



**Proceedings of the ABA Annual Conference Session on
*Has the Death Penalty Become an Anachronism? A Discussion of Changing Laws,
Practices and Religion on Our Shared Standards of Decency*
Thursday, August 2, 2018**

SPEAKER BIOGRAPHIES



Cardinal Blase J. Cupich, Archdiocese of Chicago: Cardinal Cupich obtained his B.A. in Philosophy from the College of St. Thomas in 1971 and attended seminary at the North American College and Gregorian University in Rome, where he received his Baccalaureate in Sacred Theology in 1974, and his M.A. in Theology in 1975. Cardinal Cupich is a graduate of the Catholic University of America in Washington, D.C., where he received a Licentiate of Sacred Theology in 1979 and a Doctorate of Sacred Theology in 1987, both in Sacramental Theology. He was ordained to the priesthood for the Archdiocese of Omaha in 1975. Cardinal Cupich was the Secretary at the Apostolic Nunciature in Washington, D.C. from 1981-1987; and served as Chair for the United States Conference of Catholic Bishops' (USCCB) Committee for the Protection of Children and Young People from 2008-2011 and for the National Catholic Educational

Association from 2013-2015. Cardinal Cupich was appointed Archbishop of Chicago on September of 2014, and installed as the ninth Archbishop of Chicago in November of 2014. In 2016, Pope Francis appointed Cardinal Cupich to the Congregation for Bishops and in 2017, to the Congregation for Catholic Education. Cardinal Cupich also serves on USCCB committees: Ecumenical and Interreligious Affairs, and is Co-Chair of the National Dialogue Initiative with Muslims; Subcommittee for the Church in Central and Eastern Europe, Chair; and the Ad Hoc Committee Against Racism. He is an Executive Member of The Catholic Mutual Relief Society and Chancellor of the Catholic Church Extension Society, and the University of St. Mary of the Lake, Mundelein, Illinois.



Robert Dunham, Executive Director, Death Penalty Information Center:

Robert Dunham is an attorney and a nationally recognized expert on the death penalty. Before becoming the Death Penalty Information Center's Executive Director, he was one of the leading capital appellate lawyers in Pennsylvania, arguing on behalf of the Commonwealth's death-row inmates in its state and federal courts, and in the United States Supreme Court. Mr. Dunham served as Executive Director of the former Pennsylvania Capital Case Resource Center from 1994 to 1999; Director of Training of the Capital Habeas Unit of the Philadelphia federal defender's office from 1999 to 2009; and as an assistant federal defender in the Harrisburg federal defender's capital habeas unit from 2009 until March 2015. Mr. Dunham has taught in death penalty training programs offered by national, state, and local courts, bar associations, and professional organizations for more than twenty years. Mr. Dunham is a life fellow of the American Bar Foundation and has served on the Steering Committee of the American Bar Association's Death Penalty Representation Project and on the board of directors of the Pennsylvania Innocence Project, the Pennsylvania Association of Criminal Defense Lawyers, and the Philadelphia crime-victim assistance program, Northwest Victim Services, for whom he also served as Board President.



Karen M. Gottlieb, Co-Director, Florida Center for Capital Representation:

With almost 40 years' experience as an appellate lawyer, the first 15 of which were spent in the appellate division of the Miami-Dade Public Defender's office, Gottlieb focuses on capital cases and cases in which juveniles have been sentenced to mandatory life imprisonment. She has represented criminal defendants in more than 250 appeals and extraordinary writs in Florida and federal courts, and on certiorari petitions in the Supreme Court of the United States. Gottlieb is the former chair of the Florida Public Defenders' Capital Litigation Steering Committee, and has served on the Board of Directors of the Florida Capital Resource Center since 2013. For the past four years, Gottlieb has been a member of the amicus committee of the Florida Association of Criminal Defense. She currently serves as the committee's co-chair, and has authored

numerous amicus briefs in capital cases in the Eleventh Circuit Court of Appeals and the Supreme Court of the United States. In 2015, Gottlieb filed an amicus brief in the Supreme Court of the United States on behalf of former Supreme Court of Florida Justices in *Hurst v. Florida*, in which the Court granted certiorari to consider whether Florida's capital punishment system violates the Sixth or Eighth Amendments to the Constitution and also successfully represented Rebecca Falcon in the Supreme Court of Florida, the decision requiring the re-sentencing of more than 200 Florida children who were sentenced to lifetime incarceration. She is a recipient of the ACLU's Nelson Poynter Civil Liberties Award for her death-penalty work and the President's Service Award from the Florida Association of Criminal Defense Lawyers, Miami-Dade Chapter, for her amicus briefs.



Meredith Martin Rountree, Senior Lecturer, Northwestern Pritzker School of Law; Founder, University of Texas School of Law's Capital Punishment Center:

Meredith Martin Rountree's research and teaching focuses on criminal law and criminal justice, with particular attention to how people with mental illness interact with the law and legal institutions. Before joining Northwestern Pritzker School of Law, Professor Rountree taught at the University of Texas School of Law. She helped found the University of Texas School of Law's Capital Punishment Center and co-directed its Capital Punishment Clinic. Her work has been published in the *Journal of Criminal Law and Criminology*, the *American Journal of Criminal Law*, and the *Law & Society Review*, among others, and cited by Justice Breyer in his dissenting opinion in *Glossip v. Gross* (2015). Before turning to academic research, she represented people facing the death

penalty in Arizona, Washington, and Texas. In addition, she advocated – in and out of court – on behalf of prisoners, founding, and for three years directing, the Texas ACLU's prison and jail project.



Moderator: Ronald J. Tabak, Chair, Death Penalty Committee, ABA Section of Civil Rights & Social Justice; Author, Capital Punishment Chapter, The State of Criminal Justice 2018 (ABA Criminal Justice Section):

Mr. Tabak successfully argued *Francis v. Franklin*, a death penalty case, in the U.S. Supreme Court and played a leading role in securing Johnny Gates' removal from death row after 26 years. Mr. Tabak has chaired the Committee on Civil Rights of the Association of the Bar of the City of New York and co-chaired the New York State Bar Special Committee on Re-Entry, and is chair of the Death Penalty Committee of the American Bar Association's Section of Civil Rights and Social Justice. He has been a leader in the ABA's efforts to recruit and train lawyers for indigent death row inmates. He spearheaded the successful effort to get the ABA to call for a moratorium on executions until various due

process concerns are resolved. Mr. Tabak chaired the ABA Section of Civil Rights and Social Justice's Task Force on Mental Disability and the Death Penalty, whose proposals have been adopted as policies by the ABA, the American Psychological Association and the American Psychiatric Association. Mr. Tabak is the recipient of many honors and awards, including the New York State Association of Criminal Defense Lawyers' Thurgood Marshall Award (1996), the National Coalition to Abolish the Death Penalty: Outstanding Legal Service Award (2006), the American Bar Association Section of Civil Rights and Social Justice's Robert F. Drinan Award for Distinguished Service (2014) and the Norman Redlich Capital Defense Distinguished Service Award (2015).

ABA Annual Meeting Program
Has The Death Penalty Evolved Into An Anachronism?
August 2, 2018, Chicago Illinois*

Ronald Tabak:

The origin of this program was my reading of Pope Francis' talk last October, entitled "The dynamic word of God cannot be mothballed." He used the Church's doctrine on the death penalty as his principal example of how the Church's teachings sometimes must be adjusted based on additional facts and circumstances and the Church's understanding of them. The Pope's discussion, although in a somewhat different context than United States constitutional law, seemed to be in parallel with the legal view that Constitutional holdings can and sometimes must be adjusted over time in keeping with our evolving standards of decency.

With that in mind, we will hear today from three speakers who will address how our understanding of the actual functioning of capital punishment in the United States has changed since the Supreme Court overturned all existing death sentences in 1972 and then upheld some new death penalty statutes in 1976. We will hear in particular about the Supreme Court's efforts over time to achieve the constitutional pre-requisites for the death penalty as set forth in 1976. And then, we will hear the reflections of Cardinal Cupich on the Catholic Church's views on capital punishment — on which there has been an important development today. We will then have further comments by our speakers, including in response to questions.

The first of our legal experts will be Karen Gottlieb, co-director of the Florida Center for Capital Representation, whose extensive experience is particularly great with regard to the efforts to implement the death penalty in Florida. Next, we will hear from Meredith Martin Rountree of the Northwestern Pritzker School of Law, whose experience includes years of litigation with regard to Texas' death penalty and extensive work with regard to the application of capital punishment to people with severe mental illness, to people whose age at the time of their crime was greater by at most a few years than the Constitutional limit of 18, and to people who "volunteer" for execution. She will be followed by Robert Dunham, who after years of handling capital cases *pro bono* while at a private law firm and then while at the Pennsylvania Federal Capital Habeas Unit, is now the Executive Director of the Death Penalty Information Center — the leading source for information about capital punishment in the United States.

Then, Cardinal Blase J. Cupich, who leads the Archdiocese of Chicago and has a stellar background, will shift our discussion from legalities to morality — in view of the Church's understanding of the actual implementation of our capital punishment system.

* Note regarding the written edition of the program: This written edition is based primarily on a transcription by stenographers at Skadden, Arps using an audio of the program made by the Chicago Sun Times. Cardinal Cupich's principal remarks are taken from his text, provided by the Archdiocese of Chicago. The participants in the program then made corrections to the transcribed version. The three speakers from the legal profession added text and footnotes (and Mr. Dunham added various visual aids). Ronald Tabak, the program's organizer and moderator, lightly edited the written version without affecting its substance.

Then, we will have further discussion by all of the panelists, and perhaps me, along with answers to questions posed by me and by members of the audience.

We will start off with our first speaker, Karen Gottlieb.

Karen Gottlieb:

The topic for today's panel is: "Has the death penalty evolved into an anachronism?"

Death-penalty jurisprudence over the past four-plus decades repeatedly makes clear that whether a death-row prisoner has been or will be executed is to a great extent a matter of timing. The same sentences that were deemed valid in years past are recognized as invalid now. Sentences invalid now are nonetheless accepted as valid because they were valid then. The stark reality is that prisoners lose their lives depending on where they fall on a continuum of State and Federal constitutional law. The only conclusion to be drawn is that the death penalty is unacceptably arbitrary and random. It is time to admit that, more than an anachronism, death as punishment has never been, and never can be, fairly imposed. As Justice Blackmun recognized in 1994, "[T]he death penalty experiment has failed."¹

Let's go back to the beginning of the modern death penalty in this country, by discussing the 1971 decision in *McGautha vs. California*.² At that time, California's death-penalty cases were tried in a unified jury proceeding at which both a defendant's culpability and sentence were determined. The jury's sentencing decision, whether the defendant should receive a life or a death sentence, was reached without any guiding standards.

The question before the Court was whether this unified proceeding and the standardless sentencing violated due process. Over dissents by Justices Douglas and Brennan, joined by Justice Marshall, the majority flatly rejected these due process arguments. In what would later take on added significance, the Court explained:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.³

And so, in 1971, the Court concluded that it was impossible to have predetermined standards for the decision to impose a death sentence.

¹ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari).

² *McGautha v. California*, 402 U.S. 183 (1971).

³ *Id.* at 197.

One year later, in 1972, the Court decided *Furman vs. Georgia*,⁴ and, in a 5 to 4 decision, held that the death penalty as it was applied violated the Eighth Amendment. *Furman* comprises nine separate opinions, with varying rationales.

Justices Brennan and Marshall were quite clear: the death penalty violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. For them, the death penalty degraded the dignity of humankind, and was excessive and unnecessary punishment.⁵ Justice Douglas, borrowing from Equal Protection analysis, wrote that the death penalty was only imposed on unpopular groups and that the sentencer's uncontrolled discretion, although neutral on its face, was far from neutral in application.⁶ All three Justices were concerned with the arbitrariness with which a small group of defendants were chosen for death, with Justices Douglas and Marshall specifically decrying the racism that further plagued death-penalty regimes.

