135 S.Ct. 2726
Supreme Court of the United States

Richard E. GLOSSIP, et al., Petitioners
v.
Kevin J. GROSS, et al.

No. 14–7955.
|
Argued April 29, 2015.
|
Decided June 29, 2015.

Synopsis

Background: State death-row inmates brought § 1983 action alleging that Oklahoma's three-drug lethal injection protocol created an unacceptable risk of severe pain in violation of Eighth Amendment. The United States District Court for the Western District of Oklahoma, Stephen P. Friot, J., 2014 WL 7671680, entered an order denying inmates' motion for a preliminary injunction, and they appealed. The United States Court of Appeals for the Tenth Circuit, Briscoe, Chief Judge, 776 F.3d 721, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

[1] inmates failed to establish that any risk of harm was substantial when compared to a known and available method of execution, and

[2] district court did not commit clear error in finding that midazolam was likely to render an inmate unable to feel pain.

Affirmed.

Justice Scalia filed a concurring opinion in which Justice Thomas joined.

Justice Thomas filed a concurring opinion in which Justice Scalia joined.

Justice Breyer filed a dissenting opinion in which Justice Ginsburg joined.

Justice Sotomayor filed a dissenting opinion in which Justices Ginsburg, Breyer, and Kagan joined.

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

For the reasons stated in Justice SOTOMAYOR's opinion, I dissent from the Court's holding. But rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.

The relevant legal standard is the standard set forth in the Eighth Amendment. The Constitution there forbids the "inflict[ion]" of "cruel and unusual punishments." Amdt. 8. The Court has recognized that a "claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Indeed, the Constitution prohibits various gruesome punishments that were common in Blackstone's day. See 4 W. Blackstone, Commentaries on the Laws of England 369–370 (1769) (listing mutilation and dismembering, among other punishments).

Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court's view, contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. See *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt v. Florida*, 428 U.S. 242, 247, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Jurek v. Texas*, 428 U.S. 262, 268, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); but cf. *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion) (striking down mandatory death penalty); *Roberts v. Louisiana*, 428 U.S. 325, 331, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion) (similar). The circumstances and the evidence of the death penalty's application have changed radically since then. Given those changes, I believe that it is now time to reopen the question.

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys,

and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: ***2756** (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited "cruel and unusual punishmen[t]." U.S. Const., Amdt. 8.

I

"Cruel"—Lack of Reliability

This Court has specified that the finality of death creates a "qualitative difference" between the death penalty and other punishments (including life in prison). *Woodson*, 428 U.S., at 305, 96 S.Ct. 2978 (plurality opinion). That "qualitative difference" creates "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Ibid.* There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability. Cf. *Kansas v. Marsh*, 548 U.S. 163, 207–211, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (Souter, J., dissenting) (DNA exonerations constitute "a new body of fact" when considering the constitutionality of capital punishment).

For one thing, despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed. See, *e.g.*, Liebman, Fatal Injustice; Carlos DeLuna's Execution Shows That a Faster, Cheaper Death Penalty is a Dangerous Idea, L.A. Times, June 1, 2012, p. A19 (describing results of a 4–year investigation, later published as The Wrong Carlos: Anatomy of a Wrongful Execution (2014), that led its authors to conclude that Carlos DeLuna, sentenced to death and executed in 1989, six years after his arrest in Texas for stabbing a single mother to death in a convenience store, was innocent); Grann, Trial By Fire: Did Texas Execute An Innocent Man? The New Yorker, Sept. 7, 2009, p. 42 (describing evidence that Cameron Todd Willingham was convicted, and ultimately executed in 2004, for the apparently motiveless murder of his three children as the result of invalid scientific analysis of the scene of the house fire that killed his children). See also, *e.g.*,Press Release: Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s, Jan. 7, 2011, p. 1 (Colorado Governor granted full and unconditional posthumous pardon to Joe Arridy, a man with an IQ of 46 who was executed in 1936, because, according to the Governor, "an overwhelming body of evidence indicates the 23–year–old Arridy was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else"); R. Warden, Wilkie Collins's The Dead Alive: The Novel, the Case, and Wrongful Convictions 157–158 (2005) (in 1987, Nebraska Governor Bob Kerrey pardoned William Jackson Marion, who had been executed a century earlier for the murder of John Cameron, a man who later turned up alive; the alleged victim, Cameron, had gone to Mexico to avoid a shotgun wedding).

For another, the evidence that the death penalty has been wrongly *imposed* (whether or not it was carried out), is striking. As of 2002, this Court used the word "disturbing" to describe the number of instances in which individuals had been sentenced ***2757** to death but later exonerated. At that time, there was evidence of approximately 60 exonerations in capital cases. *Atkins*, 536 U.S., at 320, n. 25, 122 S.Ct. 2242; National Registry of Exonerations, online at http://www.law.umich.edu/special/exoneration/Pages/about.aspx (all Internet materials as visited June 25, 2015, and available in Clerk of Court's case file). (I use "exoneration" to refer to relief from *all* legal consequences of a capital conviction through a decision by a prosecutor, a Governor or a court, after new evidence of the defendant's innocence was discovered.) Since 2002, the number of exonerations in capital cases has risen to 115. *Ibid.*; National Registry of Exonerations, Exonerations in the United States, 1989–2012, pp. 6–7 (2012) (Exonerations 2012 Report) (defining exoneration); accord, Death Penalty Information Center (DPIC), Innocence: List of Those Freed from Death Row, online at http://www.deathpenaltyinfo.org/innocence-and-death-penalty (DPIC Innocence List) (calculating, under a slightly different definition of exoneration, the number of exonerations since 1973 as 154). Last year, in 2014, six death row inmates were exonerated based on actual innocence. All had been imprisoned for more than 30 years (and one for

almost 40 years) at the time of their exonerations. National Registry of Exonerations, Exonerations in 2014, p. 2 (2015).

The stories of three of the men exonerated within the last year are illustrative. DNA evidence showed that Henry Lee McCollum did not commit the rape and murder for which he had been sentenced to death. Katz & Eckholm, DNA Evidence Clears Two Men in 1983 Murder, N.Y. Times, Sept. 3, 2014, p. A1. Last Term, this Court ordered that Anthony Ray Hinton, who had been convicted of murder, receive further hearings in state court; he was exonerated earlier this year because the forensic evidence used against him was flawed. *Hinton v. Alabama*, 571 U.S. ——, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (*per curiam*); Blinder, Alabama Man on Death Row for Three Decades Is Freed as State's Case Erodes, N.Y. Times, Apr. 4, 2014, p. A11. And when Glenn Ford, also convicted of murder, was exonerated, the prosecutor admitted that even "[a]t the time this case was tried there was evidence that would have cleared Glenn Ford." Stroud, Lead Prosecutor Apologizes for Role in Sending Man to Death Row, Shreveport Times, Mar. 27, 2015. All three of these men spent 30 years on death row before being exonerated. I return to these examples *infra*.

Furthermore, exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue. Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue. They are nine times more likely to exonerate where a capital murder, rather than a noncapital murder, is at issue. Exonerations 2012 Report 15–16, and nn. 24–26.

Why is that so? To some degree, it must be because the law that governs capital cases is more complex. To some degree, it must reflect the fact that courts scrutinize capital cases more closely. But, to some degree, it likely also reflects a *greater likelihood of an initial wrongful conviction*. How could that be so? In the view of researchers who have conducted these studies, it could be so because the crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure on police, prosecutors, and jurors to secure a conviction. This pressure creates a greater likelihood of convicting the wrong person. See Gross, Jacoby, Matheson, Montgomery, & Patil, ***2758** Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523, 531–533 (2005); Gross & O'Brien, Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases, 5 J. Empirical L. Studies 927, 956–957 (2008) (noting that, in comparing those who were exonerated from death row to other capital defendants who were not so exonerated, the initial police investigations tended to be shorter for those exonerated); see also B. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011) (discussing other common causes of wrongful convictions generally including false confessions, mistaken eyewitness testimony, untruthful jailhouse informants, and ineffective defense counsel).

In the case of Cameron Todd Willingham, for example, who (as noted earlier) was executed despite likely innocence, the State Bar of Texas recently filed formal misconduct charges against the lead prosecutor for his actions—actions that may have contributed to Willingham's conviction. Possley, Prosecutor Accused of Misconduct in Death Penalty Case, Washington Post, Mar. 19, 2015, p. A3. And in Glenn Ford's case, the prosecutor admitted that he was partly responsible for Ford's wrongful conviction, issuing a public apology to Ford and explaining that, at the time of Ford's conviction, he was "not as interested in justice as [he] was in winning." Stroud, *supra*.

Other factors may also play a role. One is the practice of death-qualification; no one can serve on a capital jury who is not willing to impose the death penalty. See Rozelle, The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation, 38 Ariz. S.L.J. 769, 772–793, 807 (2006) (summarizing research and concluding that "[f]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death"); Note, Mandatory Voir Dire Questions in Capital Cases: A Potential Solution to the Biases of Death Qualification, 10 Roger Williams Univ. L. Rev. 211, 214–223 (2004) (similar).

Another is the more general problem of flawed forensic testimony. See Garrett, *supra*, at 7. The Federal Bureau of Investigation (FBI), for example, recently found that flawed microscopic hair analysis was used in 33 of 35 capital cases under review; 9 of the 33 had already been executed. FBI, National Press Releases, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review, Apr. 20, 2015. See also Hsu, FBI Admits Errors at Trials: False Matches on Crime–Scene Hair, Washington Post, Apr. 19, 2015, p. A1 (in the District of Columbia, which does not have the death penalty, five of seven defendants in cases with flawed hair analysis testimony were eventually exonerated).

In light of these and other factors, researchers estimate that about 4% of those sentenced to death are actually innocent. See Gross, O'Brien, Hu, & Kennedy, Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, 111 Proceeding of the National Academy of Sciences 7230 (2014) (full-scale study of all death sentences from 1973 through 2004 estimating that 4.1% of those sentenced to death are actually innocent); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & C. 761 (2007) (examination of DNA exonerations in death penalty cases for murder-rapes between 1982 and 1989 suggesting an analogous rate of between 3.3% and 5%).

Finally, if we expand our definition of "exoneration" (which we limited to errors suggesting the defendant was actually innocent) and thereby also categorize as "erroneous" instances in which courts failed ***2759** to follow legally required procedures, the numbers soar. Between 1973 and 1995, courts identified prejudicial errors in 68% of the capital cases before them. Gelman, Liebman, West, & Kiss, A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. Empirical L. Studies 209, 217 (2004). State courts on direct and postconviction review overturned 47% of the sentences they reviewed. *Id.*, at 232. Federal courts, reviewing capital cases in habeas corpus proceedings, found error in 40% of those cases. *Ibid.*

This research and these figures are likely controversial. Full briefing would allow us to scrutinize them with more care. But, at a minimum, they suggest a serious problem of reliability. They suggest that there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime. See Earley, A Pink Cadillac, An IQ of 63, and A Fourteen–Year–Old from South Carolina: Why I Can No Longer Support the Death Penalty, 49 U. Rich. L. Rev. 811, 813 (2015) ("I have come to the conclusion that the death penalty is based on a false utopian premise. That false premise is that we have had, do have, will have 100% accuracy in death penalty convictions and executions"); Earley, I Oversaw 36 Executions. Even Death Penalty Supporters Can Push for Change, Guardian, May 12, 2014 (Earley presided over 36 executions as Virginia Attorney General from 1998–2001); but see *ante*, at 2747 – 2748 (SCALIA, J., concurring) (apparently finding no special constitutional problem arising from the fact that the execution of an innocent person is irreversible). Unlike 40 years ago, we now have plausible *evidence* of unreliability that (perhaps due to DNA evidence) is stronger than the evidence we had before. In sum, there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application.

II

"Cruel"—Arbitrariness

The arbitrary imposition of punishment is the antithesis of the rule of law. For that reason, Justice Potter Stewart (who supplied critical votes for the holdings in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), and *Gregg*) found the death penalty unconstitutional as administered in 1972:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed." *Furman*, 408 U.S., at 309–310, 92 S.Ct. 2726 (concurring opinion).

See also *id.*, at 310, 92 S.Ct. 2726 ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); *id.*, at 313, 92 S.Ct. 2726 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

When the death penalty was reinstated in 1976, this Court acknowledged that the death penalty is (and would be) unconstitutional ***2760** if "inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S., at 188, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *id.*, at 189, 96 S.Ct. 2909 ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action");

Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion) (similar).

The Court has consequently sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called " 'the worst of the worst.' " *Kansas v. Marsh*, 548 U.S., at 206, 126 S.Ct. 2516 (dissenting opinion); see also *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" (internal quotation marks omitted)); *Kennedy v. Louisiana*, 554 U.S. 407, 420, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (citing *Roper*, *supra*, at 568, 125 S.Ct. 1183).

Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the "reasonable consistency" legally necessary to reconcile its use with the Constitution's commands. *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Thorough studies of death penalty sentences support this conclusion. A recent study, for example, examined all death penalty sentences imposed between 1973 and 2007 in Connecticut, a State that abolished the death penalty in 2012. Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Studies 637 (2014). The study reviewed treatment of all homicide defendants. It found 205 instances in which Connecticut law made the defendant eligible for a death sentence. *Id.*, at 641–643. Courts imposed a death sentence in 12 of these 205 cases, of which 9 were sustained on appeal. *Id.*, at 641. The study then measured the "egregiousness" of the murderer's conduct in those 9 cases, developing a system of metrics designed to do so. *Id.*, at 643–645. It then compared the egregiousness of the conduct of the 9 defendants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases (those in which the defendant, though found guilty of a death-eligible offense, was ultimately not sentenced to death). Application of the studies' metrics made clear that only 1 of those 9 defendants was indeed the "worst of the worst" (or was, at least, within the 15% considered most "egregious"). The remaining eight were not. Their behavior was no worse than the behavior of at least 33 and as many as *170* other defendants (out of a total pool of 205) who had not been sentenced to death. *Id.*, at 678–679.

Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.

Numerous studies, for example, have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty. See GAO, ***2761** Report to the Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (GAO/GGD–90–57, 1990) (82% of the 28 studies conducted between 1972 and 1990 found that race of victim influences capital murder charge or death sentence, a "finding ... remarkably consistent across data sets, states, data collection methods, and analytic techniques"); Shatz & Dalton, Challenging the Death Penalty with Statistics: *Furman*, *McCleskey*, and a Single County Case Study, 34 Cardozo L. Rev. 1227, 1245–1251 (2013) (same conclusion drawn from 20 plus studies conducted between 1990 and 2013).

Fewer, but still many, studies have found that the gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference. *Id.*, at 1251–1253 (citing many studies).

Geography also plays an important role in determining who is sentenced to death. See *id.*, at 1253–1256. And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Smith, The Geography of the Death Penalty and its Ramifications, 92 B. U. L. Rev. 227, 231–232 (2012) (hereinafter Smith); see also Donohue, *supra*, at 673 ("[T]he single most important influence from 1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]"). Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. Smith 233. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide. DPIC, The 2% Death Penalty: How A Minority

of Counties Produce Most Death Cases At Enormous Costs to All 9 (Oct. 2013).

