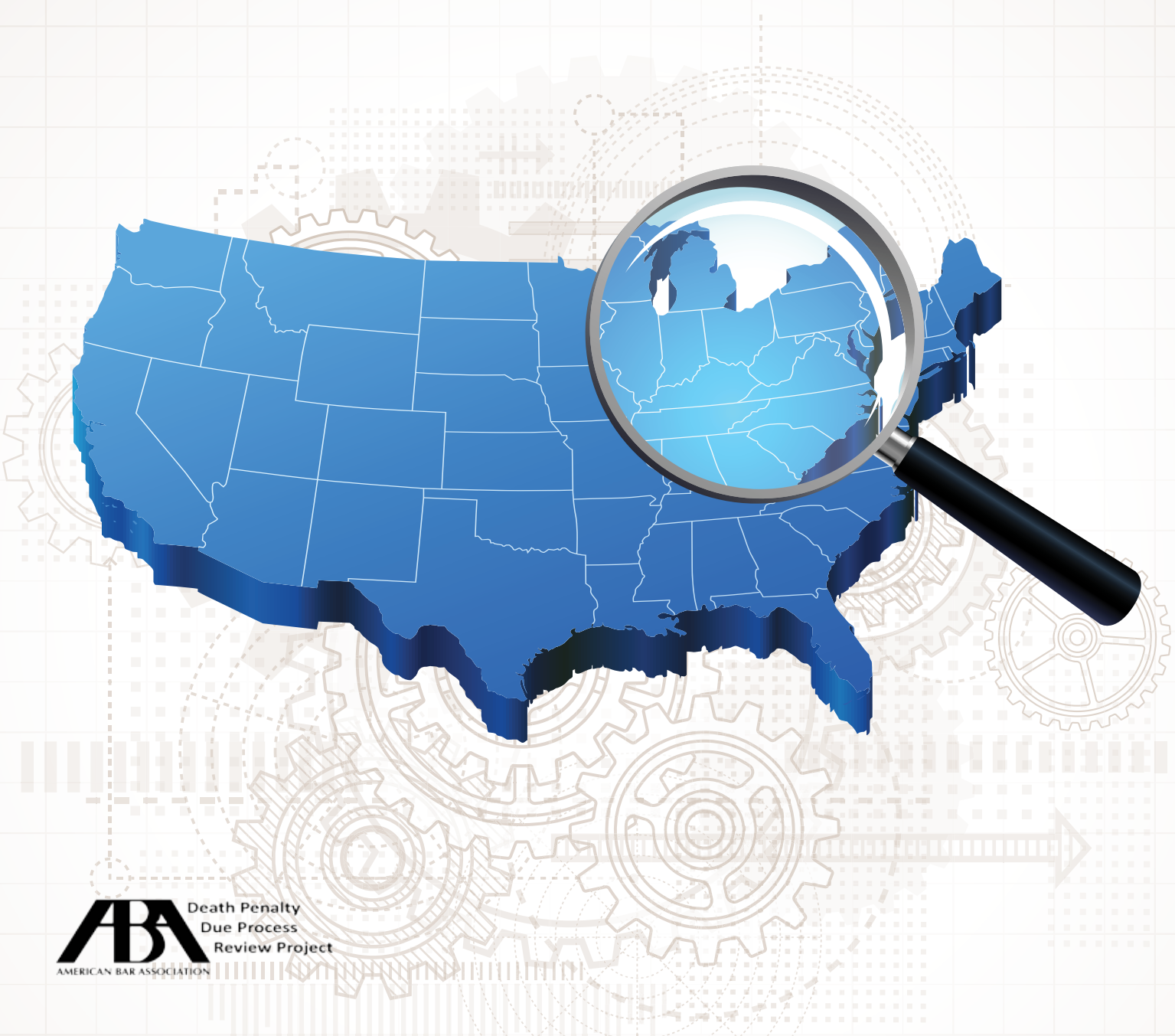


The State of the Modern Death Penalty in America



ABA Death Penalty
Due Process
Review Project
AMERICAN BAR ASSOCIATION

ABA Death Penalty Due Process Review Project
Key Findings of State Death Penalty Assessments 2006-2013

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A system that takes life must first give justice.

— John J. Curtin, Jr., former ABA President

These words have been the guiding principle of the American Bar Association’s Death Penalty Due Process Review Project since its inception in 2001. In any jurisdiction that maintains the death penalty, the process by which individuals are charged and sentenced to death must be fair, comport with due process, and minimize the risk of executing the innocent. For almost 10 years, the Project has examined the extent to which various capital jurisdictions are able to achieve these ends. This report sets out some of the Project’s key findings, including areas in which capital jurisdictions have implemented best practices, as well as areas in which significant concerns affecting the integrity and validity of death sentences remain.

The ABA’s Leading Voice on Fairness in Capital Cases

Fairness and accuracy are the foundations of the American criminal justice system. As the U.S. Supreme Court long ago recognized, these goals are especially important in cases in which the death penalty is sought. Accordingly, no jurisdiction, state or federal, can claim to provide due process or to protect the innocent unless it provides a fair and accurate system to every person who faces capital punishment.

Within the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty.