Justices Stewart and White emphasized that they were not ruling on whether the death penalty was *per se* unconstitutional, but both concurred that the death penalty as applied was capriciously imposed on a select few.⁷ Chief Justice Burger and Justices Blackman, Powell, and Rehnquist had differing views, but all agreed that the majority had overstepped the limited role of the judiciary under the separation-of-powers doctrine.⁸

At the time that *Furman* was decided, 41 States, the District of Columbia, and other federal jurisdictions had the death penalty⁹ and over 500 prisoners awaited execution.¹⁰ The immediate result of the decision was that all death row prisoners across the nation were resentenced to life imprisonment. But the question remained: what happens next? There was no single decision that garnered a majority or instructed legislatures on the death-penalty procedures that the Court would uphold as consistent with the Eighth Amendment.

After *Furman*, many believed that the death penalty would not be reinstated. Yet, by 1976, just four years later, 35 States and the federal government had enacted death-penalty

⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵ *Id.* at 257-305 (Brennan, J., concurring); *id.* at 314-74 (Marshall, J., concurring).

⁶ *Id.* at 240-57 (Douglas, J., concurring).

⁷ *Id.* at 305-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

⁸ *Id.* at 375-405 (Burger, C.J., dissenting); *id.* at 405-414 (Blackmun, J., dissenting); *id.* at 414-65 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting). All of the dissenting justices joined each other's opinions, save for Justice Blackmun's dissent, which was his opinion alone.

⁹ *See id.* at 341 (Marshall, J., concurring).

¹⁰ Arthur J. Goldberg & Alan M. Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773 (1970).

statutes.¹¹ Florida, my home State, was the first to reinstate the death penalty, rushing to do so within months of the *Furman* decision.¹²

Because there was no clear indication of the type of death-penalty statute the Court would sustain, legislatures enacted a variety of procedural schemes. On July 2, 1976, the Court considered five of these state statutes. Two statutes, those of North Carolina¹³ and Louisiana,¹⁴ which provided for a mandatory death-penalty structure, were held unconstitutional under the Eighth Amendment. The Court explained that the mandatory imposition of a death sentence without any consideration of mitigating circumstances deprived the capital defendant of the individualized sentencing that the Eighth Amendment requires.¹⁵

Three state statutes were upheld: those of Georgia¹⁶, Florida¹⁷, and Texas.¹⁸ These statutes had several things in common. All three attempted to narrow the class of death-eligible defendants by providing for specific statutory aggravating circumstances to guide the sentencer's discretion, and permitted some consideration of mitigating circumstances that might call for a sentence less than death. All three had either jury sentencing or at least jury input for the sentencing decision, and provided for appellate review by the state's highest court. The Court thought these various provisions would ensure that the death penalty would be imposed only when proportionate to the offender and the offense, and could avert arbitrariness.¹⁹

¹¹ See *Gregg v. Georgia*, 428 U.S. 153, 179 (1976)(opinion of Stewart, Powell, and Stevens, JJ).

¹² See *Asay v. State*, 210 So. 3d 1, 18 (Fla. 2016); *State v. Dixon*, 283 So. 2d 1, 2 (Fla. 1973).

¹³ See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

¹⁴ See *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion).

¹⁵ *Woodson*, 428 U.S. at 303-05; *Roberts*, 428 U.S. at 332-34.

¹⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion).

¹⁷ *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion).

¹⁸ *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion).

¹⁹ For one defendant, Ernest John Dobbert, the new Florida provisions only invited arbitrariness. In a decision that forbode how luck and timing, rather than the severity of the criminal offense, would determine who lived and who died, the Court, in a decision by Justice Rehnquist, held that Dobbert could be sentenced to death under the new procedures enacted in response to *Furman*, despite the fact that his crimes preceded their enactment. *Dobbert v. Florida*, 432 U.S. 282 (1977).

Dobbert raised an *ex post facto* claim with three components, as well as an equal protection claim. *Id.* at 287-88. The first *ex post facto* claim focused on the change in the roles of the judge and jury under Florida's new statute. *Id.* at 287. In the past, a jury verdict calling for mercy was binding, while under the new statute, a jury's recommendation of a life sentence could be overridden by the judge; Dobbert was sentenced to death by the trial judge after his jury voted 10-2 for life. *Id.* at 287, 292. The Court rejected this claim because the new scheme on the whole was ameliorative and procedural, and it could not be assured that a jury would have recommended mercy if sentencing had been under the prior procedure. *Id.* at 293-97. The second claim, that at the time of his offenses, Florida had no death penalty in effect, was rejected because the death-penalty statute, although unconstitutional, still served as an "operative fact" that warned Dobbert of the penalty he faced if convicted of first-degree murder. *Id.* at 297-98. The final *ex post facto* claim was premised on the new law's mandatory-

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To justify death as a penalty, the Court looked to the twin goals of retribution and deterrence. As to retribution, the Court explained that the death penalty served as an expression of a citizenry's moral outrage at particularly heinous offenses, and death as punishment ensured that citizens did not resort to self-help or vigilante justice.²⁰ Although proof of the death penalty as a deterrent was inconclusive, the Court was willing to assume that a possible death sentence would deter many, and in any event, said it was a task for the legislative bodies to assess the validity of statistical evidence on deterrence.²¹

Justices Brennan and Marshall dissented in all three cases upholding the death penalty, maintaining as they did in every capital case thereafter, that the death penalty violates the Eighth Amendment's Cruel and Unusual Punishment Clause.²² For both Justices, death as punishment was invariably excessive and incompatible with the basic concept of human dignity.²³ Justice Blackmun, who had dissented in *Furman*, was in the majority in these three cases.

I started my discussion with the due process analysis of *McGautha* in 1971, and the majority's determination there that erecting standards for assessing the propriety of the death penalty was a task beyond the abilities of humankind. Yet, only five years later, the Court, this time through an Eighth Amendment lens, expressly approved the death penalty in part because of the standards that were adopted by the state legislatures. The years to follow revealed that the arbitrariness and racism that these standards were intended to preclude continued on, unthwarted. The *McGautha* Court was right.

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minimum term of 25 years without parole eligibility if a life sentence was imposed, and was rejected because Dobbert was not sentenced to life imprisonment. *Id.* at 298-301.

The final equal protection claim particularly underscored Dobbert's bad timing. He pointed to the Florida Supreme Court's decision to reduce to life every death sentence imposed under the pre-*Furman*, unconstitutional statute, asserting his equal right to a life sentence because his offenses also occurred prior to *Furman*. *Id.* at 301. But the Court held that Dobbert was not similarly situated because he was neither tried nor sentenced prior to *Furman*:

Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision, and those whose cases involved acts which could properly subject them to punishment under the new statute.

Id. at 301. Ernest Dobbert was on the wrong side of the line. He was executed, despite the jury's life recommendation, on September 7, 1984. See Florida Department of Corrections Execution List at: <http://www.dc.state.fl.us/oth/deathrow/execlist.html>.

²⁰ *Gregg*, 428 U.S. at 183-84.

²¹ *Id.* at 184-87.

²² See, e.g., *Gregg*, *Proffitt*, *Jurek*, 428 U.S. 227-31 (Brennan, J. dissenting); 428 U.S. at 231-41 (Marshall, J., dissenting).

²³ *Id.*

Proof that Georgia's death-penalty procedures upheld in *Gregg* could not immunize the system from the prejudices of the past was presented to the Court in 1987.²⁴ In *McCleskey v. Kemp*, the petitioner sought to establish that the death penalty as applied in Georgia violated both the equal protection guarantee and the proscription against cruel and unusual punishment.²⁵ Armed with a comprehensive study by Professors David C. Baldus, Charles Pulaski, and George Woodworth that employed sophisticated multiple-regression analysis, Mr. McCleskey demonstrated that the odds that a defendant who killed a white victim would receive a death sentence were 4.3 times the odds of a death sentence where a defendant killed a black victim.²⁶ Moreover, examining a multitude of characteristics, the "Baldus Study" revealed that six out of ten defendants with characteristics resembling McCleskey's would not have received a death sentence if their victim had been black.²⁷ Bottom line: a black defendant who killed a white victim, as was so with McCleskey, was disproportionately likely to receive a death sentence.

Justice Powell, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia, rejected McCleskey's claims of racial bias. They said there was no equal protection violation because there was no proof of discriminatory intent. And, taking solace in the safeguards against arbitrariness that the Court had commended in previous death-penalty decisions, the majority stated that "at most the Baldus Study indicates a discrepancy that appears to correlate with race."²⁸

For the majority, the Baldus Study did not inexorably prove that race entered into the Georgia sentencing structure or that Mr. McCleskey's death sentence was based on race. They were not shy about admitting a central concern: if McCleskey's claim succeeded, the "entire criminal justice system" was at risk.²⁹ Defendants facing other types of penalties could challenge other unexplained discrepancies correlating to membership in other minority groups.³⁰ Echoing a theme from prior cases, espoused sometimes by the majority, sometimes by the dissenters, the majority here admonished that the challenges to the death penalty should be taken to the legislatures, not the courts.³¹ To this, Justice Brennan eloquently responded:

"[T]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." Those whom we would banish from society or from the human community itself often speak in

²⁴ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²⁵ *Id.* at 291, 299.

²⁶ *Id.* at 287.

²⁷ *Id.* at 325 (Brennan, J., dissenting).

²⁸ *McCleskey*, 481 U.S. at 312.

²⁹ *Id.* at 314-18.

³⁰ *Id.*

³¹ *Id.* at 319.

too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of “sober second thought.” Stone, *The Common Law in the United States*, 50 *Harv.L.Rev.* 4, 25 (1936).

McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (citation omitted).

Throughout the years, the Court has attempted to enforce its proportionality goals by striking the death penalty for certain offenses: rape of an adult woman,³² rape of a child,³³ a felony murder by a co-defendant without major participation;³⁴ and for certain offenders: those under eighteen at the time of the crime,³⁵ and those suffering from intellectual disability.³⁶ The Court also condemned the execution of the insane.³⁷ But other than these categorical preclusions, the other mechanisms intended to assure consistency and proportionality and prevent arbitrariness have been an abominable failure.³⁸

The Court’s assumption that legislatures would prescribe the death penalty only for limited categories of murder, through narrow and enumerated aggravating factors, has been eviscerated by what has been aptly described as “aggravator creep.”³⁹ With each politically charged homicide, new aggravators corresponding with the particular characteristics of the case have been codified. And the consistency in application that the Court had presumed in approving the state death-penalty statutes in 1976 has been undermined by vague standards and inconsistent applications by prosecutors, juries, trial judges, and the appellate courts.

The State of Florida well exemplifies the utter arbitrariness of today’s death-penalty statutes. The Florida statute approved in *Proffitt v. Florida* in 1976 set forth eight statutory aggravating factors.⁴⁰ Since then, the number of aggravating factors has steadily expanded, and

³² *Coker v. Georgia*, 433 U.S. 584 (1977).

³³ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

³⁴ *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

³⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

³⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁷ *Ford v. Wainwright*, 477 U.S. 399 (1986).

³⁸ Even these categorical preclusions came too late for the many capital defendants who had already been executed at the time that the Supreme Court finally addressed their issues. For example, between *Furman* and *Roper*, 22 children under age 18 at the time of their crimes were executed. See <https://deathpenaltyinfo.org/documents/StreibJuvDP2005.pdf>.

³⁹ See Mills, J., “How to Assess the Real World Application of a Capital Sentencing Statute: A Response to Professor Flander’s Comment”, 51 *UC Davis Law Rev. Online* 77, 80 (2017).

⁴⁰ Section 921.141(6), Florida Statutes (1972).

now stands at sixteen, double the previous “narrowing” categories.⁴¹ As a result, it is almost impossible to hypothesize a murder that would not fall within at least one aggravating factor. Thus, the legislature's actions made it impossible to avoid *McGautha*'s admonition that it would be impossible to formulate standards that could be uniformly enforced without arbitrary results.

The Florida Supreme Court's resistance to implementing constitutional requisites is even more disturbing. When Florida enacted the first death-penalty statute after *Furman*, it limited sentencing consideration to seven mitigating factors, along with the eight statutory aggravating factors.⁴² In 1978, two years after the Supreme Court of the United States approved the Florida statute, the Court decided *Lockett v. Ohio*, in which it held that the sentencer in a death penalty case must not be precluded from considering *all* relevant mitigation.⁴³ Underscoring what the Court had said in *Woodson* and *Roberts*, the Court now made clear that such consideration of mitigation was essential to affording the capital defendant an individualized sentencing determination.⁴⁴ But Florida decisions explicitly stated that the seven statutory mitigating factors were the only factors that could be considered as a basis for a life sentence.⁴⁵ So, in 1978, those of us dealing with Florida's death-penalty statute knew it was unconstitutional.⁴⁶

But while Florida's supreme court thereafter took a new view regarding Florida's statutory limitation on mitigation, it was disingenuous: it said consideration of mitigation had *never* been limited in Florida.⁴⁷ Based on that mischaracterization of its prior decisions, the

⁴¹ Section 921.141(6), Florida Statutes (2017).