What accounts for this county-by-county disparity? Some studies indicate that the disparity reflects the decisionmaking authority, the legal discretion, and ultimately the power of the local prosecutor. See, *e.g.*, Goelzhauser, Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death–Charging Decisions, 96 Judicature 161, 162–163 (2013); Barnes, Sloss, & Thaman, Place Matters (Most): An Empirical Study of Prosecutorial Decision–Making in Death–Eligible Cases, 51 Ariz. L. Rev. 305 (2009) (analyzing Missouri); Donohue, An Empirical Evaluation of the Connecticut Death Penalty System, at 681 (Connecticut); Marceau, Kamin, & Foglia, Death Eligibility in Colorado: Many Are Called, Few Are Chosen, 84 U. Colo. L. Rev. 1069 (2013) (Colorado); Shatz & Dalton, *supra*, at 1260–1261 (Alameda County).

Others suggest that the availability of resources for defense counsel (or the lack thereof) helps explain geographical differences. See, *e.g.*, Smith 258–265 (counties with higher death-sentencing rates tend to have weaker public defense programs); Liebman & Clarke, Minority Practice, Majority's Burden: The Death Penalty Today, 9 Ohio S. J. Crim. L. 255, 274 (2011) (hereinafter Liebman & Clarke) (similar); see generally Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L. J. 1835 (1994).

Still others indicate that the racial composition of and distribution within a county plays an important role. See, *e.g.*, Levinson, Smith, & Young, Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury–Eligible Citizens in Six Death Penalty States, 89 N.Y.U. L. Rev. 513, 533–536 (2014) (summarizing research on ***2762** this point); see also Shatz & Dalton, *supra*, at 1275 (describing research finding that death-sentencing rates were lowest in counties with the highest nonwhite population); cf. Cohen & Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425 (2010) (arguing that the federal death penalty is sought disproportionately where the federal district, from which the jury will be drawn, has a dramatic racial difference from the county in which the federal crime occurred).

Finally, some studies suggest that political pressures, including pressures on judges who must stand for election, can make a difference. See *Woodward v. Alabama*, 571 U.S. ——, ——, 134 S.Ct. 405, 408, 187 L.Ed.2d 449 (2013) (SOTOMAYOR, J., dissenting from denial of certiorari) (noting that empirical evidence suggests that, when Alabama judges reverse jury recommendations, these "judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures"); *Harris v. Alabama*, 513 U.S. 504, 519, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (Stevens, J., dissenting) (similar); Gelman, 1 J. Empirical L. Studies, at 247 (elected state judges are less likely to reverse flawed verdicts in capital cases in small towns than in larger communities).

Thus, whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as "egregiousness"—do *not* determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.

Justice THOMAS catalogues the tragic details of various capital cases, *ante*, at 2752 – 2755 (concurring opinion), but this misses my point. Every murder is tragic, but unless we return to the mandatory death penalty struck down in *Woodson*, 428 U.S., at 304–305, 96 S.Ct. 2978, the constitutionality of capital punishment rests on its limited application to the worst of the worst, *supra*, at 2759 – 2760. And this extensive body of evidence suggests that it is not so limited.

Four decades ago, the Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence. See *Gregg*, 428 U.S., at 195, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met"). But that no longer seems likely.

The Constitution does not prohibit the use of prosecutorial discretion. *Id.*, at 199, and n. 50, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *McCleskey v. Kemp*, 481 U.S. 279, 307–308, and n. 28, 311–312, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). It has not proved possible to increase capital defense funding significantly. Smith, The Supreme Court and the Politics of Death, 94 Va. L. Rev. 283, 355 (2008) ("Capital defenders are notoriously underfunded, particularly in states ... that lead the nation in executions"); American Bar Assn. (ABA)

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1, Commentary (rev. ed. Feb. 2003), in 31 Hofstra L. Rev. 913, 985 (2003) ("[C]ompensation of attorneys for death penalty representation remains notoriously inadequate"). And courts cannot easily inquire into judicial motivation. See, *e.g.*, *Harris*, *supra*.

Moreover, racial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), ***2763** which, despite their legal irrelevance, may affect a jury's evaluation of mitigating evidence, see *Callins v. Collins*, 510 U.S. 1141, 1153, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death"). Nevertheless, it remains the jury's task to make the individualized assessment of whether the defendant's mitigation evidence entitles him to mercy. See, *e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604–605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.); *Woodson*, 428 U.S., at 304–305, 96 S.Ct. 2978 (plurality opinion).

Finally, since this Court held that comparative proportionality review is not constitutionally required, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), it seems unlikely that appeals can prevent the arbitrariness I have described. See Kaufman–Osborn, Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State), 79 Wash. L. Rev. 775, 791–792 (2004) (after *Pulley*, many States repealed their statutes requiring comparative proportionality review, and most state high courts "reduced proportionality review to a perfunctory exercise" (internal quotation marks omitted)).

The studies bear out my own view, reached after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years. I see discrepancies for which I can find no rational explanations. Cf. *Godfrey*, 446 U.S., at 433, 100 S.Ct. 1759 (plurality opinion) ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not"). Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant does not, despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime. Compare *State v. Badgett*, 361 N.C. 234, 644 S.E.2d 206 (2007), and Pet. for Cert. in *Badgett v. North Carolina*, O.T. 2006, No. 07–6156, with Charbonneau, Andre Edwards Sentenced to Life in Prison for 2001 Murder, WRAL, Mar. 26, 2004, online at http://www.wral.com/news/local/story/109648. Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another defendant does not, despite having committed a "triple murder" by killing a young man and his pregnant wife? Compare *Commonwealth v. Boxley*, 596 Pa. 620, 948 A.2d 742 (2008), and Pet. for Cert., O.T. 2008, No. 08–6172, with Shea, Judge Gives Consecutive Life Sentences for Triple Murder, Philadelphia Inquirer, June 29, 2004, p. B5. For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6–year–old daughter and 3–year–old son while they slept? See Donohue, Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution, pp. 128–134 (2013), online at http://works.bepress.com/john_ donohue/87. In each instance, the sentences compared were imposed in the same State at about the same time.

The question raised by these examples (and the many more I could give but do not), as well as by the research to which I ***2764** have referred, is the same question Justice Stewart, Justice Powell, and others raised over the course of several decades: The imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?

III

"Cruel"—Excessive Delays

The problems of reliability and unfairness almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death. That

is to say, delay is in part a problem that the Constitution's own demands create. Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty "with special force." *Roper*, 543 U.S., at 568, 125 S.Ct. 1183. Those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. ——, ——, 134 S.Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014). At the same time, the Constitution insists that "every safeguard" be "observed" when "a defendant's life is at stake." *Gregg*, 428 U.S., at 187, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Furman*, 408 U.S., at 306, 92 S.Ct. 2726 (Stewart, J., concurring) (death "differs from all other forms of criminal punishment, not in degree but in kind"); *Woodson*, *supra*, at 305, 96 S.Ct. 2978 (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two").

These procedural necessities take time to implement. And, unless we abandon the procedural requirements that assure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.

A

Consider first the statistics. In 2014, 35 individuals were executed. Those executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death. DPIC, Execution List 2014, online at http://www.deathpenaltyinfo.org/execution–list–2014 (showing an average delay of 17 years, 7 months). In some death penalty States, the average delay is longer. In an oral argument last year, for example, the State admitted that the last 10 prisoners executed in Florida had spent an average of nearly 25 years on death row before execution. Tr. of Oral Arg. in *Hall v. Florida*, O.T. 2013, No. 12–10882, p. 46.

The length of the average delay has increased dramatically over the years. In 1960, the average delay between sentencing and execution was two years. See Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment? 29 Seton Hall L. Rev. 147, 181 (1998). Ten years ago (in 2004) the average delay was about 11 years. See Dept. of Justice, Bureau of Justice Statistics (BJS), T. Snell, Capital Punishment, 2013—Statistical Tables 14 (Table 10) (rev. Dec. 2014) (hereinafter BJS 2013 Stats). By last year the average had risen to about 18 years. DPIC, Execution List 2014, *supra*. Nearly half of the 3,000 inmates now on death row have been ***2765** there for more than 15 years. And, at present execution rates, it would take more than 75 years to carry out those 3,000 death sentences; thus, the average person on death row would spend an additional 37.5 years there before being executed. BJS 2013 Stats, at 14, 18 (Tables 11 and 15).

I cannot find any reasons to believe the trend will soon be reversed.

B

These lengthy delays create two special constitutional difficulties. See *Johnson v. Bredesen*, 558 U.S. 1067, 1069, 130 S.Ct. 541, 175 L.Ed.2d 552 (2009) (Stevens, J., statement respecting denial of certiorari). First, a lengthy delay in and of itself is especially cruel because it "subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement." *Ibid*.; *Gomez v. Fierro*, 519 U.S. 918, 117 S.Ct. 285, 136 L.Ed.2d 204 (1996) (Stevens, J., dissenting) (excessive delays from sentencing to execution can themselves "constitute cruel and unusual punishment prohibited by the Eighth Amendment"); see also *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (memorandum of Stevens, J., respecting denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 993, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (BREYER, J., dissenting from denial of certiorari). Second, lengthy delay undermines the death penalty's penological rationale. *Johnson*, *supra*, at 1069, 130 S.Ct. 541; *Thompson v. McNeil*, 556 U.S. 1114, 1115, 129 S.Ct. 1299, —— L.Ed.2d —— (2009) (statement of Stevens, J., respecting denial of certiorari).

1

Turning to the first constitutional difficulty, nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day. American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report). This occurs even though the ABA has suggested that death row inmates be housed in conditions similar to the general population, and the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than

15 days. See *id.*, at 2, 4; ABA Standards for Criminal Justice: Treatment of Prisoners 6 (3d ed. 2011). And it is well documented that such prolonged solitary confinement produces numerous deleterious harms. See, *e.g.*, Haney, Mental Health Issues in Long–Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency 124, 130 (2003) (cataloguing studies finding that solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations," among many other symptoms); Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash U. J. L. & Policy 325, 331 (2006) ("[E]ven a few days of solitary confinement will predictably shift the [brain's] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium"); accord, *In re Medley*, 134 U.S. 160, 167–168, 10 S.Ct. 384, 33 L.Ed. 835 (1890); see also *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, —— L.Ed.2d —— (2015) (KENNEDY, J., concurring).

The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out. In 1890, this Court recognized that, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *Medley*, *supra*, at 172, 10 S.Ct. 384. The Court was there *describing a delay of a* ***2766** *mere four weeks*. In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in decades. *Supra*, at 2764 – 2765.

Moreover, we must consider death warrants that have been issued and revoked, not once, but repeatedly. See, *e.g.*, Pet. for Cert. in *Suárez Medina v. Texas*, O.T. 2001, No. 02–5752, pp. 35–36 (filed Aug. 13, 2002) ("On fourteen separate occasions since Mr. Suárez Medina's death sentence was imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains"); Lithwick, Cruel but not Unusual, Slate, Apr. 1, 2011, online at http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_ but_not_unusual.html (John Thompson had seven death warrants signed before he was exonerated); see also, *e.g.*, WFMZ–TV 69 News, Michael John Parrish's Execution Warrant Signed by Governor Corbett (Aug. 18, 2014), online at http:// www.wfmz.com/news/Regional-Poconos-Coal/Local/michael-john-parrishs-execution-warrant-signed-by-governor-corbett/27595356 (former Pennsylvania Governor signed 36 death warrants in his first 3.5 years in office even though Pennsylvania has not carried out an execution since 1999).

Several inmates have come within hours or days of execution before later being exonerated. Willie Manning was *four hours* from his scheduled execution before the Mississippi Supreme Court stayed the execution. See Robertson, With Hours to Go, Execution is Postponed, N.Y. Times, Apr. 8, 2015, p. A17. Two years later, Manning was exonerated after the evidence against him, including flawed testimony from an FBI hair examiner, was severely undermined. Nave, Why Does the State Still Want to Kill Willie Jerome Manning? Jackson Free Press, Apr. 29, 2015. Nor is Manning an outlier case. See, *e.g.*, Martin, Randall Adams, 61, Dies; Freed With Help of Film, N.Y. Times, June 26, 2011, p. 24 (Randall Adams: stayed by this Court three days before execution; later exonerated); N. Davies, White Lies 231, 292, 298, 399 (1991) (Clarence Lee Brandley: execution stayed twice, once 6 days and once 10 days before; later exonerated); M. Edds, An Expendable Man 93 (2003) (Earl Washington, Jr.: stayed 9 days before execution; later exonerated).

Furthermore, given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals. See, *e.g.*, ACLU Report 8; Rountree, Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures, 82 UMKC L. Rev. 295 (2014) (11% of those executed have dropped appeals and volunteered); ACLU Report 3 (account of " 'guys who dropped their appeals because of the intolerable conditions' "). Indeed, one death row inmate, who was later exonerated, still said he would have preferred to die rather than to spend years on death row pursuing his exoneration. Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & C. 860, 869 (1983). Nor is it surprising that many inmates consider, or commit, suicide. *Id.*, at 872, n. 44 (35% of those confined on death row in Florida attempted suicide).

Others have written at great length about the constitutional problems that delays create, and, rather than repeat their facts, arguments, and conclusions, I simply refer to some of their writings. See, *e.g.*, *Johnson*, 558 U.S., at 1069, 130 S.Ct. 541 (statement of Stevens, J.) (delay "subjects ***2767** death row inmates to decades of especially severe, dehumanizing conditions of confinement"); *Furman*, 408 U.S., at 288, 92 S.Ct. 2726 (Brennan, J., concurring) ("long

wait between the imposition of sentence and the actual infliction of death" is "inevitable" and often "exacts a frightful toll"); *Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S.Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *People v. Anderson*, 6 Cal.3d 628, 649, 493 P.2d 880, 894 (1972) (collecting sources) ("[C]ruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out" (footnote omitted)); *District Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty unconstitutional under State Constitution in part because "[it] will be carried out only after agonizing months and years of uncertainty"); see also *Riley v. Attorney General of Jamaica*, [1983] 1 A.C. 719, 734–735 (P.C. 1982) (Lord Scarman, joined by Lord Brightman, dissenting) ("execution after inordinate delay" would infringe prohibition against "cruel and unusual punishments" in § 10 of the "Bill of Rights of 1689," the precursor to our Eighth Amendment); *Pratt v. Attorney Gen. of Jamaica*, [1994] 2 A.C. 1, 4 (P.C. 1993); *id.*, at 32–33 (collecting cases finding inordinate delays unconstitutional or the equivalent); *State* v. *Makwanyane* 1995 (3) SA391 (CC) (S. Afr.); *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney–General*, [1993] 1 Zim. L. R. 242, 282 (inordinate delays unconstitutional); *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), p. 439 (1989) (extradition of murder suspect to United States would violate the European Convention on Human Rights in light of risk of delay before execution); *United States v. Burns*, [2001] 1 S.C.R. 283, 353, ¶ 123 (similar).

2

The second constitutional difficulty resulting from lengthy delays is that those delays undermine the death penalty's penological rationale, perhaps irreparably so. The rationale for capital punishment, as for any punishment, classically rests upon society's need to secure deterrence, incapacitation, retribution, or rehabilitation. Capital punishment by definition does not rehabilitate. It does, of course, incapacitate the offender. But the major alternative to capital punishment —namely, life in prison without possibility of parole—also incapacitates. See *Ring v. Arizona*, 536 U.S. 584, 615, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (BREYER, J., concurring in judgment).