As early as 1979, three years after *Gregg v. Georgia*—the U.S. Supreme Court decision ushering in the modern death penalty era—the American Bar Association adopted a policy calling for greater competency within the ranks of capital counsel. In 1982, the ABA approved a second policy which supported state and federal courts’ authority—indeed, their responsibility—to exercise independent judgment on the merits of constitutional claims raised on collateral review. A year later, the ABA formally opposed the execution of offenders who, at the time they committed their capital offenses, were under the age of eighteen. In 1988, the ABA called for the elimination of racial discrimination in capital sentencing on the basis of either the victim’s or the defendant’s race. In 1989, the ABA adopted a policy opposed to the execution of offenders with mental retardation.¹

¹ “Intellectual disability” is now the preferred term to describe the same condition known as mental retardation. The term mental retardation is used in this publication to maintain consistency with previous reports authored by the state assessment teams on the death penalty.

Early ABA Policies on the Death Penalty Post-Gregg

1979

ABA adopts policy calling for greater competency of lawyers in death penalty cases (additional related policies adopted in 1985 and 1990).

1982

ABA calls on courts to exercise independent judgment on the merits in capital cases.

1983

ABA calls for end of death penalty for juvenile offenders (22 years before the U.S. Supreme Court prohibits the execution of juveniles in *Roper v. Simmons*).

1988

ABA calls for the elimination of racial discrimination in capital sentencing.

1989

ABA supports prohibition of execution of offenders with mental retardation (13 years before the U.S. Supreme Court prohibits the execution of mentally retarded offenders in *Atkins v. Virginia*).

ABA adopts comprehensive guidelines on the appointment and performance of counsel in death penalty cases (amended in 2003 and 2008).

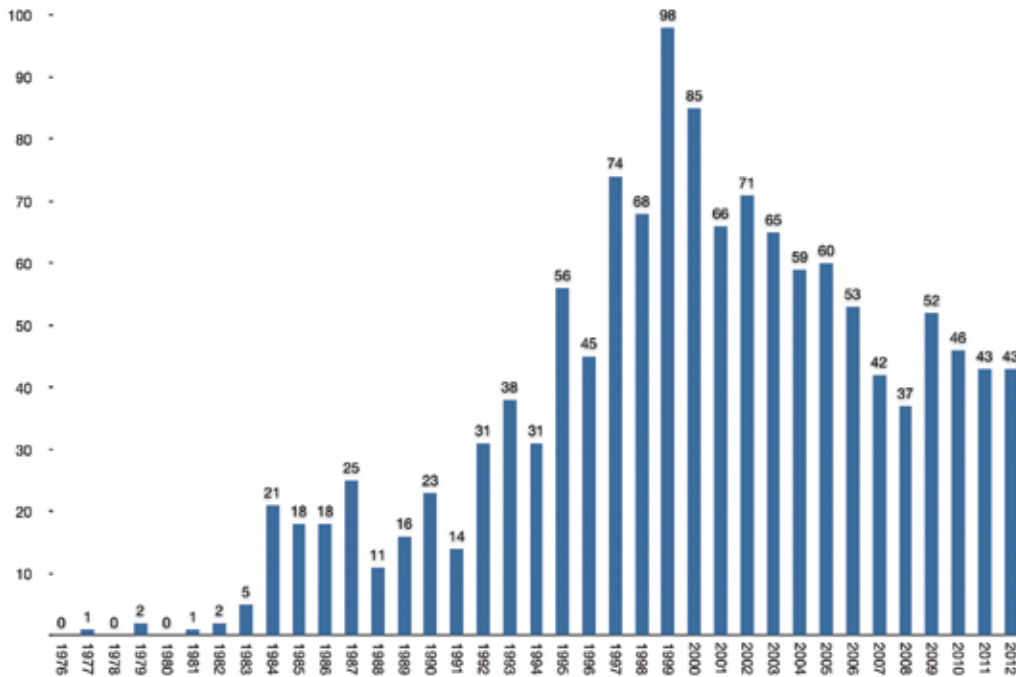
1990s: ABA Takes Decisive Action Calling for Suspension of Executions

In an era of “tough on crime” policies and rising prison populations, few jurisdictions moved to codify the principles set out in these early ABA policies. Instead, capital jurisdictions limited inmates’ ability to challenge the process through which they were convicted and sentenced to death, or to challenge the sentence imposed in their particular case. Throughout the 1990s, death row populations grew and executions increased sharply. In the summer of 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, significantly and dramatically curtailing meaningful habeas corpus review of state death sentences by federal courts. At the same time, Congress de-funded state resource centers

which provided numerous capital defendants with effective post-conviction counsel. These procedural limitations and resource deficiencies remain in place today.

In response to these troubling trends, the ABA’s Section of Individual Rights and Responsibilities urged the Association to adopt a resolution calling for a suspension of executions. The ABA did so on February 3, 1997. While the resolution takes no position on the death penalty per se, it does call on capital jurisdictions to halt executions until (1) all capital cases are accorded sufficient due process to ensure the fair and impartial administration of justice, and (2) adequate safeguards exist to minimize the risk that innocent persons will be executed.

Executions by Year Since 1976



Courtesy of the Death Penalty Information Center and found at <http://www.deathpenaltyinfo.org/executions-year>

The Report accompanying the 1997 resolution recognized that, after two decades of death penalty jurisprudence,

federal and state actions taken since the ABA adopted its policies on capital punishment, have resulted in a situation in which fundamental due process is now systematically lacking in capital cases. . . . Of course, individual lawyers differ in their views on the death penalty in principle and on its constitutionality. However, it should now be apparent to all of us in the profession that the administration of the death penalty has become so seriously flawed that capital punishment should not be implemented without adherence to the various applicable ABA policies.²



² ABA, REPORT TO RECOMMENDATION 107, 1997 Mid-Year Mtg. (adopted Feb. 3, 1997), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf (last visited Oct. 31, 2013). The Report accompanying the Recommendation should not be construed as representing the policy of the ABA.