⁴² Section 921.141(6), (7), Florida Statutes (1972).

⁴³ *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

⁴⁴ *Id.* at 602-06.

⁴⁵ *See, e.g., Cooper v. State*, 336 So. 2d 1133, 1139 (Fla. 1976)(footnote omitted):

As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law-abiding. Cooper has shown that by his conduct here. In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for 'the most aggravated and unmitigated of serious crimes,' and we are not free to expand the list.

⁴⁶ Ironically, the *Lockett* Court indicated that it had assumed, when reviewing the Florida statute in *Proffitt*, that the provision of statutory mitigating circumstances did not limit what could be considered in mitigation. *Lockett*, 438 U.S. at 606.

⁴⁷ *See Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991), in which Justice Kogan, joined by Justice Barkett, wrote a special concurrence in which he elucidated the Florida Supreme Court's turnabout from prior precedent after the *Lockett* decision:

In the 1970s, because of our own erroneous interpretation of federal case law, this Court directly barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in section 921.141(7), Florida Statutes (1975). *E.g., Cooper v. State*, 336 So.2d 1133, 1139 & 1139 n. 7 (Fla.1976), *cert. denied*, 431 U.S. 925 (1977). In 1978, the United States Supreme Court declared such a practice invalid in *Lockett v. Ohio*, 438 U.S. 586

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court permitted execution after execution to proceed despite the unacknowledged constitutional infirmity of the statute,⁴⁸ and despite the prisoners' repeated arguments that the statute, and its application under the Florida court's precedents, violated *Lockett*.⁴⁹

It was not until 1987, almost a decade after *Lockett*, that the United States Supreme Court finally granted certiorari in *Hitchcock v. Dugger*, one of the many Florida cases presenting a *Lockett* claim.⁵⁰ Justice Scalia, new to the Court at that time, wrote for a unanimous Court that the standard jury instructions given in Mr. Hitchcock's case -- the same instructions provided in every capital case --- had unconstitutionally limited the jury's consideration of mitigation to the seven statutory factors, and that the trial judge had similarly limited his mitigation assessment.⁵¹ Mr. Hitchcock's death sentence could not stand.

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(1978). Only weeks later, this Court disingenuously stated that *Cooper* and other cases never had restricted defendants solely to the statutory list. In *Songer v. State*, 365 So.2d 696, 700 (Fla.1978) (on rehearing), cert. denied, 441 U.S. 956 (1979), we retroactively amended *Cooper* with a few sentences arguing that our precedents "indicate unequivocally that the list of mitigating factors is not exhaustive." *Id.*

Yet, *Cooper* plainly and directly reveals this remark to be untrue. In *Cooper*, we stated:

The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the *itemized aggravating and mitigating circumstances*. Evidence concerning other matters have [sic] no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in *Furman v. Georgia*, 408 U.S. 238 (1972).

Id. at 717 (Kogan, J., concurring)(citations omitted; emphasis in original).

⁴⁸ Executions were also permitted to proceed after capital defense attorneys discovered by accident that the Florida Supreme Court had received confidential information about their clients without notifying counsel. See *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981). The class-action habeas of 123 death-row prisoners was rejected, despite the Supreme Court decision in *Gardner v. Florida*, 430 U.S. 349 (1977), which had condemned, as a Confrontation Clause violation, a trial judge's consideration of undisclosed sentencing information. The *Brown* Court did not admit that it had asked for and received the confidential information, instead excusing the practice with an "even-if" evaluation, and drawing a distinction between the trial judge's role of imposing sentence and its role of reviewing the sentence. 392 So. 2d at 1330-33. Noting that the Florida death-penalty statute had been repeatedly upheld, the Court said it was obliged to apply the statute "so long as the citizens of this state deem it an appropriate punishment for select acts of criminality, and so long as the United States Supreme Court tolerates its use." *Id.* at 1333. The Court complained that the case had "cast a pall on the integrity of the painful process by which this Court attempts to deal with the responsibility it has been assigned. It seems to us both unwarranted and unseemly to vilify those who endeavor to follow the constitution; we are, after all, the messengers, and not the message." *Id.* See generally, Lawrence E. Jacobs, "Ex Parte Information and the Appellate Review of Capital Sentences," 60 N.Y.U. L. Rev. 104 (1985).

⁴⁹ See Florida Department of Corrections Execution List at: <http://www.dc.state.fl.us/oth/deathrow/execlist.html>.

⁵⁰ 481 U.S. 393 (1987).

⁵¹ *Id.* at 397. Professor Michael Mello details how the *Hitchcock* legal issue morphed after *Lockett* due to what he calls the Florida Supreme Court's "historical revisionism worthy of Orwell." Michael Mello, What Came Before We Killed Him: Deconstructing Execution #58, 77 UMKC L. Rev. 849, 851 (2009). Because the Florida

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The State of Florida, by the time *Hitchcock* was decided, had already executed 16 prisoners, all of whom, like Hitchcock, had been sentenced to death pursuant to the unconstitutional scheme that restricted mitigation to the statutory factors.⁵² All had raised, to no avail, a “*Lockett* claim.” But timing, fatally, proved not to be on their side.⁵³

Florida’s disturbing capital legacy did not end there. On June 24, 2002, the Supreme Court decided *Ring v. Arizona*, in which the Court held that under the Sixth Amendment, a capital jury, not the trial judge, had to make the findings that rendered a defendant eligible for the enhanced sentence of death.⁵⁴ At that point in Florida law, a capital jury returned a verdict devoid of interrogatories, so the jury’s findings on aggravating and mitigating factors were never known. Indeed, the capital jury’s “verdict” was only a nonbinding recommendation requiring a mere majority vote – astonishingly, the only verdict for which Florida required less than a unanimous vote.⁵⁵

The Florida Legislature had chosen the trial judge as both the fact finder and sentencer in its capital scheme. With the jury’s role so minimized, it seemed readily apparent that, once again, our capital punishment scheme could not survive. But that was less than apparent to the Florida Supreme Court. What transpired in the Supreme Court in tandem with *Ring*’s announcement suggested to the Florida Supreme Court that it could ignore *Ring*’s significance.

When the United States Supreme Court granted Mr. Ring’s petition for certiorari, two Florida prisoners with pending death warrants had their death sentences stayed by the Supreme Court pending the decision in *Ring*. After the Court issued *Ring*, instead of granting certiorari and vacating and remanding the cases for further consideration by the Florida Supreme Court, it denied certiorari⁵⁶ and the stays terminated for the two men, Linroy Bottoson and Amos King.⁵⁷

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Supreme Court rejected the claim that Florida law, and the standard jury instructions based on that law, limited mitigation, defense lawyers modified the claim to assert that defense counsel had been ineffective for failing to recognize that mitigation was not circumscribed by statute. *Id.* at 851-52. If that failure was reasonable because of the statute, then the law was unconstitutional as applied. *Id.* When Assistant Public Defender Craig Barnard advanced that view in the Supreme Court’s oral argument in *Hitchcock*, he was interrupted and was asked whether the jury instructions simply violated *Lockett*. *Id.* at 853. Craig responded that he had always thought the instructions limited the jury; a unanimous Supreme Court thereafter agreed. *Id.*

⁵² See note 49, *supra*.

⁵³ *Id.* Professor Mello expounds on this injustice through his account of how his client, Ronald Straight, was executed three weeks before the Supreme Court granted plenary review in *Hitchcock*, although both Mr. Straight and Mr. Hitchcock raised identical jury-instruction claims. Straight’s stay motion was denied on a five-to-four vote. 77 UMKC L. Rev. at 869-75.

⁵⁴ 536 U.S. 584 (2002).

⁵⁵ Florida’s system was so severe that two capital defendants were executed even though their juries had unanimously recommended sparing their lives. *Bolender v. State*, 422 So. 2d 833 (1982); *White v. State*, 403 So. 2d 331 (1981). The same trial judge overruled the jury in both cases and sentenced the defendants to die.

⁵⁶ The Florida Supreme Court contrasted the Supreme Court’s treatment of Mr. Ring, overruling its prior Arizona precedent upholding judicial findings, with its failure to overrule prior holdings in Florida cases that had

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Despite black letter law that the denial of certiorari is not precedential,⁵⁸ the Florida court took the Supreme Court's action as a signal that Florida's death-penalty scheme could continue unaffected by *Ring*.⁵⁹

Both Linroy Bottoson and Amos King were executed. And executions continued despite prisoners' repeated efforts to convince the courts to reconsider the legality of Florida's capital statute in light of *Ring*'s Sixth Amendment dictates.⁶⁰

It was not until March of 2015 that the Supreme Court finally granted certiorari in *Hurst v. Florida*,⁶¹ and at last addressed *Ring*'s application in Florida.⁶² On January 12, 2016, the Court held the obvious: *Ring* applied and Florida's death penalty system, under which the jury, by majority vote, provided only a general sentencing recommendation with no specific findings, violated the Sixth Amendment.⁶³ Florida's death-penalty law would have to be rewritten.

Hurst was decided the same day that the Florida 2016 legislative session commenced. Figuring out how to rework the statute became top on the legislative agenda. Much of the debate turned on the number of jury votes that should be required for a death sentence, with final agreement settling on a ten-vote requirement.⁶⁴ The Legislature also forbade the overruling of a jury verdict for a life sentence and bound the trial judge to the jury findings on the aggravating factors.⁶⁵

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approved judicial findings and judicial overrides of jury life recommendations. *Bottoson v. State*, 833 So.2d 693, 695 & n.4 (Fla. 2002). The Florida system, unlike Arizona's, had at least some input from an advisory jury. See also *Asay v. State*, 210 So. 3d 1, 11-12 (Fla. 2016).

⁵³ *Bottoson v. Florida*, 536 U.S. 962 (2002); *King v. Florida*, 536 U.S. 962 (2002).

⁵⁸ See, e.g., *Teague v. Lane*, 489 U.S. 288, 289 (1989).

⁵⁹ *Bottoson v. State*, 833 So. 2d 693 (2002). In separate concurring opinions, Justices Anstead, Perry, Lewis, and Pariente each questioned the continued validity of Florida's death-penalty structure, but generally agreed with Justices Wells, Quince, and Harding that, because the Supreme Court had repeatedly upheld Florida's statute, only the Supreme Court could determine that *Ring* applied in Florida and overrule its prior decisions. *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).

⁶⁰ See note 49, *supra*.

⁶¹ Justice Pariente, joined by Justices Labarga and Perry, had dissented in part in *Hurst v. State*, 147 So. 3d 435, 449-50 (Fla. 2014), on which certiorari was granted, concluding that *Ring* was violated in Florida when death was imposed without a jury's unanimous finding of any aggravating circumstance.

⁶² *Hurst v. Florida*, 135 S. Ct. 1531 (2015).

⁶³ *Hurst v. Florida*, 136 S. Ct. 616 (2016).

⁶⁴ See <http://www.orlandosentinel.com/news/breaking-news/os-florida-death-penalty-reform-20160304-story.html>.

⁶⁵ Section 921.141(2)(c), (3)(a)2., Florida Statutes (2016).

This time, the Florida Supreme Court took a more activist role. Just a few months after the new statute was enacted, the Court, addressing *Hurst v. Florida* on remand from the United States Supreme Court, held that the Florida Constitution and the Eighth Amendment to the United States Constitution require that a jury vote for death must be unanimous.⁶⁶ The Legislature had to get back to work. This time, a new Bill requiring a unanimous vote was promptly adopted and signed into law.⁶⁷

Forty-one Florida prisoners were executed during the period between the announcement of *Ring* and the announcement of *Hurst*.⁶⁸ These executions were carried out despite repeated defense arguments that the Florida statute could not be reconciled with *Ring*. For these ill-fated prisoners, once again, timing proved fatal.