Thus, as the Court has recognized, the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution. See, *e.g.*, *Gregg*, 428 U.S., at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.). Many studies have examined the death penalty's deterrent effect; some have found such an effect, whereas others have found a lack of evidence that it deters crime. Compare *ante*, at 2748 – 2749 (SCALIA, J., concurring) (collecting studies finding deterrent effect), with *e.g.*, Sorensen, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime & Delinquency 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A Special Report, ***2768** States With No Death Penalty Share Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, p. A1 (from 1980–2000, homicide rate in death-penalty States was 48% to 101% higher than in non-death-penalty States); Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & C. 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification); Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791, 794 (2005) (evaluating existing statistical evidence and concluding that there is "profound uncertainty" about the existence of a deterrent effect).

Recently, the National Research Council (whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine) reviewed 30 years of empirical evidence and concluded that it was insufficient to establish a deterrent effect and thus should "not be used to inform" discussion about the deterrent value of the death penalty. National Research Council, Deterrence and the Death Penalty 2 (D. Nagin & J. Pepper eds. 2012); accord, *Baze v. Rees*, 553 U.S. 35, 79, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (Stevens, J., concurring in judgment) ("Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders").

I recognize that a "lack of evidence" for a proposition does not prove the contrary. See *Ring*, *supra*, at 615, 122 S.Ct. 2428 (one might believe the studies "inconclusive"). But suppose

that we add to these studies the fact that, today, very few of those sentenced to death are actually executed, and that even those executions occur, on average, after nearly two decades on death row. DPIC, Execution List 2014, *supra*. Then, does it still seem likely that the death penalty has a significant deterrent effect?

Consider, for example, what actually happened to the 183 inmates sentenced to death in 1978. As of 2013 (35 years later), 38 (or 21% of them) had been executed; 132 (or 72%) had had their convictions or sentences overturned or commuted; and 7 (or 4%) had died of other (likely natural) causes. Six (or 3%) remained on death row. BJS 2013 Stats, at 19 (Table 16).

The example illustrates a general trend. Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row. *Id.*, at 20 (Table 17); see also Baumgartner & Dietrich, Most Death Penalty Sentences Are Overturned: Here's Why That Matters, Washington Post Blog, Monkey Cage, Mar. 17, 2015 (similar).

Thus an offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration) can take place. In a word, executions are *rare*. And an individual contemplating a crime but evaluating the potential punishment would know that, in any event, he faces a potential sentence of life without parole.

These facts, when recurring, must have some offsetting effect on a potential perpetrator's fear of a death penalty. And, even if that effect is no more than slight, it makes it difficult to believe (given the studies of deterrence cited earlier) that such a rare event significantly deters horrendous crimes. See *Furman*, 408 U.S., at 311–312, 92 S.Ct. 2726 (White, J., concurring) (It cannot "be said with confidence that society's need for specific deterrence ***2769** justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient").

But what about retribution? Retribution is a valid penological goal. I recognize that surviving relatives of victims of a horrendous crime, or perhaps the community itself, may find vindication in an execution. And a community that favors the death penalty has an understandable interest in representing their voices. But see A. Sarat, Mercy on Trial: What It Means To Stop an Execution 130 (2005) (Illinois Governor George Ryan explained his decision to commute all death sentences on the ground that it was "cruel and unusual" for "family members to go through this ... legal limbo for [20] years").

The relevant question here, however, is whether a "community's sense of retribution" can often find vindication in "a death that comes," if at all, "only several decades after the crime was committed." *Valle v. Florida*, 564 U.S. ——, ——, 132 S.Ct. 1, 2, 180 L.Ed.2d 940 (2011) (BREYER, J., dissenting from denial of stay). By then the community is a different group of people. The offenders and the victims' families have grown far older. Feelings of outrage may have subsided. The offender may have found himself a changed human being. And sometimes repentance and even forgiveness can restore meaning to lives once ruined. At the same time, the community and victims' families will know that, even without a further death, the offender will serve decades in prison under a sentence of life without parole.

I recognize, of course, that this may not always be the case, and that sometimes the community believes that an execution could provide closure. Nevertheless, the delays and low probability of execution must play some role in any calculation that leads a community to insist on death as retribution. As I have already suggested, they may well attenuate the community's interest in retribution to the point where it cannot by itself amount to a significant justification for the death penalty. *Id.*, at ——, 132 S.Ct., at 2. In any event, I believe that whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole (a sentence that every State now permits, see ACLU, A Living Death: Life Without Parole for Nonviolent Offenses 11, and n. 10 (2013)).

Finally, the fact of lengthy delays undermines any effort to justify the death penalty in terms of its prevalence when the Founders wrote the Eighth Amendment. When the Founders wrote the Constitution, there were no 20– or 30–year delays. Execution took place soon after sentencing. See P. Mackey, Hanging in the Balance: The Anti–Capital Punishment Movement in New York State, 1776–1861, p. 17 (1982); T. Jefferson, A Bill for Proportioning Crimes and Punishments (1779), reprinted in The Complete Jefferson 90, 95 (S. Padover ed. 1943); 2 Papers of John Marshall 207–209 (C. Cullen & H. Johnson eds. 1977) (describing petition

for commutation based in part on 5–month delay); *Pratt v. Attorney Gen. of Jamaica*, [1994] 2 A. C., at 17 (same in United Kingdom) (collecting cases). And, for reasons I shall describe, *infra*, at 2770 – 2773, we cannot return to the quick executions in the founding era.

3

The upshot is that lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale. And this Court has said that, if the death penalty does not fulfill the goals of deterrence or retribution, "it is nothing more than the purposeless and needless imposition of pain and suffering and hence ***2770** an unconstitutional punishment." *Atkins*, 536 U.S., at 319, 122 S.Ct. 2242 (quoting *Enmund v. Florida*, 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); internal quotation marks omitted); see also *Gregg*, 428 U.S., at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *Furman, supra*, at 312, 92 S.Ct. 2726 (White, J., concurring) (a "penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment"); *Thompson*, 556 U.S., at 1115, 129 S.Ct. 1299 (statement of Stevens, J., respecting denial of certiorari) (similar).

Indeed, Justice Lewis Powell (who provided a crucial vote in *Gregg*) came to much the same conclusion, albeit after his retirement from this Court. Justice Powell had come to the Court convinced that the Federal Constitution did not outlaw the death penalty but rather left the matter up to individual States to determine. *Furman, supra*, at 431–432, 92 S.Ct. 2726 (Powell, J., dissenting); see also J. Jeffries, Justice Lewis F. Powell, Jr., p. 409 (2001) (describing Powell, during his time on the Court, as a "fervent partisan" of "the constitutionality of capital punishment").

Soon after Justice Powell's retirement, Chief Justice Rehnquist appointed him to chair a committee addressing concerns about delays in capital cases, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Committee). The Committee presented a report to Congress, and Justice Powell testified that "[d]elay robs the penalty of much of its deterrent value." Habeas Corpus Reform, Hearings before the Senate Committee on the Judiciary, 100th Cong., 1st and 2d Sess., 35 (1989 and 1990). Justice Powell, according to his official biographer, ultimately concluded that capital punishment:

> " 'serves no useful purpose.' The United States was 'unique among the industrialized nations of the West in maintaining the death penalty,' and it was enforced so rarely that it could not deter. More important, the haggling and delay and seemingly endless litigation in every capital case brought the law itself into disrepute." Jeffries, *supra*, at 452.

In short, the problem of excessive delays led Justice Powell, at least in part, to conclude that the death penalty was unconstitutional.

As I have said, today delays are much worse. When Chief Justice Rehnquist appointed Justice Powell to the Committee, the average delay between sentencing and execution was 7 years and 11 months, compared with 17 years and 7 months today. Compare BJS, L. Greenfeld, Capital Punishment, 1990, p. 11 (Table 12) (Sept. 1991) with *supra*, at 18–19.

C

One might ask, why can Congress or the States not deal directly with the delay problem? Why can they not take steps to shorten the time between sentence and execution, and thereby mitigate the problems just raised? The answer is that shortening delay is much more difficult than one might think. And that is in part because efforts to do so risk causing procedural harms that also undermine the death penalty's constitutionality.

For one thing, delays have helped to make application of the death penalty more reliable. Recall the case of Henry Lee McCollum, whom DNA evidence exonerated 30 years after his conviction. Katz & Eckholm, N.Y. Times, at A1. If McCollum had been executed earlier, he would not have lived to see the day when DNA evidence exonerated him and implicated ***2771** another man; that man is already serving a life sentence for a rape and murder that he committed just a few weeks after the murder McCollum was convicted of. *Ibid.* In fact, this Court had earlier denied review of McCollum's claim over the public dissent of only one Justice. *McCollum v. North Carolina*, 512 U.S. 1254, 114 S.Ct. 2784, 129 L.Ed.2d 895 (1994). And yet a full 20 years after the Court denied review, McCollum was exonerated by DNA evidence. There are a significant number of similar cases, some of which I have discussed earlier. See also DPIC Innocence

List, *supra* (Nathson Fields, 23 years; Paul House, 23 years; Nicholas Yarris, 21 years; Anthony Graves, 16 years; Damon Thibodeaux, 15 years; Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu, all exonerated for the same crime 39 years after their convictions).

In addition to those who are exonerated on the ground that they are innocent, there are other individuals whose sentences or convictions have been overturned for other reasons (as discussed above, state and federal courts found error in 68% of the capital cases they reviewed between 1973 and 1995). See Part I, *supra*. In many of these cases, a court will have found that the individual did not merit the death penalty in a special sense—namely, he failed to receive all the procedural protections that the law requires for the death penalty's application. By eliminating some of these protections, one likely could reduce delay. But which protections should we eliminate? Should we eliminate the trial-related protections we have established for capital defendants: that they be able to present to the sentencing judge or jury all mitigating circumstances, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973; that the State provide guidance adequate to reserve the application of the death penalty to particularly serious murders, *Gregg*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; that the State provide adequate counsel and, where warranted, adequate expert assistance, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); or that a jury must find the aggravating factors necessary to impose the death penalty, *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; see also *id.*, at 614, 122 S.Ct. 2428 (BREYER, J., concurring in judgment)? Should we no longer ensure that the State does not execute those who are seriously intellectually disabled, *Atkins*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335? Should we eliminate the requirement that the manner of execution be constitutional, *Baze*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420, or the requirement that the inmate be mentally competent at the time of his execution, *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)? Or should we get rid of the criminal protections that all criminal defendants receive—for instance, that defendants claiming violation of constitutional guarantees (say "due process of law") may seek a writ of habeas corpus in federal courts? See, *e.g.*, *O'Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). My answer to these questions is "surely not." But see *ante*, at 2748 – 2750 (SCALIA, J., concurring).

One might, of course, argue that courts, particularly federal courts providing additional layers of review, apply these and other requirements too strictly, and that causes delay. But, it is difficult for judges, as it would be difficult for anyone, *not* to apply legal requirements punctiliously when the consequence of failing to do so may well be death, particularly the death of an innocent person. See, *e.g.*, ***2772** *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) ("[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error"); *Kyles v. Whitley*, 514 U.S. 419, 422, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case" (internal quotation marks omitted)); *Thompson*, 556 U.S., at 1116, 129 S.Ct. 1299 (statement of Stevens, J.) ("Judicial process takes time, but the error rate in capital cases illustrates its necessity").

Moreover, review by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court, see *Hinton v. Alabama*, 571 U.S. ——, 134 S.Ct. 1081, 188 L.Ed.2d 1, he may well have been executed rather than exonerated. In my own view, our legal system's complexity, our federal system with its separate state and federal courts, our constitutional guarantees, our commitment to fair procedure, and, above all, a special need for reliability and fairness in capital cases, combine to make significant procedural "reform" unlikely in practice to reduce delays to an acceptable level.

And that fact creates a dilemma: A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place. See *Knight*, 528 U.S., at 998, 120 S.Ct. 459 (BREYER, J., dissenting from denial of certiorari) (one of the primary causes of the delay is the States' "failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing"). But a death penalty system that minimizes delays would undermine the legal system's efforts to secure reliability and procedural fairness.

In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact,

demonstrated convincingly over the past 40 years, strongly supports the claim that the death penalty violates the Eighth Amendment. A death penalty system that is unreliable or procedurally unfair would violate the Eighth Amendment. *Woodson*, 428 U.S., at 305, 96 S.Ct. 2978 (plurality opinion); *Hall*, 572 U.S., at ——, 134 S.Ct., at 2001; *Roper*, 543 U.S., at 568, 125 S.Ct. 1183. And so would a system that, if reliable and fair in its application of the death penalty, would serve no legitimate penological purpose. *Furman*, 408 U.S., at 312, 92 S.Ct. 2726 (White, J., concurring); *Gregg*, *supra*, at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Atkins*, *supra*, at 319, 122 S.Ct. 2242.

IV

"Unusual"—Decline in Use of the Death Penalty

The Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual. I can illustrate the significant decline in the use of the death penalty in several ways.

An appropriate starting point concerns the trajectory of the number of annual death sentences nationwide, from the 1970's to present day. In 1977—just after ***2773** the Supreme Court made clear that, by modifying their legislation, States could reinstate the death penalty—137 people were sentenced to death. BJS 2013 Stats, at 19 (Table 16). Many States having revised their death penalty laws to meet *Furman'* s requirements, the number of death sentences then increased. Between 1986 and 1999, 286 persons on average were sentenced to death each year. BJS 2013 Stats, at 14, 19 (Tables 11 and 16). But, approximately 15 years ago, the numbers began to decline, and they have declined rapidly ever since. See Appendix A, *infra* (showing sentences from 1977–2014). In 1999, 279 persons were sentenced to death. BJS 2013 Stats, at 19 (Table 16). Last year, just 73 persons were sentenced to death. DPIC, The Death Penalty in 2014: Year End Report 1 (2015).

That trend, a significant decline in the last 15 years, also holds true with respect to the number of annual executions. See Appendix B, *infra* (showing executions from 1977–2014). In 1999, 98 people were executed. BJS, Data Collection: National Prisoner Statistics Program (BJS Prisoner Statistics) (available in Clerk of Court's case file). Last year, that number was only 35. DPIC, The Death Penalty in 2014, *supra*, at 1.

Next, one can consider state-level data. Often when deciding whether a punishment practice is, constitutionally speaking, "unusual," this Court has looked to the number of States engaging in that practice. *Atkins*, 536 U.S., at 313–316, 122 S.Ct. 2242; *Roper*, *supra*, at 564–566, 125 S.Ct. 1183. In this respect, the number of active death penalty States has fallen dramatically. In 1972, when the Court decided *Furman*, the death penalty was lawful in 41 States. Nine States had abolished it. E. Mandery, A Wild Justice: The Death and Resurrection of Capital Punishment in America 145 (2013). As of today, 19 States have abolished the death penalty (along with the District of Columbia), although some did so prospectively only. See DPIC, States With and Without the Death Penalty, online at http://www.deathpenalty info.org/states-and-without-death-penalty. In 11 other States that maintain the death penalty on the books, no execution has taken place for more than eight years: Arkansas (last execution 2005); California (2006); Colorado (1997); Kansas (no executions since the death penalty was reinstated in 1976); Montana (2006); Nevada (2006); New Hampshire (no executions since the death penalty was reinstated in 1976); North Carolina (2006); Oregon (1997); Pennsylvania (1999); and Wyoming (1992). DPIC, Executions by State and Year, online at http://www.death penaltyinfo.org/node/5741.