The ABA Death Penalty Due Process Review Project

Discussion and debate of the various issues addressed in the 1997 Resolution have grown substantially. Thus, in the fall of 2001, the ABA created the Death Penalty Due Process Review Project (the Project).³ The Project conducts research and educates the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes in order to promote fairness and accuracy in death penalty systems. The Project encourages legislatures, courts, administrative bodies, and state and local bar associations to adopt the ABA's *Protocols on the Fair Administration of the Death Penalty* and it provides assistance to state and federal stakeholders on death penalty issues. It collaborates with other individuals and organizations to develop new initiatives to support reform of death penalty processes, including implementation of the ABA policy supporting a suspension of executions.

State Death Penalty Assessments

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project began in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and minimize the risk of executing the innocent. From 2006 to 2013, the Project conducted assessments and released reports examining the administration of the death penalty in Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas and Virginia.

These jurisdictions account for approximately 65% of the executions that have taken place in the United States since the death penalty was reinstated in 1976.

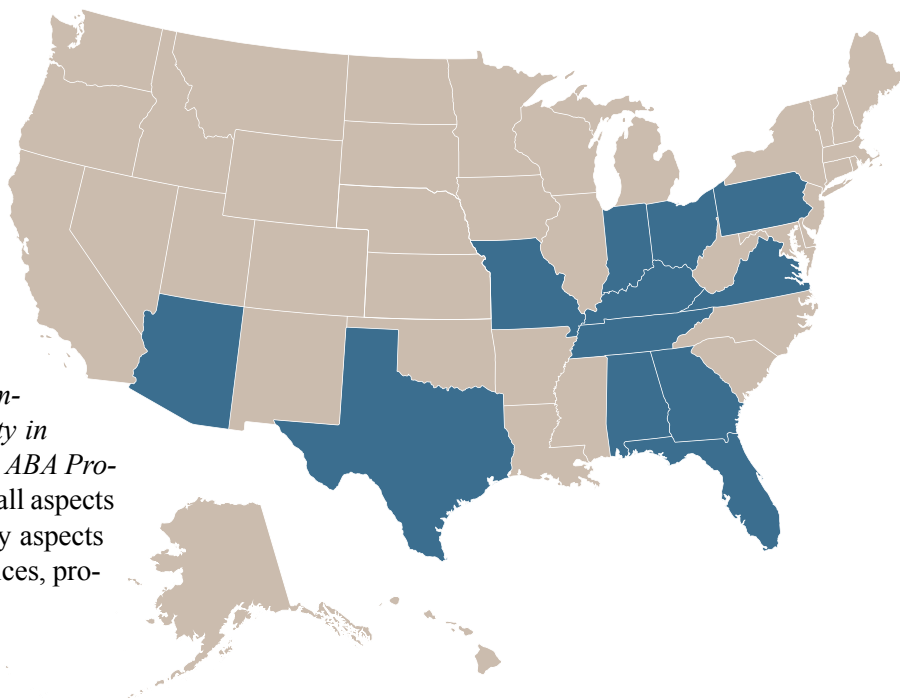
All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States (ABA Protocols)*. While the *ABA Protocols* are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, pro-

cedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments in 2006: preservation and testing of DNA evidence, law enforcement identification and interrogation procedures, crime laboratories and medical examiner offices, prosecutors, and direct appeal and proportionality review.

Each assessment was conducted by a state-based assessment team. The teams were comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members were not required to support or oppose the death penalty or a suspension of executions.

The findings of each assessment team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states implement reforms, or in some cases, impose a suspension of executions. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty per se, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should impose the death penalty.

³ The Project was originally established as the "ABA Death Penalty Moratorium Implementation Project."



Each assessment report devotes a chapter to the following areas:

1 


Overview of the state's death penalty

2 

Law enforcement identifications and interrogations

3 

Collection, preservation, and testing of DNA and other types of evidence

4 


Crime laboratories and medical examiner offices

5 


Prosecution

6 


Defense services

7 


Direct appeal process and proportionality review

8 

State habeas corpus proceedings

9 

Clemency

10 


Capital jury instructions

11 

Judicial independence and vigilance

12 

Treatment of racial and ethnic minorities

13 

Mental retardation and mental illness⁴

Each assessment examined the extent to which a state is in compliance with the *ABA Protocols* and describes any recommendations for reform agreed upon by the Assessment Team. While members of the 12 state assessment teams have varying perspectives on the death penalty, all team members agreed to use the *ABA Protocols* as a framework through which to examine the death penalty in their state.

⁴ Assessment Reports are not intended to cover all aspects of a state's capital punishment system; for example, questions concerning method of execution are not addressed by the Assessments.

Key Findings of the State Death Penalty Assessments (2006-2013)

An Examination of the System of Capital Punishment

The capital punishment system is comprised of many parts. The Assessments have sought to examine the *system* of justice through which cases are investigated, tried, and appealed rather than looking at a specific area in isolation. This kind of examination reveals that states have adopted some sound procedures in a variety of areas. However, many of these sound procedures are undermined by unsound practices in other areas.

Sound procedures are undermined most significantly by ineffective assistance of counsel. In the majority of states assessed, unqualified and under-compensated lawyers, without resources needed to adequately and effectively defend a capital case, are often appointed to represent people facing the death penalty. As effective counsel is the right through which all other constitutional rights are protected, a number of irreparable consequences flow from states' assignment of ill-equipped, poorly trained, and poorly compensated counsel to death penalty cases.