All told, 92 prisoners were executed between 1972, the time that the post-*Furman* statute was enacted, and the Supreme Court's announcement of *Hurst* in 2016.⁶⁹ None of these prisoners had been accorded the benefit of the Sixth Amendment right to jury findings that the Court recognized in *Ring* and ultimately in *Hurst*.

But the vicissitudes of the clock did not end with *Hurst*. At the time that *Hurst* was decided, there were 386 prisoners on Florida's death row,⁷⁰ all of whom had been sent there under an unconstitutional process. The questions became: who should benefit and what should be the remedy? Some defendants and amici argued that all death-sentenced defendants had to be resentenced to life imprisonment under the provisions of a Florida statute that was passed when *Furman v. Georgia* was pending in the United States Supreme Court.⁷¹ That statute provided that, if the death penalty were ever held unconstitutional, all death sentences must be reduced to life sentences -- which is what occurred after *Furman* was decided.⁷² The Florida Supreme Court quickly rebuffed this post-*Hurst* argument of life sentences for everyone.⁷³

Instead, the Florida Supreme Court "split the baby" and provided relief -- a resentencing under the provisions of the new capital statute -- dependent on where a prisoner's case happened to fall on a timeline drawn by the Court. Resentencings would be granted to those prisoners

⁶⁶ *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

⁶⁷ See <https://www.nytimes.com/2016/10/15/us/florida-death-penalty.html>.

⁶⁸ See <http://www.dc.state.fl.us/ci/execlist.html>.

⁶⁹ See note 49, *supra*.

⁷⁰ See *Asay v. State*, 210 So. 3d at 20.

⁷¹ See section 775.082(2), Florida Statutes (1972).

⁷² See *Anderson v. State*, 267 So. 2d 8 (Fla. 1972).

⁷³ See *Hurst v. State*, 202 So. 3d 40, 63-66 (Fla. 2016); *but see id.* at 75-76 (Perry, J., concurring in part, dissenting in part)(accepting this argument that all death-row prisoners had to be resentenced to life imprisonment under the statute, section 775.082(2), Florida Statutes).

whose cases had not yet become “final on direct review”⁷⁴ – not at the time that *Hurst* was decided, but at the time that *Ring* was decided.⁷⁵ This novel, “partial” retroactivity ruling resulted in relief to 158 prisoners.⁷⁶

Resentencings were denied to 167 prisoners whose cases were final prior to *Ring*, and 58 prisoners who, although falling on the right side of the *Ring* timeline, had either waived the right to the prior advisory jury proceeding, or received a unanimous death recommendation from that jury.⁷⁷ As to the latter 58 death-row inmates, it mattered not that, under the prior death-penalty structure, the jury bore no sentencing responsibility, a fact that was repeatedly emphasized to them throughout the trial.⁷⁸ The Florida Supreme Court ignored the jury’s narrow advisory role in making a mere recommendation, erroneously equating that former jury practice with the new, constitutionally required, unanimous-jury sentencing regime. The waiver of the advisory jury

⁷⁴ See generally *Griffith v. Kentucky*, 479 U.S. 314, 322-28 (1987) (discussing the significance, for retroactivity purposes, of cases still pending on direct review).

⁷⁵ *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

⁷⁶ Chief Justice Labarga, and Justices Quince and Polston concurred in the opinion. Justice Canady concurred in result only. In a concurring opinion, the Chief Justice left open the question whether two defendants whose death sentences were based on judicial overrides of a jury’s life recommendation would be entitled to relief. *Id.* at 29. Justice Polston concurred that *Hurst* should be retroactive only to the *Ring* line, but further noted his disagreement with the holding in *Hurst* on remand from the Supreme Court, his disagreement that the Legislature’s 2016 statute requiring only a 10-2 jury vote for death was unconstitutional, and his view that Florida should adopt the federal retroactivity test of *Teague v. Lane*, 489 U.S. 288 (1989). *Id.* at 29-30. Justice Lewis, concurred in result, with an opinion in which he stated that defendants whose cases were final prior to *Ring* but who had preserved the *Hurst* issue should obtain relief. *Id.* at 30-31. Justice Pariente concurred in part and dissented in part, explaining that *Hurst* was of fundamental significance because of the importance of the jury rights at issue, especially in a capital case, and complete retroactivity was mandated. *Id.* at 32-37. Justice Perry dissented, announcing that the Florida death penalty is unconstitutional because it is applied in a biased and discriminatory fashion; he also disagreed with the arbitrary *Ring* line and repeated his previously stated view that resentencing to life was required under section 775.082(2), Florida Statutes. *Id.* at 37-41; see note 73, *supra*.

⁷⁷ See generally *id.* at 20, 38.

⁷⁸ The Florida Supreme Court has also rejected “*Caldwell* claims.” In *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), the Supreme Court held that “it is constitutionally impermissible [under the Eighth Amendment] to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” The prosecutor and trial judge in *Caldwell* had advised the jury that a death verdict would be reviewed automatically by the state supreme court, omitting that, on appeal, the jury’s sentencing determination would be given a presumption of correctness. *Id.* at 325-26. In *Romano v. Oklahoma*, 512 U.S. 1, 8-9 (1994), Chief Justice Rehnquist, writing for the Court, pointed out that, because Justice O’Connor’s concurring opinion in *Caldwell* supplied the fifth vote in support of the decision, her narrower ruling focusing on the inaccurate and misleading nature of the *Caldwell* comments would control as precedent.

Florida’s former advisory jurors were repeatedly told that the responsibility for sentencing lay with the trial judge, not them, and that jurors returned only a recommendation. Relying on *Romano*, the Florida Supreme Court has rejected defendants’ post-*Hurst* *Caldwell* claims on the ground that the prior jury instructions stating that the verdict was merely advisory were accurate at the time that they were given. See, e.g., *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018).

was deemed to constitute a waiver of the “Hurst” jury, and a 12-0 death recommendation was held to make harmless the *Hurst* error in not requiring unanimous findings and verdicts.⁷⁹

In *Hurst*’s aftermath, Florida’s Governor Rick Scott has signed four death warrants. Despite desperate litigation, all four prisoners were executed.⁸⁰ Challenges by their remaining death-row cohorts continue.

In total, Florida has executed 96 prisoners under the post-*Furman* statute.⁸¹ All 96 were sentenced pursuant to a statutory scheme that was flagrantly unconstitutional under the Sixth Amendment. None had the constitutionally required jury fact-finding that death was the appropriate sentence.

When we compare those who succeed on their *Hurst* claim with those who do not, the sheer arbitrariness and unfairness in the disparate results are only underscored. For, generally speaking, it is the older cases, those tried when capital lawyering was in its infancy, and junk science at its peak, that have yielded the death-row inmates least deserving of a death sentence under current standards. Those prisoners are unlikely to be among the “narrowed” group that society labels the “worst of the worst” for whom the death penalty is intended.⁸²

With the new death-penalty procedures in place, death sentences are, and will continue to be, rare for those fortunate enough to have their cases on the right side of the *Ring* timeline, whether by virtue of the date of the murder, their appeal, or their grant of relief at some point along the post-conviction spectrum. They face a vastly different sentencing process that precludes a death sentence unless the jurors unanimously agree that the State has proved beyond a reasonable doubt that specific aggravating factors apply, that the aggravating factors are sufficient to justify a death sentence, that the aggravating factors outweigh those in mitigation, and finally, that death is the appropriate sentence.⁸³ Even then, the trial judge must concur with their findings and conclude that a death sentence is warranted before those prisoners can be resentenced to death.⁸⁴ It is hardly surprising that prosecutors are acknowledging that many of the prisoners’ death sentences are undeserved and agreeing to a life sentence without going through the new sentencing process.⁸⁵ For many other defendants, juries are refusing to return unanimous votes for death.⁸⁶

⁷⁹ See *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016) (waiver of advisory jury); *Davis v. State*, 207 So. 3d 142, 174-75 (Fla. 2016) (unanimous death advisory jury recommendation).

⁸⁰ See note 49, *supra*.

⁸¹ *Id.*

⁸² See Petition for Writ of Certiorari filed in the Supreme Court of the United States in *Hitchcock v. Florida*, SC16-6180, which was denied on December 4, 2017.

⁸³ See *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016).

⁸⁴ *Id.* at 638.

⁸⁵ See, e.g., <http://www.newsherald.com/news/20180104/killer-receives-life-in-prison-after-resentencing>; <http://www.ocala.com/news/20170606/woman-on-death-row-resentenced-to-life-in-prison>; [\(cont’d\)](http://www.news-</p></div><div data-bbox=)

But what is to become of those who are denied resentencings because their case's finality date preceded June 24, 2002: the unlucky ones? The constitutional impropriety of their sentences is no longer in question. The death-penalty procedure that was declared unconstitutional in *Hurst* was the identical procedure both before and after that June day in 2002. Their death sentences belong to a long ago, dismal period, and yet, they will remain on death row until they are executed, unless the courts once again step in and change – or correct – the unseemly precedent.

The unfortunate truth is that executions have been carried out in the past that no longer could be judicially countenanced, and death sentences stand to be carried out in the future that are ineluctably unjustifiable now. The happenstances of timing have long determined who lives and who dies under Florida's death-penalty regime.

It is time to admit that we can never create a fair, rational, and constitutional system for the taking of human life by the State. When Justice Blackman famously declared, “[f]rom this day forward, I no longer shall tinker with the machinery of death,” he explained it best:

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.

* * *

Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative.

Callins v. Collins, 510 U.S. at 1130, 1141, 1143-45 (1994).

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journalonline.com/news/20170714/daytona-killer-spared-death-re-sentenced-to-life;
<https://www.pnj.com/story/news/crime/2018/02/20/former-death-row-inmate-takes-life-sentence-deal-milton-double-homicide/354745002/>.

⁸⁶ See, e.g., <https://www.palmbeachpost.com/news/crime--law/jurors-return-life-verdict-jefty-joseph-murder-trial/2BiQ3IjwFCcgAngkwtNN/>; <https://www.orlandosentinel.com/news/breaking-news/os-darell-avant-death-penalty-life-verdict-20180705-story.html>; <http://www.sun-sentinel.com/local/broward/fl-sb-montgomery-death-penalty-decision-20180719-story.html>; <https://www.miamiherald.com/latest-news/article215464650.html>.

Meredith Martin Rountree:

Karen referred to unconstitutional executions, and I will briefly discuss Texas's experience. I will also talk about why we should be concerned that we may well look back at the execution of certain people eligible for execution today, and say that they were also unconstitutionally executed. Then I want to continue our conversation about the unreliability of the system as a whole.

One of the ways in which Texas is consistent with Florida is that Texas also had, since the inception of the modern death penalty in 1976, a jury instruction in death penalty cases that was subsequently found to be unconstitutionally constraining. Texas juries answered generally two questions: was the murder committed deliberately, and is this person a continuing threat to society? By these terms, the jury could not give meaning to conditions they might have found were mitigating, but also likely to make someone dangerous in the future.⁸⁷

For instance, one might think that someone who had a serious brain injury that affects his impulse control may well be dangerous. He can't control his impulses as well as someone with a fully healthy brain. But it's not his fault that he has a brain injury. Maybe he was just unlucky enough to grow up in an environment full of neurological poisons, or maybe his mother hit him in the head with a frying pan when he was three years old. The law and our own sense of justice distinguish this defendant from the cold, calculating, deliberate murderer we consider the most blameworthy. We might recognize this person as being more dangerous because of his mental condition, but we also want to show him mercy. And the Texas sentencing questions did not permit that to happen. While the sentencing statute was changed in 1991, the Death Penalty Information Center estimates 92 people had been sentenced to death and executed before the Supreme Court stepped in to hold the jury charge unconstitutional.

The Texas (and Florida) experiences make clear that people have been unconstitutionally executed. But we also risk future unconstitutional executions. Just a little bit of background on the legal framework for this point: The Supreme Court has incorporated the idea of proportionality into its interpretation of the "cruel and unusual punishment" clause of the Eighth Amendment.⁸⁸ Further, it interprets the Eighth Amendment in conjunction with "evolving standards of decency that mark the progress of a maturing society."⁸⁹ "Evolving standards" are assessed based on "objective factors to the maximum possible extent."⁹⁰ These objective factors include state legislation,⁹¹ jury verdicts,⁹² and "actual sentencing practices."⁹³ In addition, the Court brings its "independent judgment" to bear.⁹⁴ As the Court describes it:

⁸⁷ *Jurek v. Texas*, 428 U.S. 262 (1976); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Abdul-Kabir v. Quarterman*, 550 U.S. 233(2007).