Accordingly, 30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years. Of the 20 States that have conducted at least one execution in the past eight years, 9 have conducted fewer than five in that time, making an execution in those States a fairly rare event. BJS Prisoner Statistics (Delaware, Idaho, Indiana, Kentucky, Louisiana, South Dakota, Tennessee, Utah, Washington). That leaves 11 States in which it is fair to say that capital punishment is not "unusual." And just three of those States (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014. See DPIC, Number of Executions by State and Region Since 1976, online at http://www.deathpenalty info.org/number–executions–state–and–region–1976. Indeed, last year, only seven States conducted an execution. DPIC, Executions by State and Year, *supra* ; DPIC, Death Sentences in the United States From 1977 by State and by Year, online at http://www.deathpenaltyinfo.org/death–sentences–united–states–1977–2008. In ***2774** other words, in 43 States, no one was executed.

In terms of population, if we ask how many Americans live in a State that at least occasionally carries out an execution (at least one within the prior three years), the answer two decades ago was 60% or 70%. Today, that number is 33%. See Appendix C, *infra*.

At the same time, use of the death penalty has become increasingly concentrated geographically. County-by-county figures are relevant, for decisions to impose the death penalty typically take place at a county level. See *supra*, at 2761 – 2762. County-level sentencing figures show that, between 1973 and 1997, 66 of America's 3,143 counties accounted for approximately 50% of all death sentences imposed. Liebman & Clarke 264–265; cf. *id.*, at 266. (counties with 10% of the Nation's population imposed 43% of its death sentences). By the early 2000's, the death penalty was only actively practiced in a very small number of counties: between 2004 and 2009, only 35 counties imposed 5 or more death sentences, *i.e.*, approximately one per year. See Appendix D, *infra* (such counties colored in red) (citing Ford, The Death Penalty's Last Stand, The Atlantic, Apr. 21, 2015). And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences. See Appendix E, *infra*. In short, the number of active death penalty counties is small and getting smaller. And the overall statistics on county-level executions bear this out. Between 1976 and 2007, there were no executions in 86% of America's counties. Liebman & Clarke 265–266, and n. 47; cf. *ibid.* (counties with less than 5% of the Nation's population carried out over half of its executions from 1976–2007).

In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, *i.e.*, three States, account for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole. See *Furman*, 408 U.S., at 311, 92 S.Ct. 2726 (1972) (White, J., concurring) (executions could be so infrequently carried out that they "would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system ... when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied").

Moreover, we have said that it " 'is not so much the number of these States that is significant, but the consistency of the direction of change.' " *Roper*, 543 U.S., at 566, 125 S.Ct. 1183 (quoting *Atkins*, *supra*, at 315, 122 S.Ct. 2242) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court's decision in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)). Judged in that way, capital punishment has indeed become unusual. Seven States have abolished the death penalty in the last decade, including (quite recently) Nebraska. DPIC, States With and Without the Death Penalty, *supra*. And several States have come within a single vote of eliminating the death penalty. Seelye, Measure to Repeal Death Penalty Fails by a Single Vote in New Hampshire Senate, N.Y. Times, Apr. 17, 2014, p. A12; Dennison, House Deadlocks on Bill To Abolish ***2775** Death Penalty in Montana, Billings Gazette, Feb. 23, 2015; see also Offredo, Delaware Senate Passes Death Penalty Repeal Bill, Delaware News Journal, Apr. 3, 2015. Eleven States, as noted earlier, have not executed anyone in eight years. *Supra*, at 2773 – 2774. And several States have formally stopped executing inmates. See Yardley, Oregon's Governor Says He Will Not Allow Executions, N.Y. Times, Nov. 23, 2011, p. A14 (Oregon); Governor of Colorado, Exec. Order No. D2013–006, May 22, 2013 (Colorado); Lovett, Executions Are Suspended by Governor in Washington, N.Y. Times, Feb. 12, 2014, p. A12 (Washington); Begley, Pennsylvania Stops Using the Death Penalty, Time, Feb. 13, 2015 (Pennsylvania); see also Welsh–Huggins, Associated Press, Ohio Executions Rescheduled, Jan. 30, 2015 (Ohio).

Moreover, the direction of change is consistent. In the past two decades, no State without a death penalty has passed legislation to reinstate the penalty. See *Atkins*, *supra*, at 315–316, 122 S.Ct. 2242; DPIC, States With and Without the Death Penalty, *supra*. Indeed, even in many States most associated with the death penalty, remarkable shifts have occurred. In Texas, the State that carries out the most executions, the number of executions fell from 40 in 2000 to 10 in 2014, and the number of death sentences fell from 48 in 1999 to 9 in 2013 (and 0 thus far in 2015). DPIC, Executions by State and Year, *supra* ; BJS, T. Snell, Capital Punishment, 1999, p. 6 (Table 5) (Dec. 2000) (hereinafter BJS 1999 Stats); BJS 2013 Stats, at 19 (Table 16); von Drehle, Bungled Executions, Backlogged Courts, and Three More Reasons the Modern Death Penalty Is a Failed Experiment, Time, June 8, 2015, p. 26. Similarly dramatic declines are present in Virginia, Oklahoma, Missouri, and North Carolina.

BJS 1999 Stats, at 6 (Table 5); BJS 2013 Stats, at 19 (Table 16).

These circumstances perhaps reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter. Wilson, Support for Death Penalty Still High, But Down, Washington Post, GovBeat, June 5, 2014, online at www. washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down; see also ALI, Report of the Council to the Membership on the Matter of the Death Penalty 4 (Apr. 15, 2009) (withdrawing Model Penal Code section on capital punishment section from the Code, in part because of doubts that the American Law Institute could "recommend procedures that would" address concerns about the administration of the death penalty); cf. *Gregg*, 428 U.S., at 193–194, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) (relying in part on Model Penal Code to conclude that a "carefully drafted statute" can satisfy the arbitrariness concerns expressed in *Furman*).

I rely primarily upon domestic, not foreign events, in pointing to changes and circumstances that tend to justify the claim that the death penalty, constitutionally speaking, is "unusual." Those circumstances are sufficient to warrant our reconsideration of the death penalty's constitutionality. I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice. Oakford, UN Vote Against Death Penalty Highlights Global Abolitionist Trend-and Leaves the U.S. Stranded, Vice News, Dec. 19, 2014, online at https://news.vice.com/article/un-vote-against-death-penalty-highlights-global-abolitionist-trend-and-leaves-the-us-stranded. In 2013, only 22 countries in the world carried out an execution. International Commission Against ***2776** Death Penalty, Review 2013, pp. 2–3. No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. *Id.*, at 3. Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). *Id.*, at 2. And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia. Amnesty International, Death Sentences and Executions 2013, p. 3 (2014). (This figure does not include China, which has a large population, but where precise data cannot be obtained. *Id.*, at 2.)

V

I recognize a strong counterargument that favors constitutionality. We are a court. Why should we not leave the matter up to the people acting democratically through legislatures? The Constitution foresees a country that will make most important decisions democratically. Most nations that have abandoned the death penalty have done so through legislation, not judicial decision. And legislators, unlike judges, are free to take account of matters such as monetary costs, which I do not claim are relevant here. See, *e.g.*, Berman, Nebraska Lawmakers Abolish the Death Penalty, Narrowly Overriding Governor's Veto, Washington Post Blog, Post Nation, May 27, 2015 (listing cost as one of the reasons why Nebraska legislators recently repealed the death penalty in that State); cf. California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California 117 (June 30, 2008) (death penalty costs California $137 million per year; a comparable system of life imprisonment without parole would cost $11.5 million per year), online at http://www.ccfaj.org/rr-dp-official.html; Dáte, The High Price of Killing Killers, Palm Beach Post, Jan. 4, 2000, p. 1A (cost of each execution is $23 million above cost of life imprisonment without parole in Florida).

The answer is that the matters I have discussed, such as lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. They concern the infliction—indeed the unfair, cruel, and unusual infliction—of a serious punishment upon an individual. I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked.

Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law. See *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803); *Hall*, 572 U.S., at ——, 134 S.Ct., at 2000 ("That exercise of independent judgment is the Court's judicial duty"). We have made clear that " 'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the

death penalty under the Eighth Amendment.' " *Id.*, at ——, 134 S.Ct., at 1999 (quoting *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion)); see also *Thompson v. Oklahoma*, 487 U.S. 815, 833, n. 40, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion).

For the reasons I have set forth in this opinion, I believe it highly likely that the ***2777** death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question.

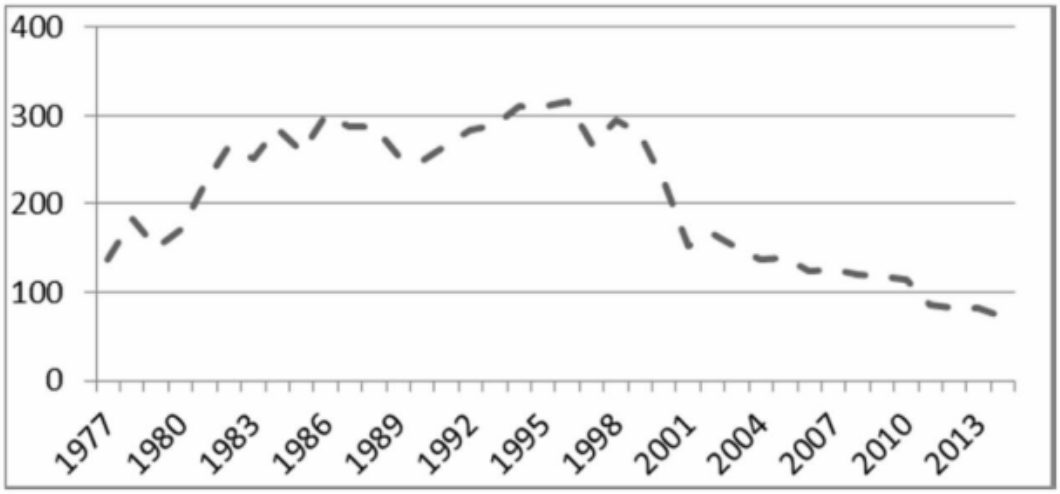
With respect, I dissent.

Appendix A

APPENDICES

A

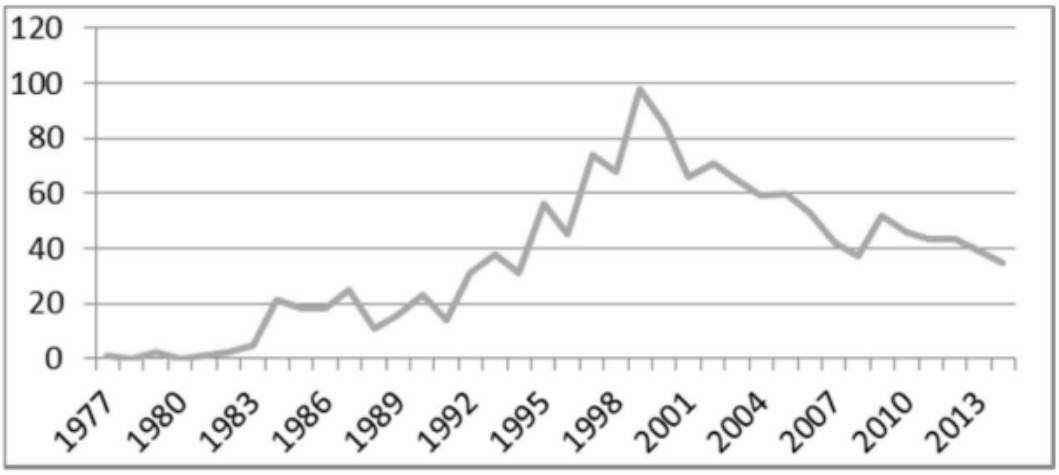
Death Sentences Imposed 1977–2014



Appendix B

B

Executions 1977–2014



***2778 Appendix C**

C

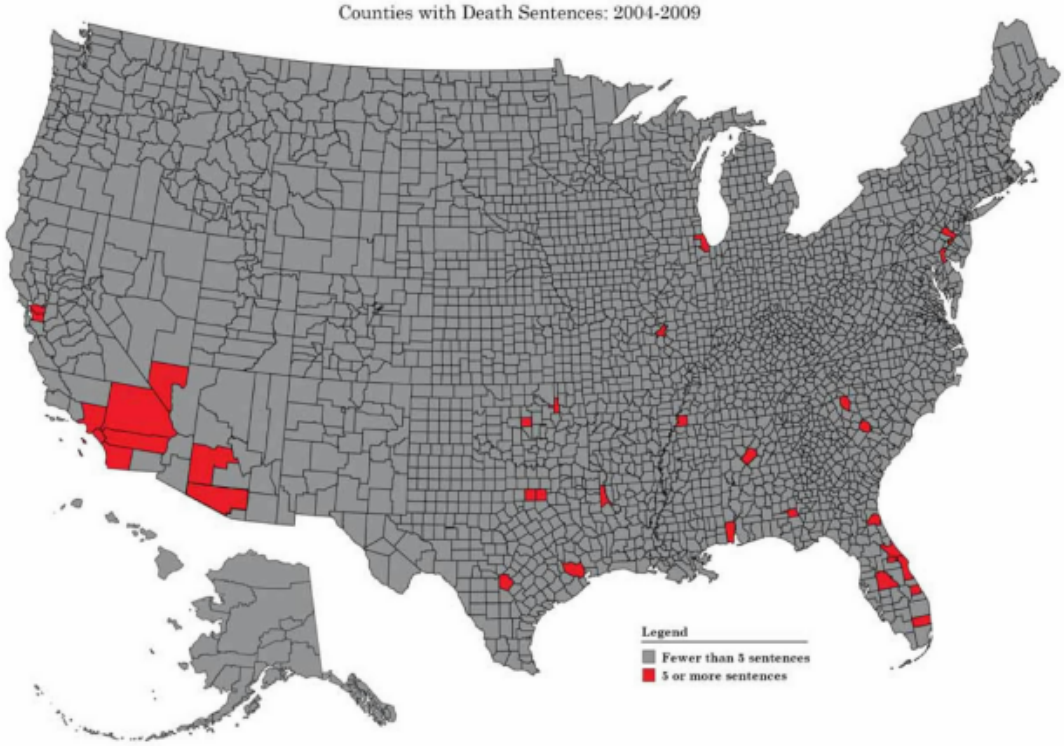
Percentage of U.S. population in States that conducted an execution within prior 3 years

Year	Percentage
1994	54%
1995	60%
1996	63%
1997	63%
1998	61%
1999	70%
2000	68%
2001	67%
2002	57%
2003	53%
2004	52%
2005	52%
2006	55%
2007	57%
2008	53%
2009	39%
2010	43%
2011	42%
2012	39%
2013	34%
2014	33%