Costs of Our Key Findings

Jurisdictions with the death penalty incur a variety of costs due to error and use of procedures and practices that do not guarantee fairness and minimize the risk of wrongful execution. Importantly, such deficiencies may cast a pall over the integrity of a state's entire criminal justice system. Mistakes in the administration of the death penalty also lead to a serious public safety concern: the innocent are convicted, possibly facing execution, while a guilty perpetrator remains free to commit additional crimes. An error-prone system also incurs a high financial cost. The wrongfully convicted must be compensated. The state and federal courts must spend significant time and resources correcting errors in capital cases—errors that could have been prevented—to the detriment of the vast majority of those who rely on the justice system every day. And such a flawed process exacts an intangible toll on victims' families.



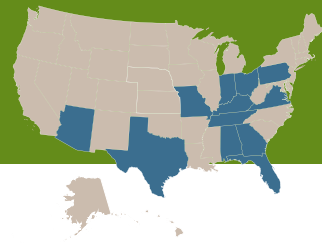
Case in Point:

Virginia and Kentucky Undermine Sound Law on Biological Evidence Preservation and Testing

Virginia requires that biological evidence in capital cases be preserved for as long as the defendant is incarcerated; however, the Virginia Death Penalty Assessment revealed that the utility of this promising policy is undermined by the procedural burdens Virginia imposes on inmates to gain access to post-conviction testing. Virginia is one of the only states to require “clear and convincing evidence” of innocence to grant access to testing of biological evidence. It has been observed that this high burden ensures that it is virtually impossible for an inmate to be exonerated through DNA evidence since, without access to that evidence, he is unable to prove those things necessary to allow him access. Conversely, in Kentucky, the Commonwealth's post-conviction DNA testing statute permits an inmate to request testing to proffer evidence of innocence or that the inmate should not have been sentenced to death. As the Kentucky Assessment uncovered, however, evidence can be destroyed after conviction under a variety of circumstances. Thus, Kentucky's important provision providing for access to testing is undermined by its failure to require preservation of the very evidence to be tested.



General Findings



Each of the state assessment teams identified several areas in need of reform and made specific recommendations to address these areas of concern. Below are some of the most serious problems identified by the twelve state assessment teams from 2006 to 2013.

Issue

1

Law Enforcement Practices During Eyewitness Identifications and Interrogations

Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing. Further, according to the Innocence Project, innocent defendants made incriminating statements, delivered outright confessions, or pled guilty in about 25% of DNA exoneration cases in the U.S. While some examined jurisdictions may require written guidelines on conducting identifications, or may voluntarily record custodial interrogations, death penalty states examined

- Do not require that law enforcement conduct eyewitness identifications in a manner to minimize the risk of misidentification; and
- Do not require recording of the entirety of custodial interviews with suspects and witnesses in potential capital cases.

Issue

2

Preservation and Testing of Biological Evidence

DNA testing is a useful law enforcement tool to establish guilt as well as innocence. It may also be used to determine whether or not a person should have been subject to the death penalty. Since release of the twelve state assessment reports, all 50 states now permit some form of post-trial DNA testing in capital cases. The availability and utility of DNA testing, however, varies dependent upon the scope of the testing statute, as well as states' practices concerning the collection and preservation of biological evidence.

The statutes of most examined jurisdictions

- Exclude the possibility of re-testing of evidence even in instances where previous testing was incorrect or a more advanced form of testing is now available; and
- Do not permit testing of biological evidence to show that the inmate would not have been subject to the death penalty if testing and analysis produced favorable results.

Finally, the Assessments have found that many states do not require biological evidence to be preserved for as long as the defendant remains incarcerated.

At the time of the Project's assessment of Alabama, the State provided no clear mechanism for a death row inmate seeking post-conviction DNA testing. Although the State adopted a new testing law in 2009, the law does not appear to serve as a meaningful tool for use by those seeking to prove their innocence or that they should not have been sentenced to death.



The power of forensic science to aid in the fair administration of justice is enormous. Just as powerfully, however, is the ability of faulty or fraudulent scientific analysis to contribute to wrongful convictions. Importantly, incidents of mistake and fraud not only cast a pall over cases in which a laboratory or analyst conducted shoddy work; but also casts the integrity of *many* criminal prosecutions in the state—albeit unfairly—into doubt.

Most examined jurisdictions rely on a patchwork of state and local, accredited and unaccredited, and formal and informal forensic laboratory analysis. The Assessments revealed that

- States do not require accreditation of crime laboratories and medical examiner offices;
- Most states have had at least one serious incident of crime laboratory mistake or fraud; in some cases, there appear to be institutional and systemic causes that have led to errors affecting many cases—including capital cases;
- Some states do not ensure that forensic investigations are conducted independent of law enforcement efforts to prosecute crime; and
- Serious backlogs for forensic analysis exist in most capital jurisdictions.

Some states—like Virginia and Missouri—have created statewide offices for forensic analysis and medico-legal death investigation which are accredited and staffed with certified forensic analysts.



In any criminal trial, the effective assistance of counsel is essential to the preservation of all other constitutional rights. In a capital case, the quality of counsel can determine whether a capital defendant or death row inmate will live or die. The assessments found that three states' public defender offices are staffed by attorneys and support staff specially trained to handle capital cases at trial (Kentucky, Missouri, and Virginia). These states' defender programs are largely independent of other branches of government and are provided sufficient resources to support effective representation. Since issuance of the various state assessment reports, some jurisdictions have also adopted more rigorous standards governing the qualifications of counsel appointed in death penalty cases.