⁸⁸ *See, e.g., Weems v. U.S.*, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for crime shuld be graduated and proportioned to offense"); *Solem v. Helm*, 463 U.S. 277, 285 (1983) (Framers "adopted ... principle of proportionality" in sentencing).

⁸⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁹⁰ *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

⁹¹ *Id.*

The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment[.]⁹⁵

Through this analysis, the Court has prohibited the death penalty – which is supposed to be “confined to a narrow category of the most serious crimes”⁹⁶ – for certain types of crimes and certain types of people. After considering first a case in which the death penalty was imposed for the rape of an adult woman, and then a case in which it was imposed for rape of a child, the Supreme Court made clear that offenses that do not involve a homicide may not be punished with the death penalty.⁹⁷ In *Atkins v. Virginia*, it excluded from the death penalty offenders with intellectual disability (ID) and in *Roper v. Simmons*, it excluded those who were under 18 at the time they committed the crime.⁹⁸

In *Atkins*, the Supreme Court surveyed state legislative prohibitions on execution of those with ID, and noted that even where it was permitted, such executions were “uncommon.”⁹⁹ In support of its contention of a national consensus against the execution of people with ID, it also cited organizations that officially opposed the execution of the intellectually disabled.¹⁰⁰ It then discussed characteristics of ID in reaching its conclusion that

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⁹² *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (plurality op.); *Tison v. Arizona*, 481 U.S. 137, 148 (1987).

⁹³ *Graham v. Florida*, 560 U.S. 48, 62 (2010).

⁹⁴ *Id.*

⁹⁵ *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

⁹⁶ *Atkins*, *supra* note 90, 536 U.S. at 319.

⁹⁷ See *Coker*, *supra* note 92, 433 U.S. at 596-97 (death penalty disproportionate punishment for rape of adult woman); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty disproportionate punishment for non-homicidal crimes). The Supreme Court also prohibits the death penalty for accomplices to murder if the accomplice was not present for, did not participate in, and did not intend the murder. *Enmund v. Florida*, 458 U.S. 782 (1982).

⁹⁸ *Atkins*, *supra* note 90, 536 U.S. at 321 (death penalty “excessive” for persons with ID); *Roper*, *supra* note 95, 543 U.S. at 578 (death penalty “disproportionate” for juvenile offenders). The Supreme Court has also prohibited the execution of those insane at the time of the proposed execution. *Ford v. Wainwright*, 477 U.S. 399, 409-10 ((1986); *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). This prohibition is not based on the Court’s proportionality analysis, however, and therefore, I do not discuss this exclusion.

⁹⁹ *Atkins*, *supra* note 90, 536 U.S. at 313-15, 316 (listing states that prohibited the execution of the intellectually disabled and noting “[i]t is not so much the number of these State that is significant, but the consistency of the direction of change.”).

¹⁰⁰ *Id.* at 318 n.21 (citing *amici curiae* briefs from the American Psychological Association and the American Association on Mental Retardation, as well as *amici* from religious community and the European Union, and polling data).

the Eighth Amendment prohibits the execution of offenders with ID. Intellectual disability may “undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards”¹⁰¹ because of the

[P]ossibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. ...[M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.¹⁰²

What makes them vulnerable defendants also diminishes their moral culpability.

Because of their impairments, however, by definition they have 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. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.¹⁰³

This diminished personal culpability also undermines the philosophical justifications for the death penalty: deterrence and retribution.¹⁰⁴

With respect to retribution—the interest in seeing that the offender gets his “just deserts”—the severity of the appropriate punishment necessarily depends on the culpability of the offender. ... If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.

...

The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out

¹⁰¹ *Id.* at 317.

¹⁰² *Id.* at 318.

¹⁰³ *Id.*

¹⁰⁴ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.¹⁰⁵

In *Roper v. Simmons*, the Supreme Court took up the question of whether offenders who were under 18 years old at the time of the crime should be excluded from the death penalty. While acknowledging the trend toward abolishing the death penalty for juveniles was not as clear as for those with ID,¹⁰⁶ the Court noted:

[Thirty] States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. . . . In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia.¹⁰⁷

The Court also pointed to common sense and social scientific research to explain why “juvenile offenders cannot with reliability be classified among the worst offenders.”¹⁰⁸ The immaturity and “underdeveloped sense of responsibility” associated with youth “often result in impetuous and ill-considered actions and decisions.”¹⁰⁹ Youth are also “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” in part because they “have less control, or less experience with control, over their own environment.”¹¹⁰ Their personality traits are also “more transitory, less fixed.”¹¹¹ As with offenders with ID, “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”¹¹²

¹⁰⁵ *Atkins*, *supra* note 90, 536 U.S. at 319-21 (internal punctuation and citations omitted).

¹⁰⁶ *Roper*, *supra* note 95, 543 U.S. at 565 (“rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower” than with ID).

¹⁰⁷ *Id.*, at 564-65.

¹⁰⁸ *Id.*, at 569.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*, at 570.

¹¹² *Id.*, at 571.

“Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”¹¹³ Deterrence is unlikely “because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”¹¹⁴

The Court’s opinions in *Atkins* and *Roper* have fueled arguments for extending these exclusions to people with severe mental illness. Professor Bruce Winick has argued, “[s]evere mental illness is a compelling next frontier at which to apply the Court’s evolving death penalty jurisprudence. Certain mental illnesses bear some striking similarities to both mental retardation and juvenile status.”¹¹⁵ Meanwhile, “organizations with germane expertise,”¹¹⁶ namely the American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and the Mental Health Association, officially oppose the execution of the severely mentally ill.¹¹⁷

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.¹¹⁸

The ABA’s 2006 resolution notably calls for excluding from the death penalty people who were significantly impaired by severe mental illness *at the time of the offense*. It is very narrow exclusion.

The concerns we have with respect to people with intellectual disability apply to people with severe mental illness as well, insofar as they, *e.g.*, may be less able to control impulses, to understand consequences of their actions, to serve as witnesses, or to assist counsel. It is inarguable that there are individuals on death row who are very mentally ill, suffered greatly from severe mental illness at the time of their offenses, and are at real risk of execution.¹¹⁹

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Bruce J. Winick, *The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 BOSTON COLL. L. REV. 785, 788 (2009).

¹¹⁶ *Atkins*, *supra* note 90, 536 U.S. at 316 n.21.

¹¹⁷ *Winick*, *supra* note 115, at 789.

¹¹⁸ *Id.*

¹¹⁹ *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Panetti v. Stephens*, 727 F.3d 398 (2013).

In 2018, the ABA’s House of Delegates also adopted a resolution barring the death penalty for people 21 years old and under at the time of the offense. Sometimes called the “*Roper* extension,” it builds on advances in brain science that indicate that generally the human brain is in fact not fully mature until about age 21. There are no clear cutoffs when it comes to these neurological processes, but over 21 years old is far superior marker of the adult brain than over 18 years old. Significantly, as noted in the Report in support of the Resolution, many states are taking these scientific developments into account. From foster care issues to, increasingly, matters of juvenile and adult jurisdiction in the criminal justice system, many states are shifting from 18 years old to 21 years old.¹²⁰

Finally, and as further background for our colleague Rob Dunham’s presentation, here are a few points about the unreliability of the system overall. I just described categorical exclusions. The Supreme Court’s holdings are not self-executing, and we have seen death-sentenced prisoners encounter significant difficulties in enforcing these categorical exclusions. Some Texas cases illustrate some of the problems in enforcing the intellectual disability exclusion.

Intellectual disability experts use three essential criteria to diagnose intellectual disability.¹²¹ One requires an IQ score of roughly 70 or below. Onset needs to be before 18, and finally, the individual must have “adaptive deficits,” *i.e.*, “the inability to learn basic skills and adjust behavior to changing circumstances,” and “significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.”¹²² One essentially asks, how easily does the person live in the world? Is he able to essentially live independently and meet his social responsibilities? Can he make change for a dollar? Does he know how to catch the bus? Can he tell you how to get to his job? Can he explain how to cash a paycheck? Can he cook food for himself? Mr. Moore’s experience is illustrative:

At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. At school, because of his limited ability to read and write, Moore could not keep up with lessons. Often, he was separated from the rest of the class and told to draw pictures. Moore's father, teachers, and peers called him “stupid” for his slow reading and speech. After failing every subject in the ninth grade, Moore dropped out of high school. Cast out of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning.¹²³

In its discussion of intellectual disability, the Supreme Court in *Atkins* referred to expert psychological studies. However, it also wrote, “we leave to the States the task of developing

¹²⁰ ABA Death Penalty Due Process Review Project Report to the House of Delegates (2018) at 8-10.

¹²¹ *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039, 1045 (2017).

¹²² *Id.*; *Atkins v. Virginia*, *supra* note 90, 536 U.S. at 318.

¹²³ *Moore*, *supra* note 121, 137 S. Ct. at 1045.

appropriate ways to enforce the constitutional restriction upon their execution of sentences.”¹²⁴ It thereby permitted States to define what constituted mental disability. In *Briseno v. Texas*, the Texas Court of Criminal Appeals [CCA], the state’s highest court for criminal cases, defined intellectual disability as follows:

- Did those who knew the person best during the developmental stage -- his family, friends, teachers, employers, authorities -- think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?¹²⁵

The *Briseno* factors require courts to consider information that is not relevant to intellectual disability.¹²⁶ Whether a person “respond[s] coherently, rationally and on point to both oral and written questions or [] his responses wander from subject to subject” might be a very pertinent question in talking about someone with a psychiatric disturbance or illness, but it is not relevant to discerning whether someone has an intellectual disability.

The Supreme Court rejected the Texas criteria in *Moore v. Texas*:

[A]djudications of intellectual disability should be informed by the views of medical experts. That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source. Not aligned with the medical community’s information, and drawing no strength from our precedent, the *Briseno* factors create an unacceptable risk that persons with intellectual disability will be executed. Accordingly, they may not be

¹²⁴ *Atkins*, *supra* note 90, 536 U.S. at 317.

¹²⁵ *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (2004).

¹²⁶ For a fuller discussion, *see* Hensleigh Crowell, “The Writing Is on the Wall: How the *Briseno* Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability,” 94 *Tex. L. Rev.* 743 (2016).

used, as the CCA used them, to restrict qualification of an individual as intellectually disabled.¹²⁷

While acknowledging it had given the States discretion in applying the intellectual disability exclusion, the Court made clear that this discretion “is not unfettered.”¹²⁸ It must be “informed by the medical community's diagnostic framework.”¹²⁹

Underscoring the earlier point that Supreme Court opinions are not self-executing, after Mr. Moore’s case was remanded to the Texas Court of Criminal Appeals, it again rejected his claim to intellectual disability. This time, the TCCA relied on Mr. Moore’s having learned how to read during his period of incarceration, and his ability to use the prison commissary. Whether this is dispositive evidence is questionable, but that's a story for another day.¹³⁰

So-called “volunteers” also bear mentioning as another source of unreliability in our death penalty system. Volunteers are people facing the death penalty who actively seek their own execution. They say, “Please kill me. Kill me now, sooner rather than later.” They constitute about 10% of the people executed in the modern death penalty era.¹³¹ Among other concerns,¹³² this certainly raises a question about the reliability of their convictions and sentences. When people say, “Execute me,” they are saying, “execute me without judicial review of my trial and my sentence.” Not only do we not know whether the law was correctly applied in the individual’s case, but permitting 10% of death penalty cases to avoid appeal disturbs our confidence that the death penalty is uniformly applied to execute only the worst of the worst.

In one case I studied, the man refused to have mitigating evidence presented at his trial. He explained that his hallucinations “haunt me daily, and I feel that, you know, death is going to

¹²⁷ *Moore*, *supra* note 121, 137 S. Ct. 1044 (internal punctuation and citations omitted).