***2779 Appendix D**

APPENDIX D

Counties with Death Sentences: 2004-2009

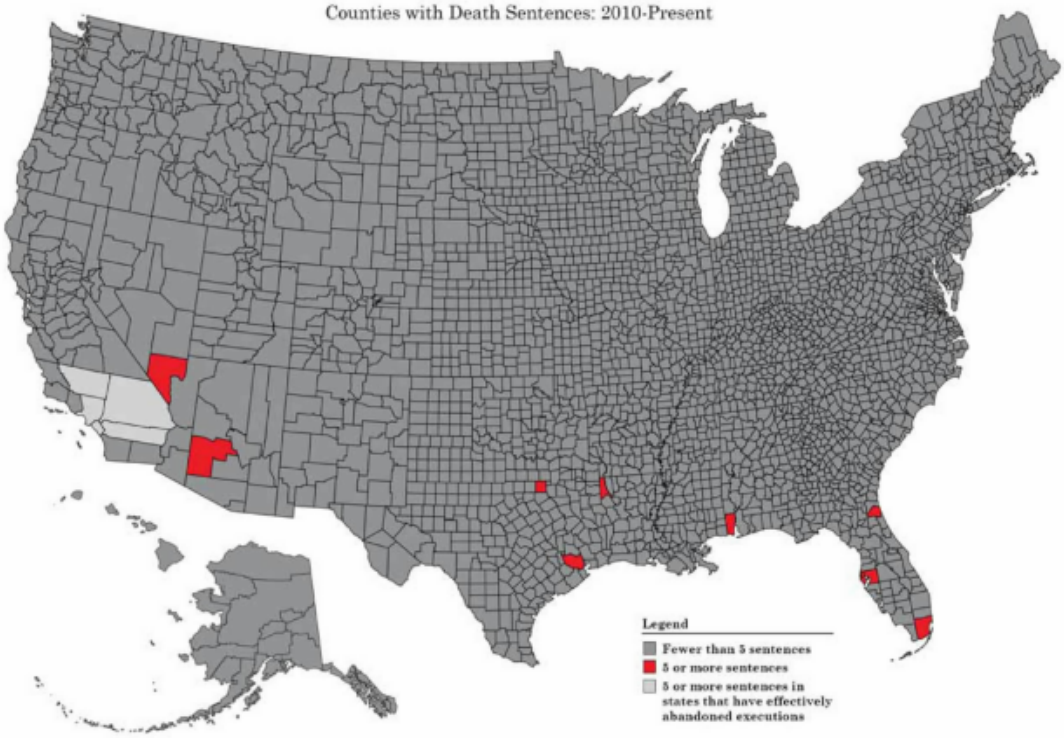


Source: Ford, The Death Penalty's Last Stand, The Atlantic, Apr. 21, 2015.

***2780 Appendix E**

APPENDIX E

Counties with Death Sentences: 2010-Present



Source: The underlying data was compiled with research assistance from the Supreme Court Library (current as of June 22, 2015).

STATE OF NORTH CAROLINA

COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.

STATE OF NORTH CAROLINA)
)
v.)
)
)
_____)

MOTION TO DECLARE THE DEATH PENALTY UNCONSTITUTIONAL

NOW COMES the defendant, _____, through counsel, pursuant to the Constitution of North Carolina, Art. I § 19, and the Constitution of the United States, Amends. VIII and XIV, and moves for an Order prohibiting the State from seeking the death penalty unconstitutional. In support of this Motion, the defendant shows the following:

PROCEDURAL BACKROUND

[tailor to your case: including all rule 24 dates]

LEGAL BASIS

I. The death penalty as applied in the State of North Carolina today and the national as a whole violates the evolving standards of decency and is unconstitutional.

After decades of heavy use of the death penalty, North Carolina has all but abandoned the death penalty in recent years. Today, a state-wide consensus on the ground shows that North Carolina no longer accepts its use in practice. North Carolina has not executed a single person since 2006. Juries have sharply turned from the death penalty: not a single person was sentenced to death in 2015. In the last ten years, a total of 20 persons were sentenced to death[1] – approximately two per year – out of more than 4,903[2]

[1]North Carolina Department of Corrections Death Row Inmates, https://www.ncdps.gov/Index2.cfm?a=000003,002240,002327,002328 (listing all death row inmates by year of admission). Another defendant,
[2]N.C. Office of Indigent Defense Services, Research Department, data for ten year period (Jan. 16, 2016).

cases charged as potentially capital in that decade. In other words, North Carolina is sentencing than one half of one percent of eligible capital defendants to die.

Five defendants sentenced to die at capital trials were exonerated in the State of North Carolina in the same ten year period.[3] North Carolina has exonerated more capital defendants in the last decade than executed ones, and exonerated one capital defendant for every four convicted. Its capital sentencing system has failed in other important ways. Prosecutorial discretion is virtually unbridled under North Carolina's broad statute, and prosecutors declare vast numbers of cases as capital. The large majority of declared capital cases in North Carolina – 58% -- resulted not in life or death verdicts, but rather in second-degree murder convictions or less.[4] Worse, these capital prosecutions forced scores of defendants in North Carolina to face capital charges despite evidence that was too weak to prove their guilt.[5] This unchecked discretion has created a death sentencing scheme that is arbitrary at best, and often worse, for the constant ingredient in North Carolina's death penalty scheme is race.[6]

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[3] Death Penalty Information Center, Innocence Database (sorted by state), http://www.deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=36&race=All&dna=All.

[4] N.C. OFFICE OF INDIGENT DEFENSE SERVICES, FY15 CAPITAL TRIAL CASE STUDY (November 2015), available at http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY15CapitalCaseStudy.pdf.

[5] CENTER FOR DEATH PENALTY LITIGATION, ON TRIAL FOR THEIR LIVES: THE HIDDEN COSTS OF WRONGFUL CAPITAL PROSECUTIONS IN NORTH CAROLINA (June, 2015) (documenting 56 capital defendants whose cases were acquitted or saw their cases dismissed for lack of evidence since 1989).

[6] Catherine Grosso and Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 1973 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) (documenting the racial disparities in jury selection practices of prosecutors in capital trials over two decades); Barbara O'Brien, et al. , *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina*, 1990-2009 North Carolina Law Review, *forthcoming* (March 1, 2015) (finding defendants charged with murder of at least one white victim were more than two times more likely to be charged and sentenced to death); Isaac Unah and Jack Boger, *Race and the Death Penalty in North Carolina, An Empirical Analysis*: 1993-1997 (Commons Sense Foundation & North Carolina Council of Churches 2001); available at http://www.deathpenaltyinfo.org/race-and-death-penalty-north-carolina (same).

These problems, and the resulting drop in the acceptance of the death penalty, are far from unique to North Carolina. As a whole, the country resoundingly rejects capital punishment in practice today. This past year, 2015, saw the lowest number of executions, (28) and new death sentences (49) in decades. [7] The death penalty has become a relic of a handful of outlier geographical counties in a handful of states. Less than 2 percent of the nation's counties account for the majority of new death sentences and executions today.[8] Several of the states that retain the death penalty on the books have not executed anyone in years.[9] And states are increasingly formally turning from the death penalty. Seven states in the last decade formerly abolished it and four more have Governor-instituted moratoria.[10]

The punishment has become cruel and unusual, is prohibited by the North Carolina and federal constitutions, and cannot be imposed in this case.

A. The North Carolina and United States Constitutions Prohibit Penalties that Violate Evolving Standards of Decency

Article I, Section 27 of North Constitution provides, in part, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." This Eighth Amendment to the United States Constitution is nearly identical, but bars "cruel and unusual punishments." U.S. Const. amend. VII. The North Carolina courts analyze the provisions similarly. *See State v. Green,* 348 N.C. 588, 603 (N.C. 1998). Both "must draw [their] meaning from the evolving standards of decency that mark the progress of a

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[7] Editorial*, The Death Penalty Endgame,* THE NEW YORK TIMES (January 16, 2016).
[8] Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, Death Penalty Information Center, 6 (2013).
[9] Six death penalty states have been free of executions for a decade or more: Colorado, Kansas, New Hampshire, Oregon, Pennsylvania, and Wyoming. Seven have had only a single execution in the last decade: Arkansas, Kentucky Louisiana, Nevada, Utah, Montana, and Washington. *See* DPIC, Searchable Execution Database, http: www.deathpeanlyinfo.org/views-executions (last visited 1/17/2016).
[10] *Supra* note 7.

maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Green,* 348 N.C. at 603-04 (quoting Trop). According, the U.S. Supreme Court's framework for resolving Eighth Amendment challenges to a particular punishment guides this Court's analysis of the constitutional question presented. *See id.*

In evaluating the permissibility of a punishment under the Eighth Amendment, the U.S. Supreme Court first examines objective indicators, such as state legislation, death sentences, and executions, to determine whether a punishment or practice is consistent with contemporary standards of decency. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002). However, this review of societal consensus, though significant, does not "wholly determine" the constitutional permissibility of capital punishment. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Rather, "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id*.

B. Objective Indicators of Societal Consensus Define Constitutional Limits on Penalties and Punishment

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. The "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting). Therefore, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop,* 356 U.S. at 101. To gauge whether a punishment practice has fallen outside these evolving standards, the Court looks to objective indicia of societal consensus. *See Atkins*, 536 U.S. at 312.

Legislative authorization of a punishment is one indicia, but "[t]here are measures of consensus other than legislation." *Kennedy*, 554 U.S. at 433; s*ee also Graham v. Florida*, 560 U.S. 48, 62 (2010) (finding a societal consensus against juvenile life without parole sentences for non-homicide offenses even where the vast majority of jurisdictions formally authorized the practice). Because it is a "well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime," *Atkins*, 536 U.S. at 315, legislative activity may reflect an acceptance of harsh punishment in the abstract that does not, in fact, exist in practice. Therefore, "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. In death penalty cases, "'the jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved,' and … it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker*, 433 U.S. at 596, quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)(concluding that the death penalty for rape of an adult woman is unconstitutional, in part, because 9 out of 10 rape cases had not resulted in a death sentence). Under this aspect of the analysis, the Court will consider not only actual sentences imposed, *id.*, but also the number of executions carried out, *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005); *Kennedy*, 554 U.S. at 433.

Therefore, although its laws still authorize the death penalty, the Court regards a jurisdiction that does not utilize capital punishment, or does so with extreme infrequency, as the functional equivalent of abolitionist. *Atkins*, 536 U.S. at 316.

1. North Carolina's Near Total Abandonment of Capital Punishment Demonstrates that, as a Constitutional Matter, it is Functionally Abolitionist

The state constitutional issue presented here requires a focus on the objective indicia of consensus currently existing within the State of North Carolina. Constitutional consensus is determined by legislation, sentencing practices, and executions, not opinion polls or public outcry resulting from news of a particular crime. *See Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), reversed on other grounds by *Roper v. Simmons*, 543 U.S. 551 (2005)(consensus is determined by "state and federal statutes and the behavior of prosecutors and juries," not "public opinion polls, the views of interest groups, and the positions adopted by various professional associations"); *see also*, *State v. Santiago*, 318 Conn. 1, 32 (2015)(finding a statewide consensus against the death penalty where, "[a]lthough some opinion polls continue to reflect public support for the death penalty in theory, in practice, our state has proved increasingly unwilling and unable to impose and carry out the ultimate punishment").

The relevant objective indicia for this Court to consider are also necessarily local: only the moral judgments of the citizenry of this State can define the bounds of its constitutional guarantees. *See Santiago*, 318 Conn. At 20-29 (examining the societal consensus against the death penalty within Connecticut in holding the death penalty violates the state constitution); *State v. Lyle*, 854 N.W. 378, 389 (Iowa 2014)(relying, in part, on the consensus "building in Iowa in the direction of eliminating mandatory minimum sentencing" in holding the application of mandatory minimums to juvenile offenders violates the Iowa Constitution); *State v. Campbell*, 691 P.2d 929, 947-48 (Wash. 1984) (looking to "current community standards" within Washington in analyzing a state constitutional challenge to Washington's death penalty). When this Court examines these

objective factors at the state level, it is clear that, within North Carolina's borders, there is a consensus against the death penalty.

Although there remains a legislative provision authorizing capital punishment, its actual administration within the state reveals a functional abolition of the practice. "Statistics about the number of executions may inform the consideration whether capital punishment … is regarded as unacceptable in our society." *Kennedy*, 554 U.S. at 433. This metric demonstrates North Carolina's abrogation of the death penalty. The last execution in North Carolina was on August 18, 2006. There have been no executions in the last nine years, and only a total of four in the last decade.

New death sentences imposed by juries are another important indicator. As the Supreme Court has recognized, "'[t]he jury ... is a significant and reliable objective index of contemporary values because it is so directly involved.'" *Enmund v. Florida*, 458 U.S. 782, 794 (1982), quoting *Coker*, 433 U.S. at 596. The number of death sentences returned by juries is also a particularly telling measure of consensus because it reflects not only the decision of the jury itself, but also the exercise of discretion by locally-elected prosecutors and the legal and constitutional determinations made by judges handling potentially capital cases. Each of these actors can, and do, make determinations about whether or not the ultimate sanction of death is an acceptable or appropriate punishment for an aggravated murder. Whether or not a prisoner is sentenced to death is essentially a composite of all of these decisions, each of which is a key factor in the Court's determination of consensus.

It is extremely rare that a North Carolina imposes a death sentence after an aggravated murder conviction. Last year not a single jury returned a death sentence. In the decade between 2006 and 2015, there were 4,903 cases that were indicted with first

degree on open homicide charge, and eligible for the death penalty. Hundreds in fact proceeded capitally,[11] but only 20 resulted in death sentences. This dramatic infrequency of death verdicts is compelling evidence that the citizenry of North Carolina no longer supports the use of capital punishment.[12] As in *Graham*, "an examination of actual sentencing practices … where the sentence in question is permitted by statute discloses a consensus against its use." 560 U.S. at 62; *see also People v. Anderson*, 493 P.2d 880, 893-94 (Cal. 1972)("Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency").

The infrequency of death sentences and executions in North Carolina demonstrate that a societal consensus against the death penalty has developed within its borders. The evolving standards of decency within the state reflect that, in North Carolina, the death penalty has become a "cruel and unusual" punishment. Because it violates the guarantees of the North Carolina Constitution, the death penalty cannot be imposed in this or any case.