Largely, however, jurisdictions examined have not established the kind of legal services system that is necessary to ensure that defendants charged with capital offenses or on death row receive the defense they require. Few states meet the standards set out by the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003).

Most assessed states, for example, **empower the judiciary** to make attorney appointments, as well as to approve or deny funding requests by defense counsel for expert or ancillary services. This system not only permits the assignment of counsel to capital cases to be influenced by factors irrelevant to ensuring effective representation, but also unnecessarily complicates the judge's role as neutral arbiter, inviting uneven treatment of capital cases. Such an arrangement may induce counsel to provide less-than-zealous representation for fear of antagonizing the presiding judge on whom their livelihood depends.

Although Texas has improved its delivery of indigent defense services in capital cases in many counties, the most active death penalty jurisdictions in the state continue to rely on list-qualified appointed counsel.



Examined jurisdictions also **lack rigorous qualification standards** for and monitoring of counsel appointed to capital cases. Many states do not guarantee the appointment of two lawyers at all stages of a capital case and do not provide a right to counsel during clemency proceedings.

Assessed jurisdictions **inadequately compensate counsel**, including distinguishing between in-court and out-of-court work and imposing caps on compensation. In- and out-of-court rate disparities and flat fees can induce counsel to bring a case to trial, as opposed to negotiating a plea agreement that, in many capital cases, is in the best interest of the client. Flat fees also pose an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee. Qualified counsel also may opt not to represent capital defendants out of concerns that their considerable efforts will not be fairly compensated.

Finally, most jurisdictions **do not ensure access to expert and ancillary services**—such as a mitigation specialist and investigator—in every capital case, although these services are critical for the defense investigation of the offense and the extensive social history that must be done.

Two states—Alabama and Georgia—even fail to provide a right to counsel during post-conviction proceedings.

Issue

5

Charging Practices and Disparate Outcomes

Prosecutors possess unfettered discretion in determining whether or not to seek the death penalty in every jurisdiction examined by the assessments. While the vast majority of prosecutors may seek to exercise discretion in death penalty cases to support the fair, efficient and effective enforcement of law, there is no mechanism in place to guide prosecutors in their charging decisions to support the even-handed, non-discriminatory application of the death penalty. For example, it appears that most prosecutors' offices do not possess written guidelines governing the exercise of discretion in potential capital cases.

In several states examined by the Project, racial disparity persists in the application of the death penalty. Geographic disparity is also present in numerous jurisdictions evaluated by the assessment teams.

In Texas, 1,060 individuals have been given death sentences in the state since 1976 through 2011. These sentences are dispersed across 120 counties. However, just 20 of Texas's 254 counties account for over 76% of those individuals sentenced to death. In Missouri, a homicide defendant charged in a rural or suburban county may be more than 10 times likely to receive a death sentence than a similar defendant charged in Kansas City or St. Louis City.



The Project examined whether race influences the outcomes of capital cases in four states and, after accounting for various aggravating factors, found that

- In Georgia, those suspected of killing whites are 4.56 times more likely to be sentenced to death than those who are suspected of killing blacks;
- In Indiana, 94 percent of the 17 people in Indiana who were executed since 1972 had white victims, whereas only 64 percent of the homicide victims in the state are white;
- In Ohio, those who kill whites are 3.8 times more likely to be sentenced to death than those who kill blacks; and
- In Tennessee, individuals who killed whites were 3.15 times more likely to be sentenced to death than individuals who killed blacks

In some examined jurisdictions, the state’s highest criminal appellate court reviews the death sentence to determine if the sentence imposed is proportionate in comparison to similar cases and offenders. Meaningful comparative proportionality review helps to ensure that the death penalty is being administered in a rational and non-arbitrary manner, provides a check on broad prosecutorial discretion, and seeks to prevent discrimination from playing a role in the capital decision-making process—the key concerns underlying the U.S. Supreme Court’s death penalty jurisprudence.

The Indiana Supreme Court appears to engage in a more searching proportionality review in non-death penalty cases than those cases in which a death sentence was imposed.

While the majority of states with the death penalty engage in some form of proportionality review in capital cases, Texas, Arizona, and Pennsylvania do not. Further, in nearly all other jurisdictions examined, the appellate court typically offers minimal analysis of the similarities between the facts of the case at bar and previous cases in which a death sentence was imposed. Moreover, the universe of cases that the court uses in conducting proportionality review is too small to accurately assess the correctness of the death sentence.

Issue

6

Failure to Investigate and Sanction Conduct

Derogations of duty, even where unintentional, must be consistently and reliably identified so that defense counsel, prosecutors, judges, and other actors in the criminal justice system can learn from past errors and prevent errors in the future.

Wrongful convictions in murder and other serious felony cases have occurred in all examined states when prosecutors failed to disclose all exculpatory evidence to the defense before trial, or because prosecutors relied primarily upon unreliable confessions, uncorroborated eyewitness identifications, or untruthful jailhouse informant testimony to obtain a conviction. Further, defense counsel who have missed filing deadlines or engaged in other conduct to the detriment of a client facing the death penalty have remained on appointment lists and continue to undertake capital representation.

While only some misconduct—that committed with extreme or reckless carelessness, or higher degrees of fault—is appropriately met with individual discipline, in all examined states, it does not appear that state bar disciplinary authorities—or any other entity—consistently investigates and disciplines ineffective defense lawyers or prosecutors who engage in misconduct in capital cases.

Issue

7

Capital Juror Confusion

Citizens who serve on capital juries deserve full information about their responsibilities and the scope of their options for sentencing a capital defendant. Trial judges must, through jury instructions, present clearly and accurately the applicable law to be followed and the “awesome responsibility” of determining whether another person will live or die.