¹²⁸ *Id.*, 137 S. Ct. at 1048 (quoting *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. at 1998).

¹²⁹ *Id.*, 137 S. Ct. at 1048 (quoting *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. at 2000).

¹³⁰ Indeed, in *Moore*, the Court observed:

Clinicians, however, caution against reliance on adaptive strengths developed “in a controlled setting,” as a prison surely is. [American Psychiatric Association Diagnostic and Statistical Manual]-5, at 38 (“Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.”); see [American Association on Intellectual and Developmental Disabilities]-11 User's Guide 20 (counseling against reliance on “behavior in jail or prison”).

Id. at 1050.

¹³¹ Meredith Martin Rountree, “Volunteers for Execution: Directions For Further Research on the Influence of Mental Distress, Self-Blame, And Legal Structures on Decisions to Hasten Death,” 82 UMKC L. REV. 295 (2014).

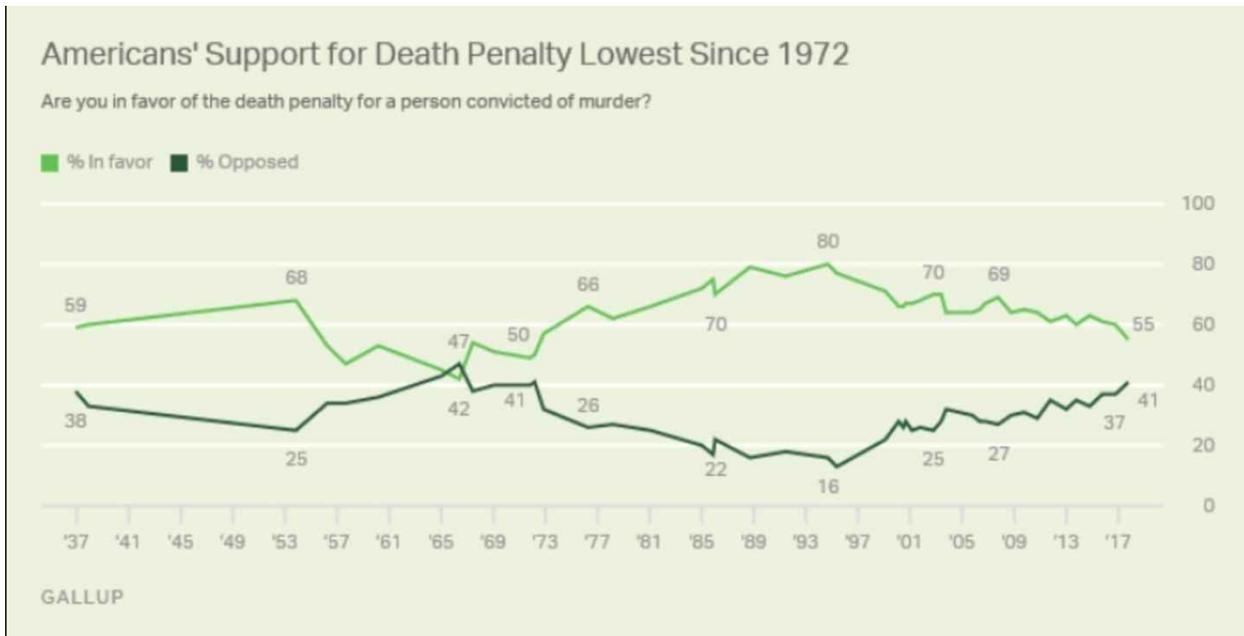
¹³² See, e.g., Meredith Martin Rountree, ‘I’ll Make Them Shoot Me’: Accounts of Death Row Prisoners Advocating for Execution, 46 L. & SOC. REV. 589 (2012); Meredith Martin Rountree, *Criminals Get All The Rights: The Sociological Construction of Different Rights to Die*, 105 J. CRIM. L. & CRIMINOLOGY 149 (2015).

be the only thing that takes them away.”¹³³ The court concluded he understood the consequence of waiving his appeal – an important component of the legal standard - so it permitted him to forfeit his appeals. He was thereafter executed. You can see why there may have been a constitutional claim that could have been raised under those circumstances that he should have not been executed. Indeed, a substantial brief on his behalf had been filed, but it was “unfiled” after the court accepted his waiver.¹³⁴

Robert Dunham:

The question for this panel is whether the death penalty has become an anachronism. To answer that, you need to know a little bit about history. So, I’m going to talk really quickly today about the evolution of the death penalty as practiced in the United States and the evolution of public opinion about the death penalty. Is the death penalty less arbitrary today than when the U.S. Supreme Court declared existing death-penalty statutes unconstitutional in 1972,¹³⁵ or does it remain arbitrary? Have the people we are actually executing been convicted and sentenced in a manner that is constitutionally defensible and reliable? Or are the people who are being executed the most vulnerable and the ones whom the judicial system has treated the most unfairly?

When we look at the recent history of the death penalty in the United States, we see a sea change in America’s attitudes about capital punishment.



¹³⁴ *Id.*

¹³⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

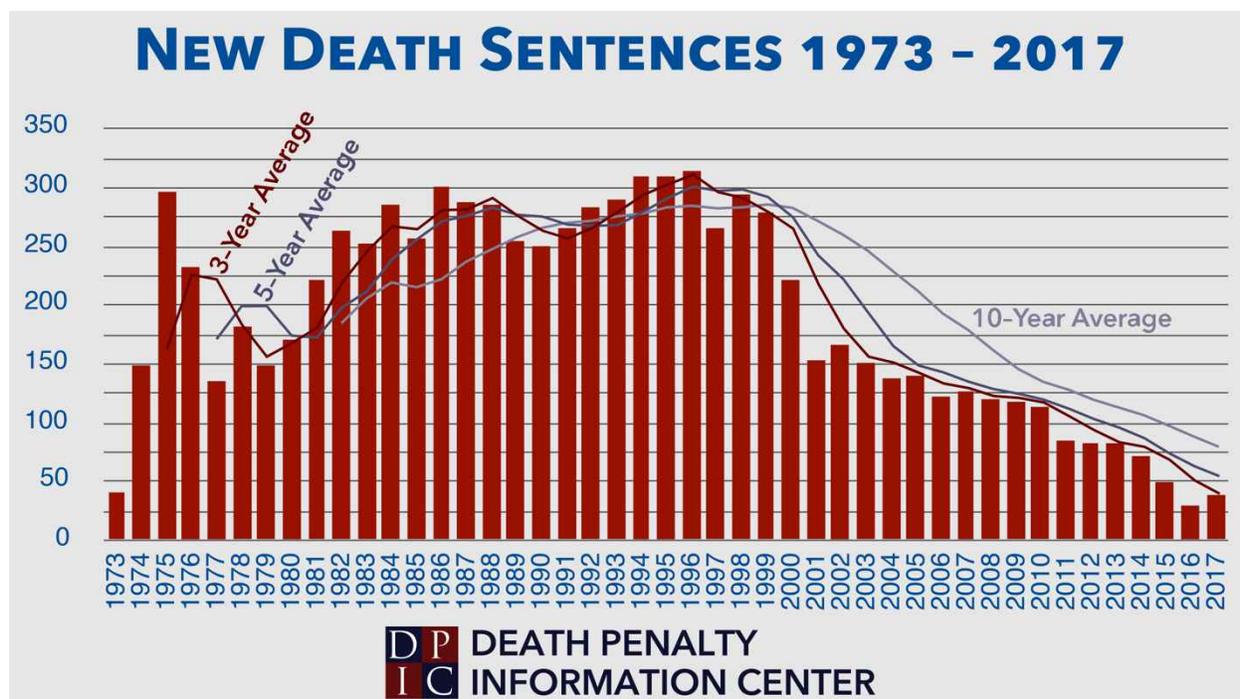
In the mid-1990s, according to Gallup, 80% of the American public supported the death penalty. In the latest Gallup poll, support is at an historic low; we're at 55% support for the death penalty.¹³⁶ That is the lowest level of support in 45 years. And the level of opposition to the death penalty reported by Gallup, 41%, is the highest in 45 years. The numbers from the Pew Research Center reflect a similar climate change: they go from 78% support for capital punishment in 1996 down to 54% today.¹³⁷ So, whichever poll we look at, we're seeing a huge shift – 25 percentage points for Gallup, 24 percentage points for Pew. There is a consistent, long-term movement in one direction, away from the death penalty in the United States. And this is true across every demographic group: each one supports the death penalty substantially less than it did in the 1990s.

Along with that change in public opinion, we're seeing a change in what actually is happening in the courts. When we look at new death sentences imposed in the United States, there has been a precipitous drop. We've gone from 315 death sentences imposed in 1994 and in 1996 – that's 315 death sentences imposed in a single year in the United States – to 31 two years ago and 39 last year, the fewest number of death sentences in any two years since capital punishment came back in the 1970s.¹³⁸ While the numbers may go up and down a little bit in the near future after these historic lows, we will never see numbers like we saw in the 1990s.

¹³⁶ Death Penalty Information Center (DPIC), *GALLUP POLL: Support for Death Penalty in U.S. Falls to a 45-Year Low* (October 26, 2017), https://deathpenaltyinfo.org/Gallup-Support_for_Death_Penalty_Falls_in_2017.

¹³⁷ DPIC, *Pew Poll Finds Uptick in Death Penalty Support, Though Still Near Historic Lows* (June 12, 2018), <https://deathpenaltyinfo.org/node/7121>. While the 54% support level for capital punishment was an increase from the record-low 49% support recorded in 2016, it was the second lowest level of support for capital punishment ever recorded by Pew and was 2% below the support level recorded in 2015. Pew Research Center, *May 2018 Political Survey, Final Topline*, http://assets.pewresearch.org/wp-content/uploads/var/www/vhosts/cms.pewresearch.org/htdocs/wp-content/blogs.dir/12/files/2018/06/08154320/FT_18.06.08_death_penalty_topline_for_release.pdf

¹³⁸ DPIC, <https://deathpenaltyinfo.org/death-sentences-year-1977-present>.



As I said, that’s in part because public opinion has shifted away from capital punishment. It’s in part because homicide rates have fallen¹³⁹ – though at nowhere near the rate death sentences have dropped. It’s in part because seven states have abolished capital punishment since the 1990s. And there have been a number of important reforms in capital representation in jurisdictions that used to produce large numbers of death sentences.

The quality of counsel makes a huge difference. In a city like Philadelphia, my home town, there have been approximately 85 death sentences imposed since 1993. That year is significant, because it was the first year in which the public defender’s office was permitted to handle capital cases. They now get to handle 20% of the homicide cases in the city. If counsel made no difference, we would expect that 17 public defender clients would have been sentenced to death. But that’s not what has happened. Not one single public defender client has received a death sentence in Philadelphia.

So, counsel makes a difference. The evolution in the way in which defense representation is handled has had a huge impact across the country.

Death sentences have plummeted in Texas, they’ve plummeted in Georgia, they’ve plummeted in Virginia and North Carolina, all traditional big death penalty states.¹⁴⁰ And in all of those states, the decline coincided with the formation of statewide or regional capital

¹³⁹ DPIC, *Study Analyzes Causes of “Astonishing Plunge” in Death Sentences in the United States* (Apr. 2, 2018), <https://deathpenaltyinfo.org/node/7059>.

¹⁴⁰ DPIC, *Death Sentences in the United States From 1977 By State and By Year*, <https://deathpenaltyinfo.org/death-sentences-united-states-1977-present>.

defender offices. The death penalty disappeared in New York in large part because, after the New York Capital Defender Office was created, nobody it represented got sentenced to death. After the New York Court of Appeals declared the state's death-penalty statute unconstitutional, it seemed like an enormous waste of money to bring it back. And one of the factors that led to the abolition of the death penalty in New Jersey was that the state public defender system provided meaningful capital representation. As a result, very few defendants were sentenced to death, and those who were almost all won relief on appeal.

And when you look at the other side of the coin, at where the most death sentences are imposed right now, we can tell you that there are a constellation of systemic factors involved. The counties in which the most death sentences are imposed are not those with the highest murder rates. They tend to have a combination of overaggressive prosecutors, a history of discriminatory policing practices, inadequate and underfunded defense services, and courts that tolerate all this.