2. The drop in North Carolina's use of the death penalty mirrors the nation's abandonment.

Disuse of the death penalty in North Carolina accords with a strong and growing national abandonment of the punishment. Two United States Supreme Court Justices have

[11] For example, 534 of the 2,826 cases handled by the private bar in a similar time period proceeded capitally.
[12] This number of death sentence far overstates North Carolina's population's true acceptance of the death penalty. Because capital juries are entirely composed of death-qualified members, *i.e.*, those who will commit to considering and imposing the death penalty in an appropriate case, verdicts reflect the consensus of only this portion of society. *See Lockhart v. McCree*, 476 U.S. 165 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). The significant segment of the population that is entirely opposed to capital punishment is entirely excluded from service and therefore, its views are unrepresented in this metric.

invited briefing to address the continued constitutionality of the death penalty in light of the decline in the use of the death penalty. *See Glossip v. Gross,* 135 S. Ct. 2726, 2756-58, 192 L. Ed. 2d 761 (Breyer, J., dissenting), *reh'g denied*, 136 S. Ct. 20 (2015) (Breyer, J., dissenting, joined by Justice Ginsburg). As Justice Breyer detailed, executions in this country have become exceptionally rare in all but a few jurisdictions. *Id*. The Governors of four states, Colorado, Pennsylvania, Washington, and Oregon have indefinitely suspended executions. In total, thirty-three jurisdictions have either abolished the death penalty or executed one or fewer inmates per decade over the past half-century.[13]

Other traditionally active death jurisdictions have recently seen dramatic decreases in the number of death sentences imposed and executions carried out. In Texas, Oklahoma, Louisiana, Mississippi, Alabama, Arizona, Florida, and South Carolina, death sentences and executions have both decreased dramatically over the past decade. *See* DPIC, Death Sentences in the United States From 1977 By State and By Year[14]; DPIC, Searchable Execution Database.[15] Indeed, in 2015, "[e]xecutions in the United States . . . fell to their

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[13] Capital punishment is now prohibited entirely in nineteen jurisdictions: AK, CT, HI, IL, IA, ME, MD, MA, MI, MN, NJ, NM, NY, ND, RI, VT, WV, WI, and the District of Columbia. *See* DPIC, States With and Without the Death Penalty, *available at* http://www.deathpenaltyinfo.org/states-and-without-death-penalty. Though subject to a statewide referendum, the Nebraska Legislature repealed the death penalty in May 2015. Julie Bosman, *Nebraska to Vote on Abolishing Death Penalty After Petition Succeeds*, N.Y. Times, Oct. 16, 2015. Moreover, at least seven other states, the federal government, and the U.S. military exhibit a significant degree of long-term disuse. New Hampshire, which has only one occupant on its death row, has not performed an execution in 86 years. *See* DPIC, State by State Database, *available at* http://www.deathpenaltyinfo.org/state_by_state; DPIC, Searchable Execution Database, *available at* http://www.deathpenaltyinfo.org/views-executions. Wyoming has executed one person in fifty years and its death row is empty. *Id.* The U.S. military has not executed anyone since 1961. *Id.* Idaho, Kentucky, Montana, South Dakota, and the Federal Government have performed only three executions each over the past fifty years. *Id.* Kansas, as the *Hall* Court noted, "has not had an execution in almost five decades." *Hall v. Florida*, ___U.S. ___, 134 S. Ct. 1986, 1997, 188 L. Ed. 2d 1007 (2014). Moreover, of the sixteen death sentences carried out by these nine jurisdictions, seven have involved inmates who volunteered for execution. DPIC, Information on Defendants Who Were Executed Since 1976 and Designated as Volunteers, *available at* http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers.

[14] *Available at* http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[15] *Available at* http://www.deathpenaltyinfo.org/views-executions.

lowest number in nearly 25 years, and new death sentences imposed by courts declined to levels not seen since the early 1970s." Timothy Williams, *Executions by States Fell in 2015, Report Says*, N.Y. Times, Dec. 16, 2015.[16] These drops are not an aberration, but rather the result of a long, consistent national march away from capital punishment.

IV. Numerous Additional Factors Should Compel This Court to Independently Conclude that the Death Penalty Violates the State and Federal Constitution.

After the Court reviews the societal consensus in favor of or against a punishment, it independently "ask[s] whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313. Rather, "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, 433 U.S. at 597.

A. Capital Punishment Serves No Legitimate Penological Purpose

When the infliction of capital punishment no longer serves a penological purpose, its imposition represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312. The U.S. Supreme Court has repeatedly acknowledged that a punishment without penological purpose is necessarily cruel and unusual. *Kennedy*, 554 U.S. at 441, citing *Gregg*, 428 U.S. at 173, 183, 187; *Atkins*, 536 U.S. at 319; *Enmund*, 458 U.S. at 798.

The social purposes purportedly served by the death penalty are "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183. Capital punishment, in its current form, serves neither.

[16] *Available at* http://www.nytimes.com/2015/12/16/us/executions-by-states-fell-in-2015-report-says.html?_r=0.

1. There is No Evidence that the Death Penalty Deters Murder

"Despite 30 years of empirical research . . . , there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." *Baze v. Rees*, 553 U.S. 35, 79, 128 S. Ct. 1520, 1550, 170 L. Ed. 2d 420 (2008) (Stevens, J., concurring in judgment). In an exhaustive analysis of deterrence studies, the National Research Council reached the same conclusion, rejecting the claims of sholars who had purported to demonstrate such an effect. *See also Glossip v. Gross,* 135 S.Ct. 2726, 2768 (2015)(Breyer, J., dissenting) (discussing why death penalty is unlikely to deter murder); *Menzies v. Galetka*, 150 P.3d 480, 521 (Utah 2006)(Wilkins, J., concurring)("The death penalty acts as a deterrent to those put to death, for sure. It does not seem to have any realistic application to anyone else.")

Without resort to statistical analysis, however, it is obvious that a punishment as infrequently imposed as the death penalty is in North Carolina can serve little, if any, deterring purpose. While the imposition of a death sentence is remarkably infrequent, an execution is even more so. "[A]n offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration) can take place." *Glossip*, 135 S.Ct. at 2768 (Breyer, J., dissenting). As Justice White articulated in *Furman*, "the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." 408 U.S. at 311. North Carolina, like the country as a whole, has reached this point.

2. The Death Penalty Does Not Contribute Any Significant Retributive Value Beyond That Afforded By A Sentence of Life Without Parole.

Retribution is the principle that "most often can contradict the law's own ends," because, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing constitutional commitment to decency and restraint." *Kennedy*, 554 U.S. at 420. Therefore, the U.S. Supreme Court exercises "particular concern" when it "interprets the meaning of the Eighth Amendment in capital cases." *Id*. Specifically, the death penalty must be reserved for only the most aggravated homicides committed by the most culpable offenders. *See, e.g.*, *Simmons*, 543 U.S. at 568; *Atkins*, 536 U.S. at 319; *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). However, experience demonstrates that the death penalty is not so limited.

i. The Death Penalty Is Not Reserved For The Most Aggravated Offenses.

The Court has consistently limited the imposition of capital punishment to "a narrow category of the most serious crimes," in order to ferret out those crimes which, while severe, are not deserving of the ultimate punishment. *Atkins*, 536 U.S. at 319; *Kennedy* (banning the death penalty for non-homicide offenses); *Godfrey*, 446 U.S. at 433 (requiring states to narrow their homicide statutes so that only aggravated murders are death-eligible).

While the imposition of the ultimate sanction of death is undeniably rare, this infrequency does not reflect the identification and punishment of the most culpable offenders. "Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, i.e., without the "reasonable consistency" legally necessary to reconcile its use

with the Constitution's commands." *Glossip,* 135 S.Ct. at 2760 (Breyer, J., dissenting), citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Justice Breyer recently noted that numerous studies "indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought not to affect application of the death penalty, such as race, gender, or geography, often do." *Id*. As a result, Justice Breyer has concluded it is likely that the death penalty is unconstitutional. *Id*. at 2762; *see also Baze*, 553 U.S. at 82-86 (Stevens, J., concurring in judgment)(stating that the death penalty is unconstitutional and rejecting the assumption "that adequate procedures [are] in place to avoid the danger of discriminatory application . . . of arbitrary application . . . and of excessiveness" of the death penalty) (internal citations omitted); *Callins v. Collins*, 510 U.S 1141, 1145 (1994) (Blackmun, J., dissenting) (refusing to further "tinker with the machinery of death" because it was "virtually self-evident . . . that no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies").

ii. The Death Penalty Is Not Reserved For The Most Culpable Offenders

There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Thus, in addition to requiring that only aggravated murders are punishable by death, the Eighth Amendment also mandates that a death sentence be limited to those offenders with "a consciousness materially more depraved" than that of

the typical person who commits a murder. *Godfrey*, 446 U.S. at 433. The execution of a person with insufficient culpability would serve no retributive purpose, and, therefore, it would "violate[] his or her inherent dignity as a human being." *Hall v. Florida*, 134 S.Ct. 1986, 1992 (2014).

In part because of their reduced moral culpability, the U.S. Supreme Court has categorically prohibited the execution of juveniles and those with intellectual disability. *See Simmons*; *Atkins*, *supra*. The Court held that juveniles, who are more impetuous, reckless, influenced by negative peer pressure, and unable to control their actions as compared to adults, are also substantially less culpable. *Simmons*, 543 U.S. at 569-71. As a result, death is a constitutionally disproportionate punishment for all juveniles. *Id*. The Court held, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id*. at 572-73.

Similar concerns motivated the Court's prohibition on executing offenders with intellectual disabilities. In *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), the Court noted that the "cognitive and behavioral impairments" of the intellectually disabled – "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" – substantially reduced their moral culpability. Therefore, the execution of the intellectually disabled failed to advance any retributive goal. *Id*. at 319.

The concern over retributive excess extends beyond juvenile status and intellectual disability to include offenders with severe mental illness, traumatic brain injuries and other functional deficits that have a tendency to degrade the quality of thought processes. *See e.g.*,

Porter v. McCollum, 558 U.S. 30, 43-44 (2009) (recognizing mitigating value of a defendant's "brain abnormality and cognitive deficits," as well as "the intense stress and mental and emotional toll" that army service can have on an individual); *Simmons*, 543 U.S. at 574 (acknowledging that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18").

The Court's imposition of categorical rules in *Simmons* and *Atkins* not only protects classes of individuals for whom death is a disproportionate punishment *per se*; it also reflects an understanding of the inherent difficulty—even unreliability—of jury determinations about moral culpability. The Court has explicitly acknowledged that juries do fail to make reliable and accurate culpability assessments about offenders facing a potential death sentence. *See Simmons*, 543 U.S. at 573 ("[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course"); *Penry*, 492 U.S. at 324 (noting that mitigation evidence can be "a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future").

Equally troubling are the many impairments or disadvantages impacting an offender's culpability of which a jury and court are entirely unaware. The failure of defense counsel to discover and present mitigation is but one area of tremendous concern.[17] Another is the not uncommon circumstance where mitigation is entirely waived by a defendant. In those cases, there is simply no way to determine what hidden factors or impairments may drive or explain a defendant's plainly irrational objection to the jury's

[17] *See*, *e.g.*, Bright, S., "Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer," 103 Yale Law Journal 1835 (1994).

consideration of any mitigating information. *See*, *e.g.*, *Godinez v. Moran*, 509 U.S. 389, 416-17 (Blackmun, J., dissenting)("Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf. The psychiatrists' reports supplied one explanation for Moran's self-destructive behavior: his deep depression").

Racial disparities continue to plague the application of the death penalty in North Carolina and around the country. Decades of rigorous academic scholarship consistently show that the death penalty is overwhelming reserved for white victims. Even after accounting for other legitimate non-racial case characteristics, defendants charged with killing white victims are far more likely to be sentenced to death than all others.[18] After four decades of tinkering, race remains the same stain on capital punishment it was in Furman.

These profound challenges in the death penalty's implementation exist nationwide. Courts in every jurisdiction where defendants are sentenced to death are constantly grappling with the difficulty of determining what degree of disability, illness, or disadvantage renders death an impermissible or disproportionate punishment. The substantial functional impairments of the executed and the condemned reveal the inefficacy of this pursuit.[19] Despite the numerous procedural safeguards in place, a substantial proportion of the executed and condemned suffer or suffered from limited

[18] *See supra* note 6; United States General Accounting Office, Death Penalty Sentencing, Research Indicates Pattern of Racial Disparities (Feb. 1990); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003).
[19] Robert J. Smith, *et al*, Zoe, *The Failure of Mitigation*? HASTINGS LAW JOURNAL, Vol. 65: 1221 (June 2014).

intellectual ability, severe mental illness, addiction, or an abusive upbringing such that death is neither a just nor a constitutionally proportionate sentence. It is evident, therefore, that there remains a systemic risk of wrongfully executing an insufficiently culpable defendant.

B. Persistent and Irremediable Difficulties in Administrating the Death Penalty Demonstrate its Unconstitutionality

1. There is an Unacceptable Risk of Executing the Innocent

It is now incontrovertible that startling numbers of innocent people have been sentenced to death and wrongfully executed. *See Glossip*, 135 S.Ct. at 2756-58 (Breyer, J., dissenting). Advances in forensic evidence, particularly DNA testing, have produced a substantial number of exonerations in capital cases. In 2006, Justice Souter wrote in *Kansas v. Marsh*, "we are [] in a period of new empirical argument about how 'death is different.'" 548 U.S. 163, 210 (2006)(Souter, J., dissenting)(quoting *Gregg*, 428 U.S. at 188). When the Court decided *Marsh*, there had been 120 exonerations of death row inmates.[20] Today, there have been 153 exonerations of death row inmates.[21] Even more troubling, there is growing concern that states have executed actually innocent defendants. *See Glossip*, 135 S.Ct. at 2758 (Breyer, J., dissenting); Maurice Possley, *Fresh Doubts Over a Texas*

[20] *See* Death Penalty Information Center, *List of Those Freed from Death Row*, available at: http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited June 3, 2015).

[21] *Id*. The number of exonerations is harrowing in its own right, but particularly so when considering the human aspect of the individual cases. As just one example, in a 1994 case, Justice Scalia used North Carolina death rown inmate Henry McCollum as a poster child for the death penalty for his purported role in "the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat." *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring). Twenty years after that opinion, Henry McCollum was exonerated. *See* Jonathan Katz and Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES, Sept. 2, 2014, available at: http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html?_r=0 (last visited June 3, 2015).

Execution, Washington Post, Aug. 3, 2014[22] (discussing case of Cameron Todd Willingham); James Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (Columbia University Press 2014 ed.) (discussing case of Carlos DeLuna). As Justice Stevens has recently noted, the risk of killing an innocent person, which cannot be entirely eliminated, is a "sufficient argument against the death penalty: society should not take the risk that that might happen again, because it's intolerable to think that our government, for really not very powerful reasons, runs the risk of executing innocent people." *See* Columbia Law School, *Professor James Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says*, Jan. 26, 2015.[23]

2. Current Execution Methods are Cruel and Involve Torture or a Lingering Death

Even if juries and courts were able to sentence to death only the most culpable offenders who committed the most aggravated murders, and if we could guarantee that no innocent person would be wrongfully convicted, and if conditions of confinement pending execution did not raise independent constitutional concerns, there would still remain "a substantial, constitutionally unacceptable risk" of suffering in the current administration of capital punishment. *Baze*, 553 U.S. at 52. "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances," without regard to how commonly they are employed. *Graham*, 560 U.S. at 59, citing *Hope v. Pelzer*, 536 U.S. 730 (2002). The death penalty, as it is executed by States today, is such a punishment.

[22] Available at: http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/ (last visited June 3, 2015)
[23] Available at https://www.law.columbia.edu/media_inquiries/news_events/2015/january2015/stevens-liebman.