Often, however, the assessments found that jurors who have served on death penalty cases have experienced significant miscomprehensions about their roles and responsibilities in determining if a defendant should be sentenced to death. On some issues, a majority of surveyed jurors expressed understandings of the law that contradicted U.S. Supreme Court decisions.

Jurors often are *not* instructed that they may return a sentence less than death even if they do not find sufficient evidence in mitigation of punishment. In some states, jurors are not instructed on the meaning of alternative punishments.



As found by the Capital Jury Project in the majority of assessment states, jurors who have actually served on capital cases

- Erroneously believed that death was required if the defendant's crime was "heinous, vile or depraved," or that death was required if the defendant would be "dangerous in the future";
- Erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating;
- Did not realize they could consider any evidence as mitigating evidence; and
- Did not know that they were not required to find mitigating evidence beyond a reasonable doubt.

Despite this confusion, trial courts often do not respond meaningfully to jurors' requests for clarification of legal concepts, instead referring the jury back to the given instructions that generated their confusion in the first instance.

Issue

8

Post-Conviction/State Habeas Proceedings

The availability of state post-conviction review, sometimes known as "state habeas," is an integral part of the capital punishment review process. Because some capital defendants receive inadequate counsel at trial and on direct appeal, and because it is often impossible to uncover prosecutorial misconduct or other crucial evidence until after direct appeal, state post-conviction proceedings often provide the first opportunity to establish meritorious constitutional claims. Moreover, exhaustion and procedural default rules require the defendant to present such claims in state court before they may be considered in federal habeas corpus proceedings.

In this area, however, all examined states have imposed a number of restrictions that limit adequate development and judicial consideration of all claims. Largely, examined states' collateral review procedures emphasize finality of convictions and death sentences over fairness.

- Most states impose strict and unreasonably short deadlines in which to file post-conviction petitions; notably, in several states, no such deadlines are imposed in *non*-capital cases, thereby affording the least amount of preparation time to those inmates who face the ultimate punishment;
- Most states make it very difficult to obtain discovery materials in post-conviction proceedings, even though such proceedings are an inmate's first opportunity to present claims based on information that appears outside the trial record, such as a claim that the prosecutor withheld favorable evidence under *Brady v. Maryland*;
- States permit trial courts to adopt findings of fact and conclusions of law proposed by one party verbatim; and
- Post-conviction courts in some states make findings of fact and conclusions of law without the benefit of an evidentiary hearing, and instead through review of affidavits. This practice limits the court's ability to accurately assess the claims presented; accordingly, cognizable claims may not be uncovered until federal habeas proceedings, if at all.



Many states' limits on post-conviction review also render it nearly impossible for any claim not properly raised in the first instance—such as at trial or on direct appeal—to be reviewed on the merits, irrespective of the strength of the claim or the egregiousness of the alleged error. In such instances, an inmate could be executed without having had several alleged errors reviewed by any court, simply because his/her lawyer failed to properly preserve this issue for review.



The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiency. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole. However, states' clemency processes do not appear to well-serve their function as the final safeguard to prevent wrongful execution in several respects:

- Most states fail to require any specific type or breadth of review in considering clemency petitions;
- Clemency decision-makers have denied clemency stating that all relevant issues have been vetted by the courts; in fact, however, claims that may often warrant a grant of clemency have not or *cannot* be reviewed on the merits in the court system;
- States do not provide a right to counsel in clemency proceedings; and
- Few states require the clemency decision-maker to meet with the inmate or the inmate's counsel.



Due to the nature of a capital offense and its effect on the community, death penalty cases are more likely than other types of cases to play an outsized role in judicial elections and appointments. In some assessed states, the judicial selection process is influenced by consideration of judicial candidates' purported views on the death penalty or incumbent judges' past decisions in capital cases. While the bar associations of some jurisdictions have defended judges who have been unfairly criticized for their decisions in death penalty cases, there is an increased risk—or, at least, the perception—that judges will decide cases not on the basis of their best understanding of the law, but on the basis of how their decisions might affect their likelihood to obtain or retain a judgeship.



Several states prohibited the execution of people with mental retardation prior to the U.S. Supreme Court's decision in *Atkins v. Virginia* (2002) holding that the execution of such persons is unconstitutional. This holding, however, does not guarantee that persons with mental retardation will not be executed as each state may promulgate its own procedures for determining whether a capital defendant has mental retardation and thus cannot be subject to the death penalty. In this regard, many states' procedures do not adequately safeguard the constitutional prohibition on the execution of people with mental retardation. For example

- Several states' statutes and case law governing mental retardation do not comport with the modern, scientific understanding of the condition; and
- Some states do not make a pretrial determination of whether a capital defendant has mental retardation. These states waste time and judicial resources by requiring a long and costly capital trial for a defendant who may not be eligible for the death penalty in the first instance. These jurisdictions also require jurors to consider evidence of mental retardation at the same time they are considering evidence related to the crime and other aggravating evidence, increasing the risk of juror confusion.

Like persons with mental retardation, persons suffering from severe mental illness possess diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. For these reasons, the execution of those with a severe mental illness similarly does not serve the death penalty's deterrent and retributive purposes. Despite the serious cognitive limitations described above, all assessed states permit persons with severe mental illness to be sentenced to death and executed.⁵



Two states—Alabama and Texas—have not adopted a law to determine whether a capital defendant has mental retardation and instead rely on judicially-created stopgap measures.