Even though pockets of outlier jurisdictions persist, we're looking at a long-term decline in the death penalty. The critical question then becomes: as the death penalty is being imposed less frequently, is it being imposed more selectively? Are the people who are being sentenced to death today more morally culpable than the much larger number of people who were sentenced to death in the mid-1990s? All of the data indicate that they are not. The same arbitrary factors that were present at the time of *Furman* and throughout the 1990s still apply.

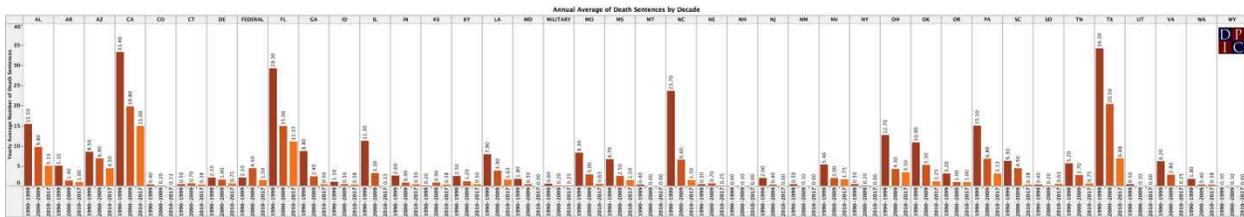
A recent study in Tennessee¹⁴¹ of more than 2,500 first-degree murder cases prosecuted since the state brought back the death penalty in 1977 found that the odds "are close to nil" that a person supplied with a description of the cases would be able to identify the 86 cases that have resulted in death sentences sustained on appeal or the six cases that have resulted in executions.¹⁴² You can't tell by looking at the nature of the murder whether or not somebody gets the death penalty. What you *could* tell is that factors like geography (on what side of the bridge the murders occurred); the political ideology of the prosecutor; the quality of the defense representation; and, disturbingly, the race of the victim and the race of the defendant all affected whether a death sentence would be imposed.

The upshot is, while the number of death sentences has greatly declined since the 1990s, the ones that have been imposed have been just as arbitrary, just as capricious, as when the United States Supreme Court held the death penalty to be unconstitutionally arbitrary in 1972. And when we look at what's going on now – the death-penalty trends, public opinion – social conditions look like they are ripe for the United States Supreme Court to step in ... except that the composition of the Court is much different.

¹⁴¹ DPIC, *STUDY: The Death Penalty in Tennessee is "a Cruel Lottery"* (July 11, 2018), <https://deathpenaltyinfo.org/node/7145>.

¹⁴² Bradley A. MacLean and H.E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 TENN. J. LAW & POLICY 84, 87 (Summer 2018).

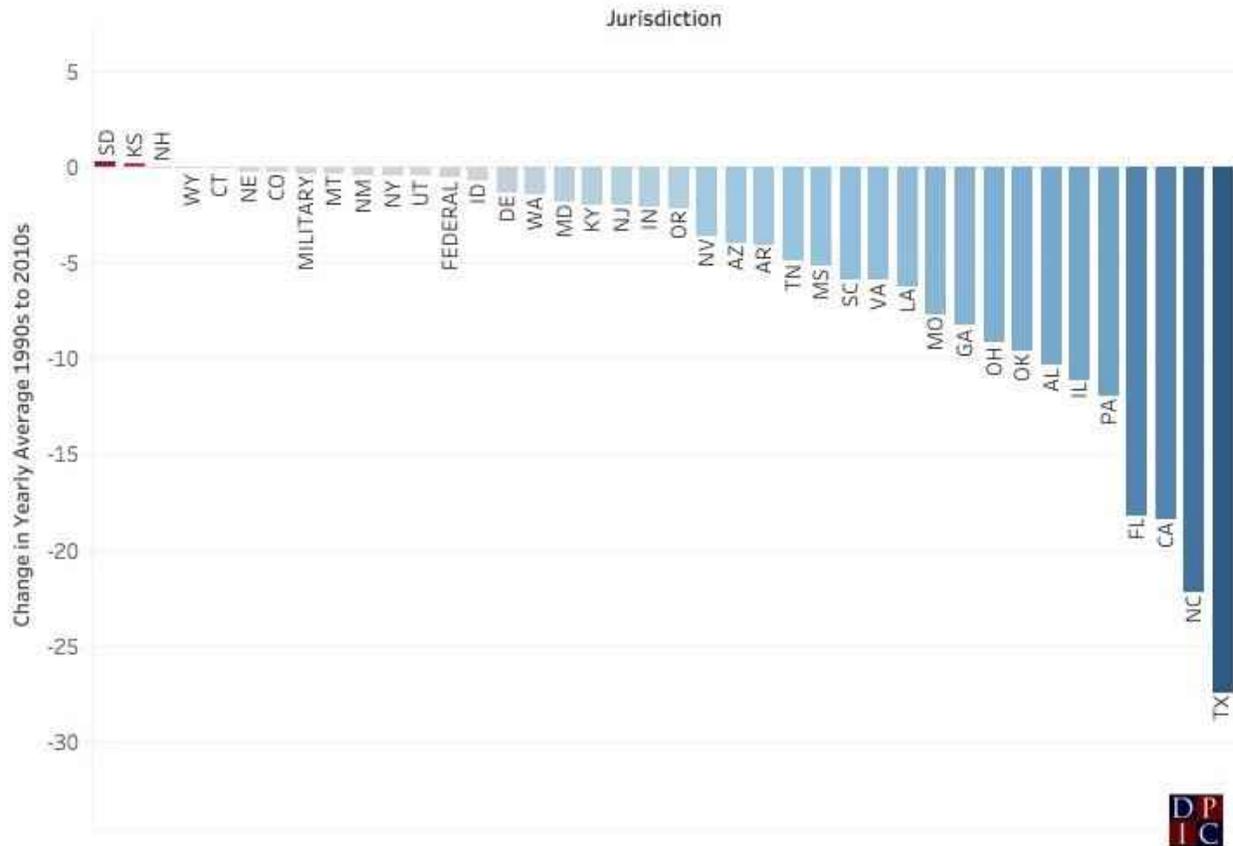
Executions get more attention, but new death sentences imposed are, I think, a better indicator of where the public stands on the death penalty. And if we look at ten-year trends as an indicator, you can see that, starting in 2015, we are able to say that fewer death sentences were imposed in the preceding decade than in the ten years that led up to the United States Supreme Court’s deciding in 1972 that the death penalty was unconstitutional. This is not just a national decline. As the slides below illustrate, it’s a *nationwide* decline. The decline occurs in virtually every jurisdiction and is even more pronounced in the jurisdictions that historically have over-pursued the death penalty.



It is hard to visually display three decades of death sentences for each of the death-penalty states on one page: the slide is meant for a large screen. However, the point here is not the names and numbers, but the persistence of the patterns. The bars depict the average number of death sentences per year for the decades of the 1990s, the 2000s, and the 2010s. All across the country, the darkest orange bar (denoting death sentences in the 1990s) is the highest. All across the country, the middle orange bar (death sentences in the decade of the 2000s) falls significantly. And all across the country, the lightest orange bar (denoting death sentences this decade) falls even farther. And even the exceptions seem to support the rule. Alabama and Florida have experienced a smaller percentage of decline than most of the rest of the country. Why? Because the votes of individual jurors mattered less in those states: non-unanimous jury recommendations for death led to approximately 80% of all the death sentences in those states between 2010 and 2015. And, with the death penalty a largely academic enterprise in California this decade, five Southern California counties continue to produce new death sentences at a rate disproportional to rest of the state and the rest of the nation.

Moreover, as the slide below illustrates, the number of new death sentences has fallen almost everywhere, and in terms of sheer numbers, it has fallen the most in states that had been imposing it the most.

Change in Annual Average Death Sentences Between the 1990s and 2010s



Karen and Meredith have spoken about some of the ways in which American death-penalty law has evolved since *McGautha v. California*¹⁴³ in 1971 and *Furman v. Georgia* in 1972. The concept that death-penalty law evolves – and that judgments about the appropriateness of the death penalty and death-penalty practices change over time as society’s values mature – is not unique to the law in the United States. The Cardinal will be talking about changes over time as well, with respect to Catholic Church doctrine about capital punishment. But it is also the case that evolving standards of decency govern international death-penalty law and practices.

One of my former clients, Roger Judge, had been deported from Canada to the United States to face the death penalty. He filed a challenge to the deportation in the United Nations Committee on Human Rights.¹⁴⁴ The UN Committee changed its interpretation of the provisions of the International Covenant on Civil and Political Rights and adopted new international law in his case because international values concerning the death penalty had changed. The Committee found that because of the growing international consensus against capital punishment, it was no longer appropriate for a country that has abolished the death penalty to send a person to a country that has the death penalty without first obtaining assurances that the receiving country will not seek or carry out the death penalty in that case.

That’s one of the core precedents in international law. It’s part of this whole doctrine about the law evolving: as society matures, as public attitudes change – locally, regionally, nationally, and internationally – the law is supposed to change with it. And historically, each time there has been a change, it’s been a change *against* the use of the death penalty or a change that *limits* the use of the death penalty.

What happens in places that aren’t limiting the uses of death penalty? And how is it that the death penalty is still in operation in the United States? One of the disturbing things that we’ve discovered is that just 2% of the counties in the United States produced 56% of all the death sentences and more than 50% of all the executions.¹⁴⁵ Eighty percent of the counties in the United States have no one on death row. Eighty-five percent have never executed anybody. But there are tiny clusters of counties that are responsible for the disproportionate costs – moral

¹⁴³ 402 U.S. 183 (1971).

¹⁴⁴ *Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003) (“the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place”). Roger was represented by Canadian lawyer, Eric Sutton in the U.N. Committee proceedings.

¹⁴⁵ Richard C. Dieter, *DPIC Report, The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All* (Oct. 2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

costs, economic costs, and opportunity costs – borne by all of us as a result of the way they send people to death row.¹⁴⁶

This naturally raises the question of what can be done about it? And while the answers to that question are beyond the scope of this panel and are a discussion for another day, it's something we really have to think about.

I think it is safe to say that people who over-pursue the death penalty – and counties that over-pursue the death penalty – are not likely to be fair in everything else they do. It's kind of a canary in the coalmine for bad criminal justice practices.¹⁴⁷ In places where you see the over-production of death sentences, I will bet you that you will find a whole constellation of other social justice and criminal justice issues. Virtually every place we look, we see this phenomenon.¹⁴⁸ So, if you want to target jurisdictions most in need of criminal justice reform,

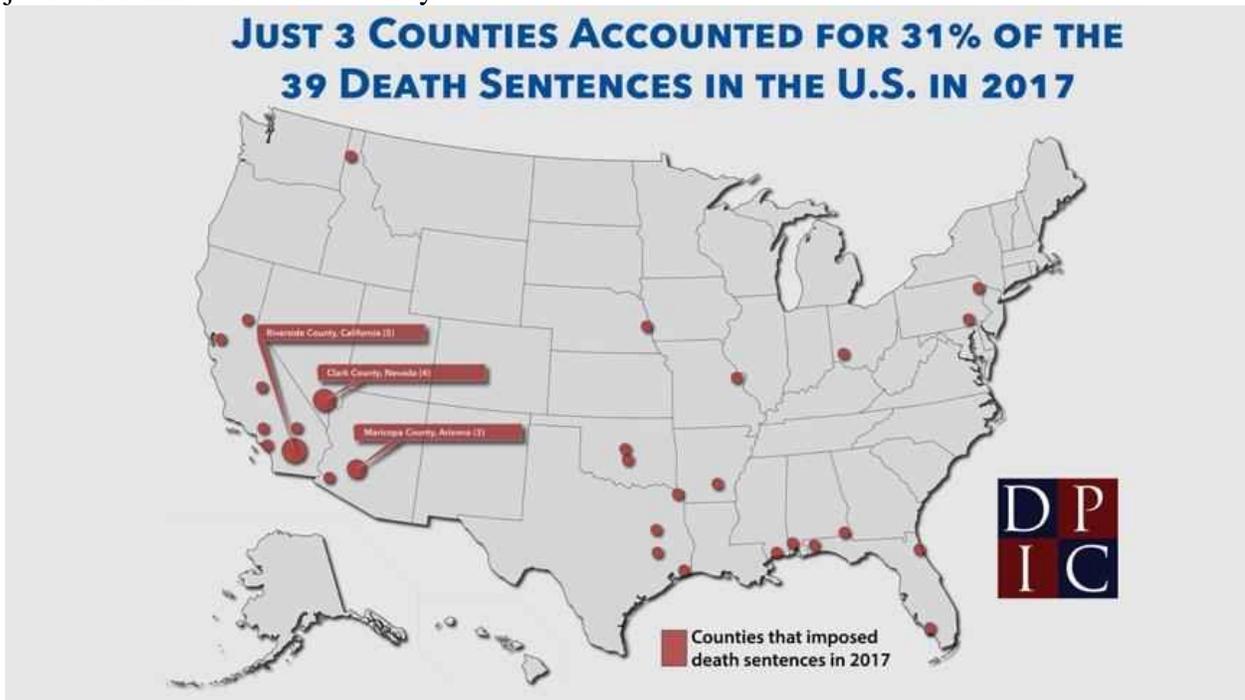
¹⁴⁶ See generally *The 2% Death Penalty*; see also Richard C. Dieter, *DPIC Report, Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis* (Oct. 2009), <https://deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

¹⁴⁷ DPIC, *New Study Explores “Systemic Deficiencies” in High-Use Death Penalty Counties* (Aug. 23, 2016), <https://deathpenaltyinfo.org/node/6536>; DPIC, *Death Sentences Drop in Three High-Use Counties As Prosecutors Change* (Aug. 12, 2015), <https://deathpenaltyinfo.org/node/6219>; DPIC, *Deadliest Prosecutors, Worst Defense Lawyers Linked to High Rates of Death Sentences in Heavy-Use Counties* (Nov. 4, 2015), <https://deathpenaltyinfo.org/node/6291>.