Each of the thirty-one jurisdictions that legislatively authorize capital punishment employs lethal injection as its primary or only execution method.[24] "The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection." *Baze*, 553 U.S. at 62. The uniform shift among states towards lethal injection is a reflection of public opinion, which no longer condones outdated execution methods that are gruesome, inflict intense pain, or result in a slow death.[25]

The promise of a quick, painless death has proven empty with frequently botched executions. Pharmaceutical companies seeking to prevent the use of their products in executions have refused to supply prisons with drugs traditionally used to execute inmates.[26] Recent shortages in these medications have led prison administrators to make impromptu substitutions, often without any scientific basis or study.[27] In doing so, States have made laboratory animals out of condemned prisoners, performing often unsuccessful human experiments upon them to determine what combination of drugs or new execution methods will produce a quick and arguably dignified death.[28] Worse, these experiments are designed by laymen, not scientists or medical professionals, and have resulted in a number of botched executions in which the condemned do not die quietly or painlessly, but

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[24] State-by-state data on execution methods utilized has been gathered by the Death Penalty Information Center and is published at http://www.deathpenaltyinfo.org/methods-execution

[25] Swanson, E., *Americans Favor the Death Penalty, But Few Want the Executed to Suffer*, HUFFINGTON POST, January 25, 2014 (reporting on poll results showing that 54% of Americans approve of lethal injection as an execution method and favor a quick and painless death for the executed. Fewer than 35% approved of any alternative method, including electrocution, firing squad, hanging, beheading, or the gas chamber).

[26] Jeffrey Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC MONTHLY (June 2015). Available at http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/.

[27] *Id*.

[28] The Oklahoma legislature recently passed a bill authorizing the use of nitrogen hypoxia in executions. The method, developed through internet research, is entirely untested. Oklahoma's next execution may be the first clinical trial. Murphy, S., *Oklahoma Poised to Allow Nitrogen Gas for Executions*, Washington Post, April 9, 2015, available at http://www.washingtonpost.com/national/nitrogen-gas-execution-bill-heading-to-oklahoma-governor/2015/04/09/532b15e2-ded3-11e4-b6d7-b9bc8acf16f7_story.html

rather writhe in agony for substantial periods of time – sometimes hours -- before they suffocate and finally expire.[29] There is simply no question that these practices involve "torture" and "a lingering death" and are, therefore, cruel punishment. *See Baze*, 553 U.S. at 52 (recognizing that, without a proper dose of a drug "that would render a prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride"); *Hodges v. Bell*, 548 F.Supp.2d 485, 541 (M.D. Tenn. 2008) (murder of victim "was heinous, atrocious, or cruel, in that it involved torture or serious physical abuse" where he was conscious when strangled, could be heard moaning and choking, and it took approximately five minutes for him to die); *State v. Smith*, 359 N.C. 199, 220 (2005)(murder especially heinous, atrocious, or cruel where victim was still alive when defendant bound his hands and feet and covered his head including his nose and mouth with tape, ultimately causing him to suffocate to death); *Huggins v. State*, 889 So. 2d 743, 770 (Fla. 2004)("strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable"); *State v. Dawson*, 233 Mont. 345 (1988)(murder victims killed by "torture" where they were bound, gagged, forcefully injected with unknown drugs, then asphyxiated to death).

VI. Conclusion

Because there is a societal consensus rejecting capital punishment, its application serves no penological purpose, and there are persistent and irremediable difficulties in its

[29] *See* Jeffrey Stern, *supra* note 21; Michael L. Radelet, *Examples of Post-Furman Botched Executions*, available at http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions?scid=8&did=478.

administration, the death penalty violates Article 1, Section 19 of the North Carolina Constitution and the Eighth and Fourteenth Amendments of the United States Constitution. Therefore, [defendant] moves this Court to strike the death penalty as a potential punishment in this case.

JAN. 6 2016 5:15 AM

The Death Penalty's Last Stand

Capital punishment is collapsing under the weight of its own corruption and cruelty.

By Charles Ogletree

Photo by ViewApart/Thinkstock

Carl Staples moved his family to Shreveport, Louisiana a few years after the assassination of Martin Luther King, Jr. Forty years later, Staples had to walk past a Confederate flag atop a monument to the Confederacy on the Shreveport courthouse lawn in order to report for jury duty. When the lawyers asked

Mr. Staples whether he could be an impartial juror in a death penalty case—a question routinely asked and answered in the affirmative in courthouses across the country—his response likely stunned the room:

> The Confederate flag flies here. This is a symbol of one of the most, to me, one of the most heinous crimes ever committed to another member of the human race, and I just don't see how you could say you're here for justice and then again you continue to overlook this great injustice by continuing to fly this flag which continues to put salt in the wounds of people of color. I don't buy it. I don't buy it.

In 2011, I travelled to Louisiana and stood with Carl Staples on the courthouse lawn. We asked Shreveport to take down that flag. During my visit, I learned that Caddo Parish, which includes Shreveport and has a population of about 250,000 people, has been the site of more lynchings of black men than all but one other county in America. In the 1920s, even progressives justified the use of capital punishment on the grounds that whites would demand more lynchings of blacks if the death penalty wasn't available. No white person has ever been executed for killing a black man in Caddo—or anywhere in Louisiana for that matter.

Carl Staples' quiet and courageous assertion sent forth a ripple that became a wave. In November of 2011, the County Commissioners voted to take down the Confederate Flag. Unfortunately, that symbolic gesture has not yet improved the administration of justice in the county. But that could change. While Caddo Parish remains one of the only counties in the United States that continues to **repeatedly impose new death sentences**, this dubious distinction is now coming under increasing public scrutiny. The result is that, even in this locale, the death penalty is collapsing under the weight of its own corruption and cruelty.

In 2014, Glenn Ford, a Caddo Parish resident, was exonerated after spending 30 years in solitary confinement on death row for a crime he did not commit. He died from untreated cancer shortly after his release from Angola State Penitentiary. Marty Stroud, the prosecutor who put Ford on death row, wrote a public apology:

> I now realize, all too painfully, that as a young 33-year-old prosecutor, I was not capable of making a decision that could have led to the killing of another human being. No one should be given the ability to impose a sentence of death in any criminal proceeding. We are simply incapable of devising a system that can fairly and impartially impose a sentence of death because we are all fallible human beings.

In response to Stroud's act of humility, Dale Cox, then acting district attorney of Caddo Parish and a prosecutor who was single-handedly responsible for one-third of Louisiana's death sentences since 2010, told a local reporter "we need to kill more people." Cox called society "a jungle" and expressed support for the death penalty as "revenge."

Cox's comments have drawn outrage not just within Caddo, but throughout the nation. He announced that he would not run for re-election as district attorney because his views on the death penalty were so out of step with his community.

In November, the voters of Caddo Parish elected Judge James Stewart to be the first black district attorney of Caddo Parish. He ran on a reform platform. Days later, Dale Cox resigned from the office.

Like the monument commemorating the Confederacy, Caddo Parish is a symbol, in this case a symbol of the **death penalty's last stand in America**. It offers a vivid example of the personality-driven process that is virtually all that is left of the death penalty today. Caddo did not become the poster child for a wildly dysfunctional capital punishment system because its inhabitants were more bloodthirsty than those living in other counties across the Deep South. It became an outlier because of prosecutors like Dale Cox, who were **overzealous and reckless** in their single-minded pursuit of death sentences.

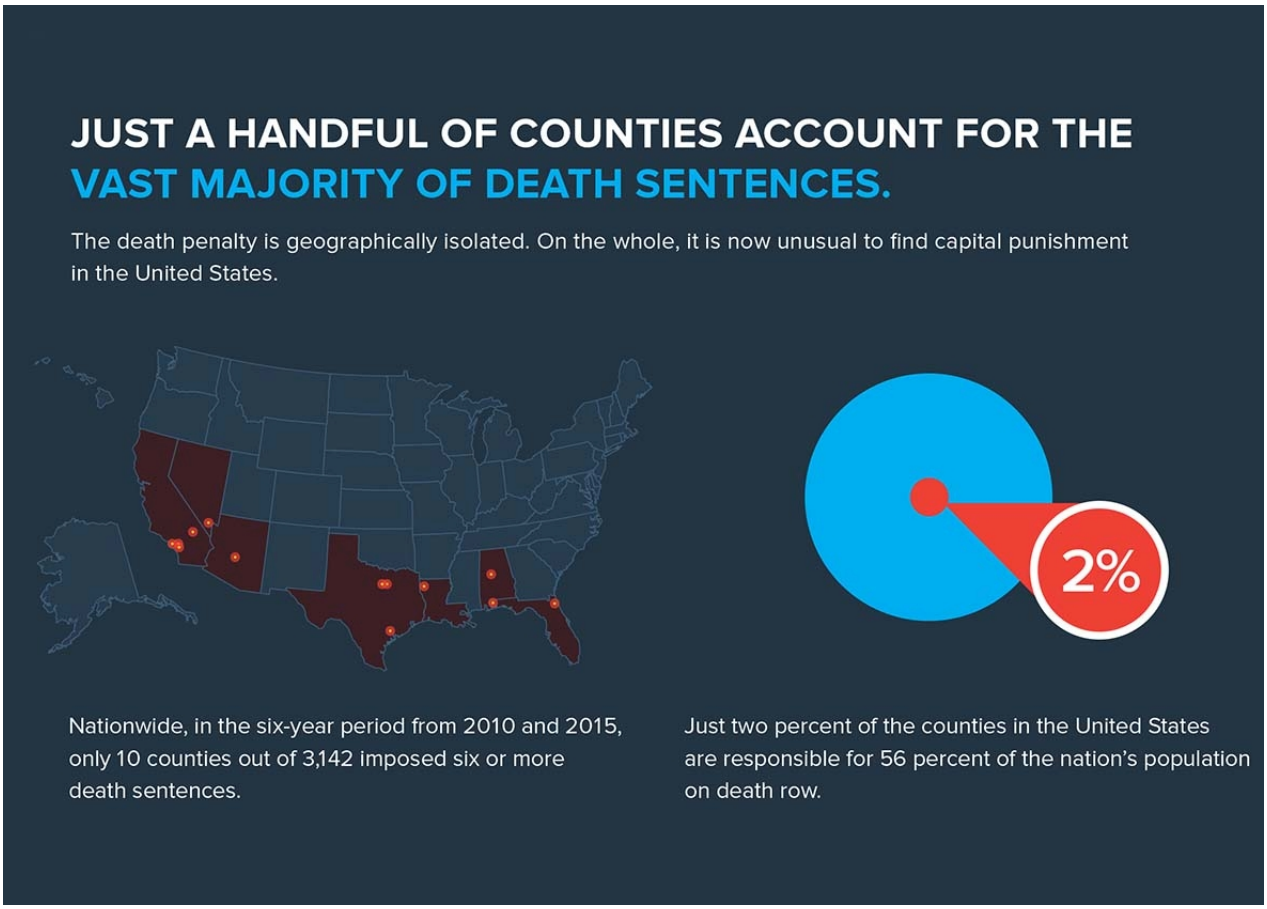
In addition to facing the overzealous prosecutors, 75 percent of those sentenced to death since 2005 were represented by a defense lawyer who is **no longer certified to try capital cases** under new statewide standards. One such lawyer, Daryl Gold, once offered less than a day's worth of mitigation for a client accused of murdering his infant son. In a case that has now received national attention, this man was convicted and sentenced to death despite the fact that the state's own medical examiner couldn't be certain that the death was a homicide.

Combine these factors with a legacy of racial terror and continuing institutional racism—for example, a **recent study** that found that black candidates were struck from juries three times as often as whites in Caddo—and you have the recipe for a dysfunctional death penalty system. A broken system preys upon the most fragile and least competent among us. It can hardly be surprising then, that in this Parish juries sentenced an individual like Corey Williams to death. (Williams, who **was likely framed for murder**, had his sentence commuted to life in prison because he was 16 at the time of his crime and intellectually disabled. Both are factors that constitutionally exclude him from the death penalty.)

Similarly, Laderick Campbell, an 18-year-old ninth-grade dropout and former special education student with a 67 IQ and a severe mental illness, was also sentenced to death. The trial judge wondered aloud whether Campbell was "delusional" during jury selection in the case.

I represented Brandy Holmes, who was named after her mother's favorite drink while pregnant, and who attempted suicide as a child after she was raped. Caddo prosecutors sought the death penalty despite the fact that Brandy suffers from fetal alcohol syndrome, organic brain damage, post-traumatic stress disorder, and major depression.

Caddo offers us a microcosm of what remains of the death penalty in America today. In practice, capital punishment is increasingly being rejected by prosecutors, juries, judges, legislatures, and the public across the country. Only 10 counties out of 3,142 produced more than six death sentences between 2010 and 2015.



There is strong and growing national consensus that the **death penalty should be replaced** with life without parole. Thirty-three jurisdictions, including 30 states and the District of Columbia, the federal government, and the U.S. Military, have formally abandoned the death penalty or have not carried out an execution in more than nine years. The governors of Oregon, Washington, Pennsylvania, and Colorado have vowed not to perform an execution. Seven states have replaced the death penalty with life without parole in the past decade, and more than a dozen other legislatures have considered repealing in recent years. Several may achieve that goal within the next few years.

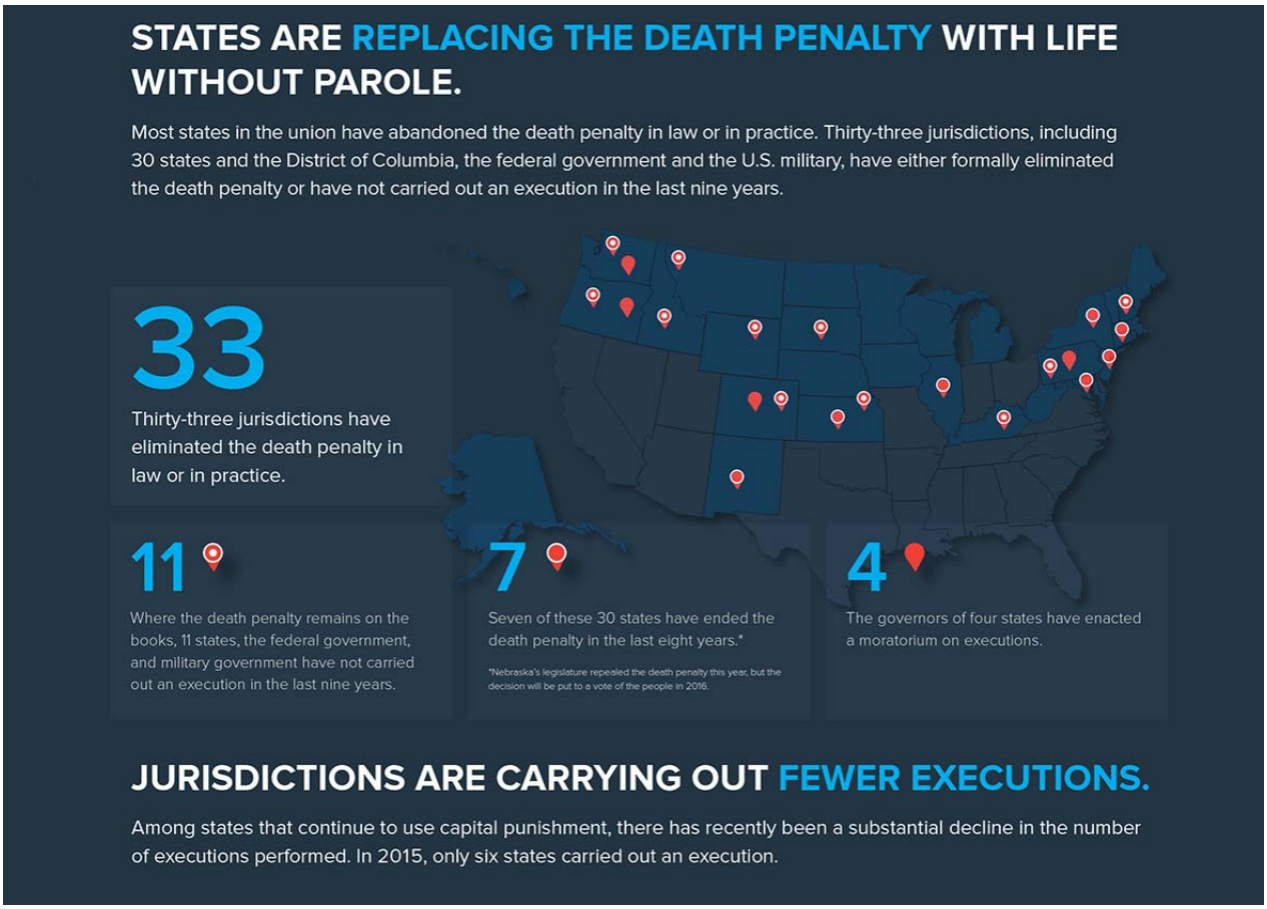


Chart courtesy of Harvard Law School

In 2015, juries returned the fewest new death sentences—49—in modern history.