Issue

12

Unavailability of Data

Each assessment team encountered a great deal of difficulty obtaining data on all death-eligible cases, such as those cases in which the death penalty was sought, but not imposed, and those in which the death penalty could have been sought, but was not. The lack of data collection and reporting on the overall use of capital punishment brings in to doubt whether these state systems operate fairly, effectively, and efficiently. Without this data, courts cannot engage in meaningful proportionality review, prosecutors are not afforded relevant information to assist them in making charging decisions, and states cannot fully assess whether and the extent to which racial or geographic bias affects the administration of the death penalty.


⁵ It is unconstitutional to execute prisoners who are “insane” at the time of their execution. *Ford v. Wainwright*, 477 U.S. 399 (1986).



Snapshot of State-Specific Areas of Concern

Through the assessment process, the Project has also uncovered a number of practices and procedures which fail to ensure basic fairness in capital cases and stand in sharp contrast to the policies of most jurisdictions with the death penalty. These outlier practices are, generally, unique to the individual jurisdictions listed below. A snapshot of these findings is summarized here as each has far-reaching effects on the integrity and fairness of a state's death penalty system. Importantly, laws and procedures that are both fair and workable are in place in other capital jurisdictions and could serve as model for reform and repeal of some the practices described below.

Insufficient Protection of the Innocent



Florida leads the nation in the number of people sentenced to death and to later be exonerated: 24 people have been exonerated from Florida's death row. **Texas** has exonerated 12 people under a death sentence and as a result of the many exonerations in Texas—in both death and non-death cases—the State has paid out over \$60 million in compensation to the wrongfully convicted. Disconcertingly, in May 2013, Florida passed the “Timely Justice Act,” the purpose of which is viewed by many to quicken the pace of executions and shorten the length of time from conviction to execution in the state with the highest number of individuals wrongly convicted and sentenced to die in the country.

Non-Unanimous Jury Verdict for a Death Sentence

Florida is also the only state in the country that allows a jury to sentence a defendant to death by a mere majority (7-5) vote. As a result, Florida juries spend less time deliberating on whether to sentence a defendant to death, indicating a diminished thoroughness of their consideration of whether a defendant should receive the ultimate punishment. Relatedly, Alabama permits juries to sentence a defendant to death by a 10-2 majority vote.


Judicial Override

Alabama is only one of three states that allow a trial judge to override a jury's recommendation of life without parole and impose a death sentence. There are many cases in which a trial court has imposed a death sen-


tence despite a jury's unanimous (12-0) recommendation for a sentence of life without parole. Although Alabama judges—who are elected through partisan elections—may also override death verdicts and sentence a defendant to life, over 90% of overrides in Alabama are used to impose a death sentence. According to the Equal Justice Initiative, over 20% of prisoners currently on Alabama's death row are there through judicial override. Florida also permits judicial override, although it does not appear any Florida trial judge has overridden a life sentence since 1996.

Limited Discovery at Trial


Virginia's criminal trial discovery rules are more restrictive than most other states and the federal system in providing capital defendants the basic information necessary to prepare and present a defense. A capital defendant in Virginia may go to trial without knowing who will testify against him or her and without access to some of the police investigation records that gave rise to capital charges. S/he may face the prospect of cross-examining witnesses without access to written or recorded statements made by the witness at the time of the events. And because capital cases bring particular focus on issues of mitigation, Virginia's limited rules of discovery can put the prosecutor in the difficult position of deciding for him- or herself which evidence in a police file may support a sentence less than death.



Limited Discovery During Post-Conviction Proceedings



Absent full and meaningful discovery during state post-conviction review, it is often impossible to determine whether all valid claims and defenses have been raised by the defense at trial, as well as whether all exculpatory material has been disclosed in a death penalty case. **Kentucky** and **Ohio** deny death-sentenced inmates access to the discovery procedures necessary to develop such claims for post-conviction relief. Both states further prohibit an inmate from using the public records laws to obtain materials in support of post-conviction claims.





High Burden of Proof for Mentally Retarded Defendants Facing the Death Penalty



“Beyond a reasonable doubt” is the highest standard of proof that exists in American law. Of the states that have adopted statutes prohibiting the execution of the mentally retarded, **Georgia** is the only state that requires the defendant to prove his/her mental retardation beyond a reasonable doubt.

The effect of this procedure is that individuals with mental retardation can be executed when they are unable to meet this extraordinarily high burden of proof.

Overreliance on “Future Dangerousness”

In **Texas**, the capital sentencing procedure is remarkably different from that of other jurisdictions. In most states, after finding a defendant guilty of a capital crime, jurors must weigh aggravating and mitigating circumstances to determine whether a defendant should receive the death penalty. In Texas, only after deciding unanimously that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” will the jury consider whether any evidence in mitigation supports a sentence less than death. As a result of this structure, the defendant’s alleged “future dangerousness” is placed at the center of the jury’s punishment decision.

This emphasis on future dangerousness is problematic in several respects. Jurors are left to comprehend “probability,” “criminal acts of violence,” and “society” so broadly that a death sentence would be deemed warranted in virtually every capital murder case. Second, the future dangerousness question too often turns on unreliable scientific evidence and the undue persuasive effect of highly-questionable expert testimony. Finally, life without possibility of parole now is the only capital sentencing alternative to death in the State of Texas, which ensures that all defendants convicted of capital murder will die in prison, posing no threat to free society. The use of future dangerousness effectively diminishes the jury’s understanding of, and ability to give effect to, evidence that might serve as a basis for a sentence less than death.



