while a sketch of both pro and con rationales is provided, this report takes no position on the legality, wisdom, or morality of the death penalty for juvenile offenders.

### *ETHICS QUESTIONS RAISED BY NEUROPSYCHIATRIC, NEUROPSYCHOLOGICAL, EDUCATIONAL, DEVELOPMENTAL, AND FAMILY CHARACTERISTICS OF 18 JUVENILES AWAITING EXECUTION IN TEXAS*

*Dorothy Otnow Lewis, Catherine A. Yeager, Pamela Blake, Barbara Bard, and Maren Strenziok*

Eighteen males condemned to death in Texas for homicides committed prior to the defendants' 18<sup>th</sup> birthdays received systematic psychiatric, neurologic, neuropsychological, and educational assessments, and all available medical, psychological, educational, social, and family data were reviewed. Six subjects began life with potentially compromised central nervous system function. All but one experienced serious head traumas in childhood and adolescence. All subjects evaluated neurologically and neuropsychologically had signs of prefrontal cortical dysfunction. Neuropsychological testing was more sensitive to executive dysfunction than neurologic examination. Fifteen had signs, symptoms, and histories consistent with bipolar spectrum, schizoaffective spectrum, or hypomanic disorders. Two subjects were intellectually limited, and one suffered from parasomnias and dissociation. All but one came from extremely violent and/or abusive families in which mental illness was prevalent in multiple generations. Implications regarding the ethics involved in matters of culpability and mitigation are considered.

### *SOCIO-HISTORICAL ANALYSIS OF JUVENILE OFFENDERS ON DEATH ROW*

*Christopher A. Mallett*

This paper reviews all current eighty death row inmates who were sixteen and seventeen at the time of capital offense commissions, focusing on their socio-historic backgrounds, searching for common themes among these individuals. Socio-historical factors include poverty, mental health/psychiatric disorders, abuse/neglect, family dysfunction, organic brain damage, drug and/or alcohol addictions, school failure/MRDD, and child welfare/juvenile justice involvement. Records were obtained through all available resources including published reports, court and trial documents, current and past defense attorneys, advocacy groups, and then inmates/families themselves. The paper's first thesis is that these youth "never had a chance" because of their socio-historical background factors. The paper's second thesis is that the systems designed to support at risk youth failed for these juveniles. Executing these juvenile offenders is against their

legal rights because jury trials are not presented this mitigating evidence of their childhood and adolescent socio-historical backgrounds. This study finds systemic incompetence of counsel. These juvenile offenders' legal rights are not upheld within the current death penalty system. The death penalty should be abolished for sixteen and seventeen year-old offenders.

*JUVENILES' COMPETENCE TO STAND TRIAL: A COMPARISON OF ADOLESCENTS' AND ADULTS' CAPACITIES AS TRIAL DEFENDANTS*

*Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickson Reppucci, and Robert Schwartz*

Abilities associated with adjudicative competence were assessed among 927 adolescents in juvenile detention facilities and community settings. Adolescent' abilities were compared to those of 466 young adults in jails and in the community. Participants at four locations across the United States completed a standardized measure of abilities relevant for competence to stand trial as well as a new procedure for assessing psychosocial influences on legal decisions. Youths aged 15 and younger performed more poorly than did young adults, with a greater proportion manifesting a level of impairment consistent with that of persons found incompetent to stand trial. Adolescents also tended more often than young adults to make choices that reflected compliance with authority, as well as influences of psychosocial immaturity. Implications of these results for policy and practice are discussed, with an emphasis on the development of legal standards that recognize immaturity as a potential predicate of incompetence to stand trial.

*THE LEGAL CONSTRUCTION OF ADOLESCENCE*

*Elizabeth S. Scott*

This Essay proceeds as follows: Part I presents the legal account of childhood, sketching the traits that are assumed to distinguish children from adults and the policies that are based on these assumptions. Contrasting with the straightforward account of childhood is the absence of any clear vision of adolescence. Part II turns to the issue of how the state draws the legal boundary between childhood and adulthood. The analysis of the presumptive age of majority includes an examination of the passage of the Twenty-Sixth Amendment, which offers interesting lessons on how we fix this boundary. Part II then examines medical decision-making and abortion rights, contexts that clarify the benefits of a binary classification scheme. Abortion regulation particularly is instructive of the costs of an intermediate category that uses a case-by case approach. Part III examines juvenile justice policy, a context in which the general efficiency of binary classification does not hold. Strikingly different (and largely fictional) accounts of young offenders have been deployed in service of the policy agendas of Progressives and of modern conservatives. I conclude that a justice policy that treats adolescence as a distinct legal category not only will promote youth welfare, but will also advance utilitarian objectives of reducing the costs of youth crime.



*ATKINS, ADOLESCENCE AND THE MATURITY HEURISTIC: RATIONALES FOR A CATEGORICAL EXEMPTION FOR JUVENILES FROM CAPITAL PUNISHMENT*

*Jeffrey Fagan*

This Article addresses these questions by first examining both the jurisprudence and social science of retardation. Whereas the courts have given primacy to determinations of IQ to assess mental retardation, clinical and epidemiological evidence suggests that retardation is a multidimensional diagnostic category, and that its determination is fraught with scientific judgments that carry varying degrees of error. The Court recognized this complexity in *Atkins*, pointing out the significance of social and psychological underdevelopment. Accordingly, the Article begins by decomposing the diagnostic category of retardation into specific dimensions of underdevelopment. Second, the Article analyzes the correspondence of these dimensions of underdevelopment among the retarded to legal standards about immaturity and culpability of adolescents. If children are in fact less “formed” developmentally than adults, they lack full capacity and therefore are “less culpable” than adults. But what characteristics define immaturity among adolescents, and how do these mirror the incapacities of retarded adults? Finally, the Article addresses both the convergence of the two vectors of underdevelopment, and the difficulty of establishing reliable temporal markers when such capacities attain.