Fourteen of those sentences came from split juries in Alabama and Florida. These are two of only three states that allow non-unanimous jury verdicts in capital cases.

Nineteen of those sentences came from states—namely, California, Kansas, Nevada and Pennsylvania—where no one has been executed in at least nine years, and in the case of Kansas, in more than 50 years.

And, in a remarkable turnabout, Texas, a state that sentenced 48 people to death in 1999—only one sentence fewer than the national total this year—had just two confirmed death sentences in 2015.

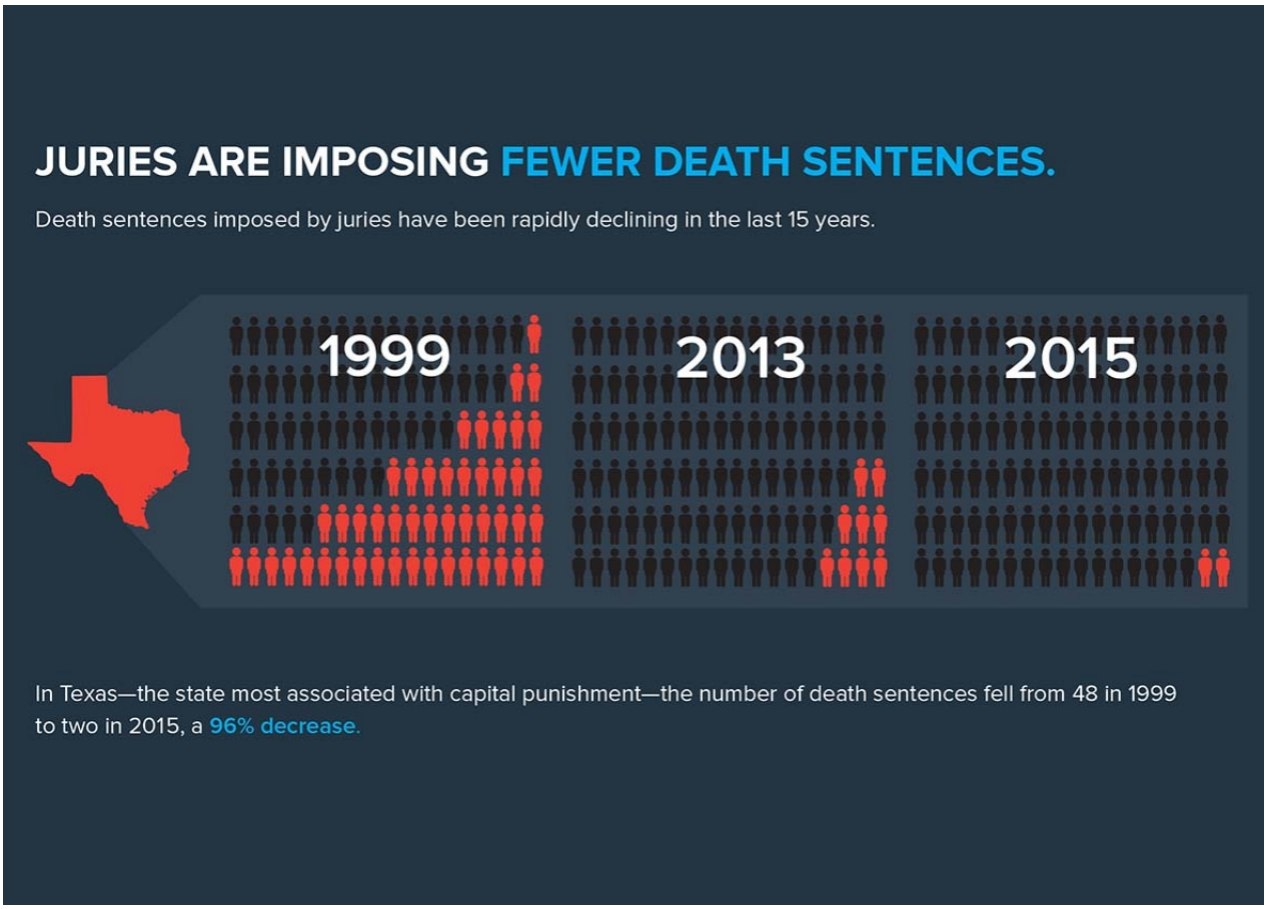


Chart courtesy of Harvard Law School

Six states performed a total 28 executions this year, the lowest number in 25 years. Three-quarters of the people executed in 2015 suffered from crippling intellectual or mental disabilities, endured extreme childhood trauma and abuse, or were executed despite doubts about their guilt.

Chart courtesy of Harvard Law School

Seven of the executed individuals had an intellectual impairment or brain injury. Cecil Clayton had a 71 IQ score and lost 20 percent of his prefrontal cortex—the part of the brain responsible for decision-making—in a sawmill accident. Three doctors declared Clayton incompetent to be executed.

Texas executed Robert Charles Ladd, who had a 67 IQ score. A state-employed psychiatrist said Ladd was "rather obviously retarded." Texas also executed Juan Garcia, who had an IQ score of 75, which puts him in the lowest 5 percent of the population. Garcia was just 18 years old when he was sentenced to die. If he had committed the same crime six months earlier, he would have been ineligible for the death penalty.

Georgia executed Warren Hill, a man with a 70 IQ score, even though three state-employed physicians found that he was intellectually disabled.

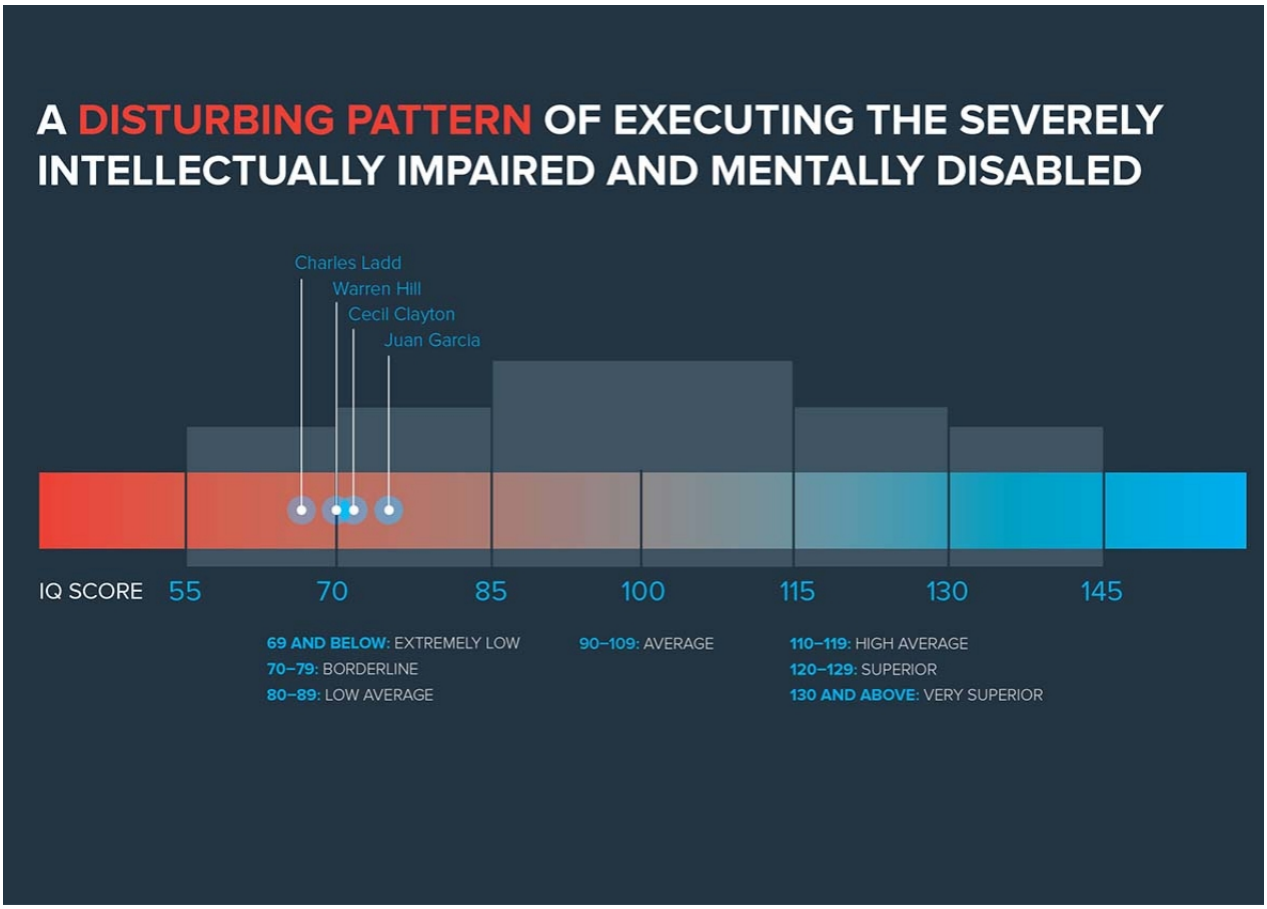


Chart courtesy of Harvard Law School

Seven executed individuals suffered from serious mental illnesses. Georgia executed Andrew Brannan, a decorated Vietnam combat veteran, diagnosed with both post-traumatic stress disorder and bipolar disorder. The Department of Veteran Affairs categorized him as 100 percent disabled.

Texas executed Raphael Holiday, who was diagnosed with depression with psychotic features. A physician testified that his mental health background suggested psychotic decompensation, which meant that he had "some loss of contact with reality." Texas also executed Kent Sprouse, who had been diagnosed with schizophrenia by a court-appointed psychiatrist who said he was "psychotic, paranoid, believed people were persecuting him, and did not understand the wrongfulness of his conduct."

Top Comment

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The crippling impairments of many of the people executed this year reveal the excessiveness of the death penalty as a punishment. As someone who knows the pain of losing a loved one to homicide, I can understand the desire to hold people who commit heinous crimes accountable. I lost my beloved sister, Barbara Jean Ogletree Scoggins, who served as a police officer with the Merced County Sheriff's Office, to murder in the 1980s. However, extracting the ultimate revenge from persons who have severe mental disabilities, borderline intellectual functioning, or impairments as the result of serious childhood abuse and trauma crosses a moral line when we have other options, such as life without parole, available to us.

The death penalty in America today is the death penalty of Caddo Parish—a cruel relic of a bygone and more barbarous era. We don't need it, and I welcome its demise.

MONEYBOX COMMENTARY ABOUT BUSINESS AND FINANCE.

JAN. 13 2016 6:04 PM

The Year Banks Finally Paid

Federal prosecutors are finally going after Wall Street's bad actors in a serious way. Is that enough?

Death penalty increasingly a part of NC's history

KEN ROSE
Guest Columnist

This year, for the second time since 2012, not a single person was sentenced to death in North Carolina. Our state is clearly realizing that, while no punishment can heal the terrible grief of violent crime, life without parole is a tough and fair sentence for those who commit the worst crimes. The evidence bears that out.

North Carolina hasn't executed anyone in nearly a decade. During this hiatus, our murder rates have gone down. At the same time, we have continued to discover innocent people in our state's prisons. Two-thousand and fifteen saw Gov. Pat McCrory, a conservative "law and order" governor, give a rare pardon of innocence to my former client Henry McCollum, who spent 30 years wrongfully imprisoned on North Carolina's death row.

In light of all that, this year's zero death sentences might sound unsurprising. But for someone like me, who has fought to save the lives of capital defendants in North Carolina for 25 years, it is difficult to describe the seismic shift that number signals.

Try to imagine 1995. It wasn't so long ago, though it feels like another lifetime. In that single year, 34 people were sentenced to death in North Carolina. There were at least 70 death penalty trials.

The Capital Defender's Office, a state agency that now coordinates the defense of people facing the death penalty, did not yet exist. Those of us who represented capital defendants did so largely in isolation, for little pay, and knowing that any mistake could cost our clients their lives.

Prosecutors demanded death sentences even in cases where the defendants suffered serious mental illness, psychosis, or intellectual disabilities — even in cases where deaths were clearly accidental. Juries sometimes deliberated less than an hour before voting unanimously for a person's execution. At least one elected district attorney celebrated each new death sentence by handing out noose-shaped lapel pins to his staff.

As a defense attorney, I was assigned one new capital client after the next — all impoverished, many mentally disabled, and most African-American.

One of my clients, Bo Jones, came within a few days of being executed in the 1990s because his prior attorneys had missed the deadline for filing his appeal. Years later, in 2008, all charges against him were dismissed and he was released because there was no credible evidence tying him to the crime.

Twenty years isn't even long enough for a child to reach full adulthood. But somehow, it has been enough time for North Carolina to grow up. A state that once blindly trusted the criminal justice system to sift the guilty from innocent, and to determine who deserved to die, now sees that no system made up of human beings is deserving of that trust.

A state Innocence Inquiry Commission, along with several independent innocence projects, now pore over cases to find wrongful convictions — and the results have shown disturbing evidence that our system is deeply flawed. Seven innocent people who were sentenced to death in North Carolina have been exonerated since 1999.

Our last execution was carried out in August 2006, and with each passing year the death penalty becomes more a part of North Carolina's past than its future. Juries have handed down just six death verdicts in the past five years. This year, the state pursued the death penalty at four trials but wasn't successful in any, needlessly spending hundreds of thousands of dollars on each failed attempt.

People on all sides are realizing that capital punishment is wasteful and ineffective. In the past few months, a former death penalty prosecutor who sent five people to death row and a Republican state legislator have taken public stands against the death penalty.

North Carolina is in step with the nation. We are now among a majority of states that have abandoned the death penalty, either in law or in practice. Across the United States, new death sentences and executions reached historic lows this year. Just six states carried out executions, and many were horribly botched. Even Texas sentenced only two people to death in 2015.

As I look out across this changed landscape, it's tempting to feel that the 1990s were just a bad dream — except that many of the people we sent to death row in that frenzy of bloodlust are still there today. A stunning 104 of North Carolina's 147 death row inmates were sentenced between 1990 and 2000.

Even as we finally see the error of our ways, we are still paying for the mistakes of the past.

Ken Rose is a senior staff attorney at the Center for Death Penalty Litigation in Durham.