Absence of State Funding of Capital Defense Services

The Commonwealth of **Pennsylvania** provides no funding for indigent defense services, opting instead to rely on county-funded indigent defense systems. It ap-

pears that Pennsylvania is the only state in the country to provide no state funding for poor defendants—including those facing the death penalty. As a result, Pennsylvania’s capital indigent defense system fails to afford uniform, quality representation to many capital defendants.

High Rate of Error in Capital Cases

Since the reinstatement of the death penalty in **Kentucky** through November 2011, 78 people have been sentenced to death in that state. Fifty-two of these individuals have had a death sentence overturned on appeal by Kentucky or federal courts, or been granted clemency. This is an error rate of approximately sixty percent. Furthermore, capital prosecutions occur in far more cases than result in death sentences. This places a significant judicial and financial burden on Commonwealth courts, prosecutors, defenders, and the criminal justice system at large, to treat many cases as death penalty cases, despite the fact that such cases often result in acquittal, conviction on a lesser charge, or a last minute agreement to a sentence less than death.

Expansive Eligibility for the Death Penalty

The U.S. Supreme Court has held that the death penalty must be reserved for a “narrow category” of the most culpable murderers to ensure that it is applied in a rational, non-arbitrary manner. To that end, capital-eligible offenses and statutory aggravating circumstances must be narrowly defined to ensure that the death penalty is applicable only to the worst offenders. The assessments found that the expansiveness of the eligibility for the death penalty in three states in particular—**Alabama**, **Georgia**, and **Missouri**—increases the risk of arbitrary imposition of the punishment:

- Alabama law permits imposition of the death penalty if the “capital offense was especially heinous, atrocious or cruel compared to other capital offenses.” Because Alabama courts have not systematically reviewed cases involving this aggravating circumstance, and have thus failed to fully enforce the statutory requirement that prosecutors establish the comparative atrocity of a given capital murder as compared to other capital murders, this aggravating factor is not subject to any meaningful or rational limitation. It thus has the potential to be improperly used as a “catchall.”

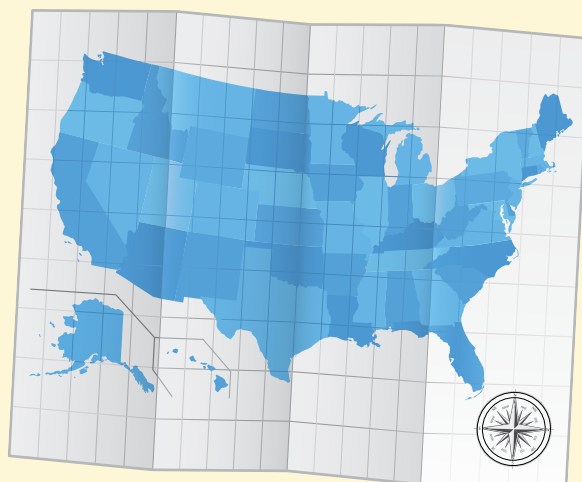




- **Georgia** law allows for the imposition of a death sentence when the defendant has been convicted of malice murder *or* of felony murder. Malice murders are those murders committed with express malice (intent to kill) or implied malice (an abandoned and malignant heart/a reckless disregard for human life). Felony murder is a killing in the commission of a felony irrespective of malice. Thus, in Georgia, an offender may be sentenced to death even if he or she did not have an intent to kill or did not commit an offense with reckless indifference to life.
- **Missouri's** death penalty statute enumerates seventeen aggravating circumstances, many of which are so broadly drafted as to qualify virtually any intentional homicide as a death penalty case. One study found that, for instance, the “wantonly vile” aggravating circumstance, which can be found by the jury if one of eleven conditions is met, was applicable to more than 90% of Missouri cases that could have been charged as an intentional homicide. As a result, the aggravating circumstances provide little guidance and little restraint to prosecutors with respect to capital charging.

Next Steps

Each state assessment team promulgated specific recommendations to address the varied problems identified through their examination of a state's death penalty system. In some cases, the state teams recommended that their jurisdiction suspend executions until the various problems identified had been remedied. In all cases, the state teams urged their jurisdictions to implement, with great urgency, reforms to ensure the fair administration of the death penalty and to better ensure that no innocent or otherwise undeserving person is sentenced to death or executed.

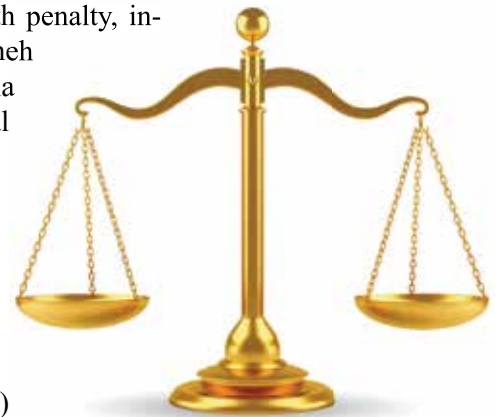


These state assessment reports have been used as blueprints for state-based study commissions on the death penalty, served as the basis for new legislative and court rule changes on the administration of the death penalty, and generally informed decision-makers' and the public's understanding of the problems affecting the fairness and accuracy of states' death penalty systems. The purpose of the state assessments is not to simply document the problems that exist, but to help instill the will to fix those problems. With the issuance of these twelve comprehensive reports, the ABA Death Penalty Due Process Review Project will continue to provide the data and information needed to engender a climate where useful and meaningful dialogue on the current administration of the death penalty is possible.

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The Project has attempted to describe as accurately as possible information relevant to assessed states' death penalty systems. The Project would appreciate notification of any factual errors or omissions in this report so that they may be corrected in any future reprints.

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