¹⁴⁸ See DPIC, *OUTLIER COUNTIES: Legacy of Racism Persists in Caddo Parish, Which Had Nation’s Second-Highest Number of Lynchings* (Sept. 23, 2016) (Caddo Parish, Louisiana), <https://deathpenaltyinfo.org/node/6561>; DPIC, *OUTLIER COUNTIES: Official Misconduct, Race Bias Permeate Death Penalty in Clark County, Nevada* (Sept. 8, 2016), <https://deathpenaltyinfo.org/node/6543>; DPIC, *OUTLIER COUNTIES: Dallas County, Texas Imposing Fewer Death Sentences After Years of Discrimination* (Dec. 2, 2016), <https://deathpenaltyinfo.org/node/6617>; DPIC, *OUTLIER COUNTIES: Duval, Florida--Controversial Prosecutor, Inadequate Defense, Systemic Death Penalty Problems* (Aug. 26, 2016), <https://deathpenaltyinfo.org/node/6537>; DPIC, *OUTLIER COUNTIES: Death Sentences, Executions More Likely in Hamilton County Than Elsewhere in Ohio* (Feb. 28, 2018), <https://deathpenaltyinfo.org/node/7026>; DPIC, *OUTLIER COUNTIES: Former Death Penalty Capital Shows Signs of Change* (October 20, 2016) (Harris County, Texas), <https://deathpenaltyinfo.org/node/6582>; DPIC, *OUTLIER COUNTIES: A Pledge of Change After Years of Error and Racial Bias in Hillsborough County Death Sentences* (Nov. 11, 2016) (Hillsborough, Florida), <https://deathpenaltyinfo.org/node/6601>; DPIC, *OUTLIER COUNTIES: Alabama's Leading Death Sentencing County Elects Prosecutors Who Oppose Capital Punishment* (Nov. 15, 2016) (Jefferson County), <https://deathpenaltyinfo.org/node/6603>; DPIC, *OUTLIER COUNTIES: Kern County, California Leads Nation in Police Killings, Ranks Among Highest in Death Sentences* (Oct. 11, 2016), <https://deathpenaltyinfo.org/node/6575>; DPIC, *OUTLIER COUNTIES: Los Angeles County Has Nation's Largest—And Still Expanding—Death Row* (Nov. 21, 2016), <https://deathpenaltyinfo.org/node/6608>; DPIC, *OUTLIER COUNTIES: Maricopa, Arizona—“Outrageously Exploited Power,” “Crippled” Defense, and Five Exonerations* (Sept. 2, 2016), <https://deathpenaltyinfo.org/node/6541>; DPIC, *OUTLIER COUNTIES: Miami-Dade Death Sentences Reflect Constitutional Defects, Misconduct* (Dec. 12, 2016), <https://deathpenaltyinfo.org/node/6624>; DPIC, *OUTLIER COUNTIES: Judicial Override, Race Bias, Official Misconduct Rampant in Mobile, Alabama’s Use of Death Penalty* (Sept. 16, 2016), <https://deathpenaltyinfo.org/node/6555>; DPIC, *OUTLIER COUNTIES: Orange County, California Plagued by Misconduct Scandals* (Dec. 28, 2018), <https://deathpenaltyinfo.org/node/6639>; DPIC, *OUTLIER COUNTIES: Non-Unanimous Jury Verdicts Highlight Systemic Flaws in Pinellas County, Florida Death Penalty* (Nov. 7, 2016), <https://deathpenaltyinfo.org/node/6597>; DPIC, *OUTLIER COUNTIES: Riverside County, “The Buckle of a New Death Belt”* (Oct. 3, 2016) (Riverside, California), <https://deathpenaltyinfo.org/node/6566>; DPIC,

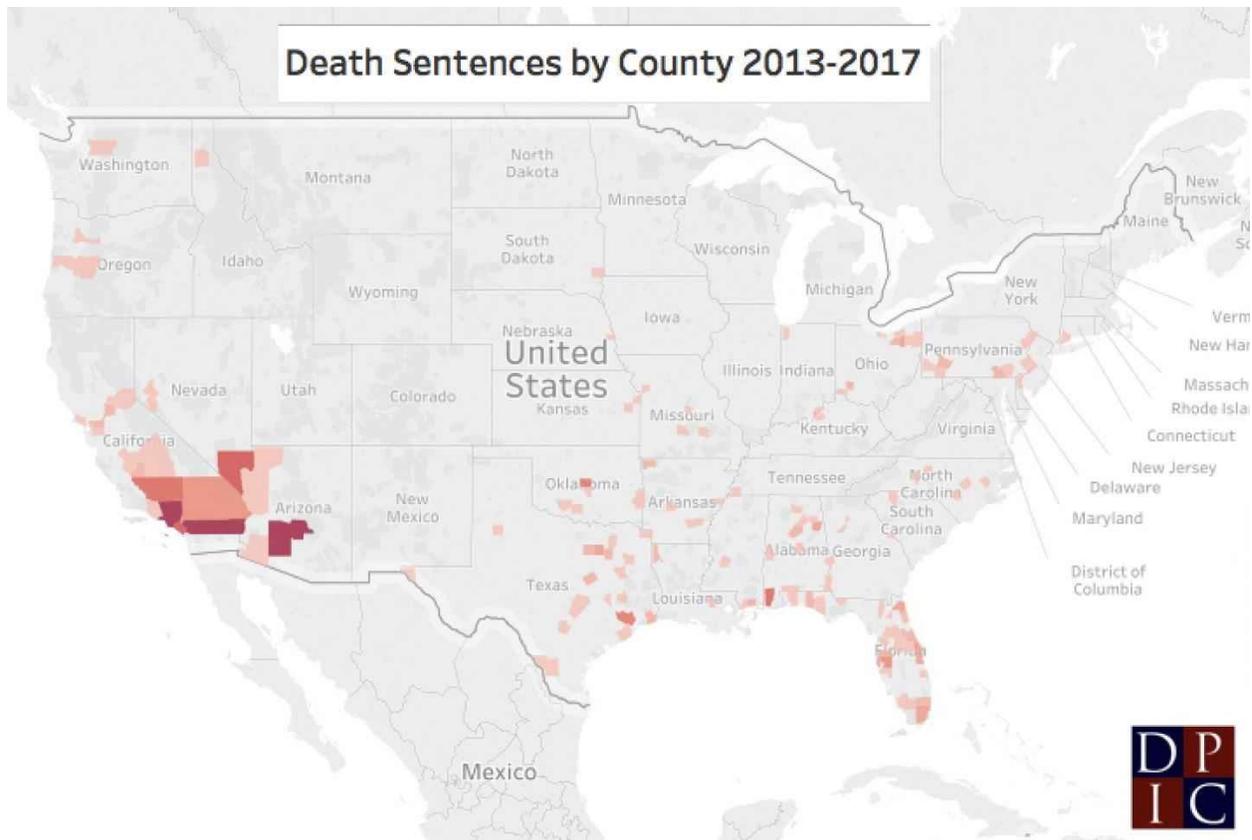
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you should look to where there are the largest numbers of death sentences. The places that disproportionately produce death sentences are red flags for where we need to institute criminal justice reforms across the country.



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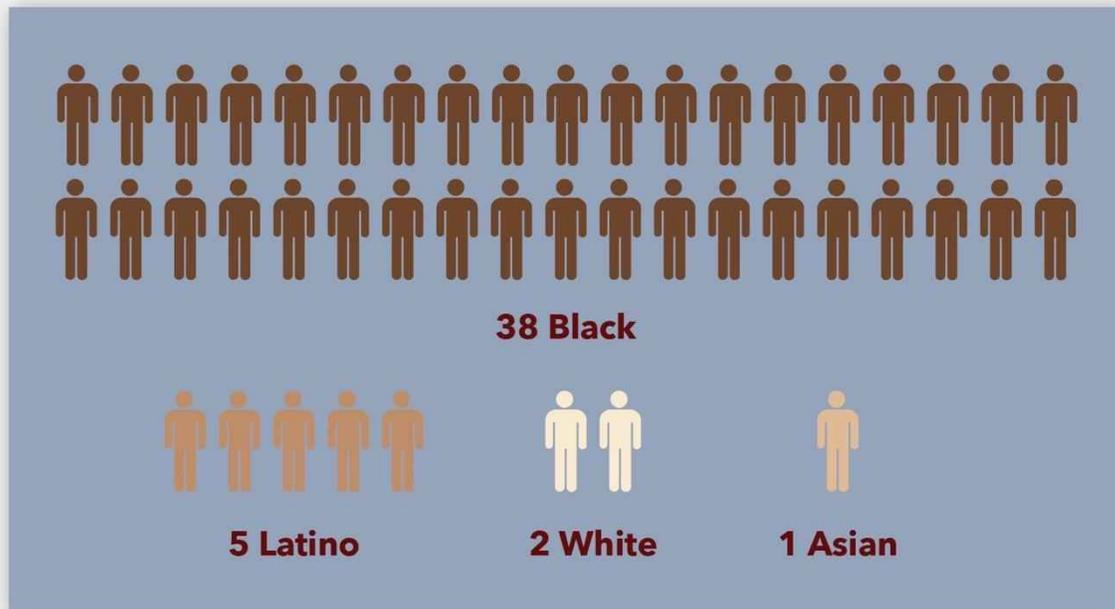
OUTLIER COUNTIES: San Bernardino, California Shares Problematic Patterns of Neighboring Counties (Oct. 31, 2016), <https://deathpenaltyinfo.org/node/6592>; DPIC, *Why Missouri is an Outlier in Execution Trends* (Sept. 8, 2015), <https://deathpenaltyinfo.org/node/6239>.



Last year, just three counties accounted for 31% of all the death sentences imposed in this country. That’s an astonishing number. And, as we look at where these things happened, there is now a cluster in the southwest corner of the United States – five southern California counties; Las Vegas (Clark County, Nevada), and Sheriff Joe Arpaio’s Maricopa County (Phoenix). Those seven counties now account on a regular basis for a quarter of all the death sentences being imposed in the entire United States.

Even more disturbing, the death penalties that are being imposed now appear to be even more racially disproportionate than in the past. As Philadelphia, Pennsylvania has moved from an average of 9.9 death sentences per year in the decade of the 1990s to fewer than one death sentence per year this decade, the city’s already disproportionately black and Latino death row has become even more racially concentrated: 44 of the past forty-six defendants sent to death row in the City of Brotherly Love have been defendants of color. Death sentences also have

**In the past two decades,
83% of defendants sentenced to death in Philadelphia
have been Black.**

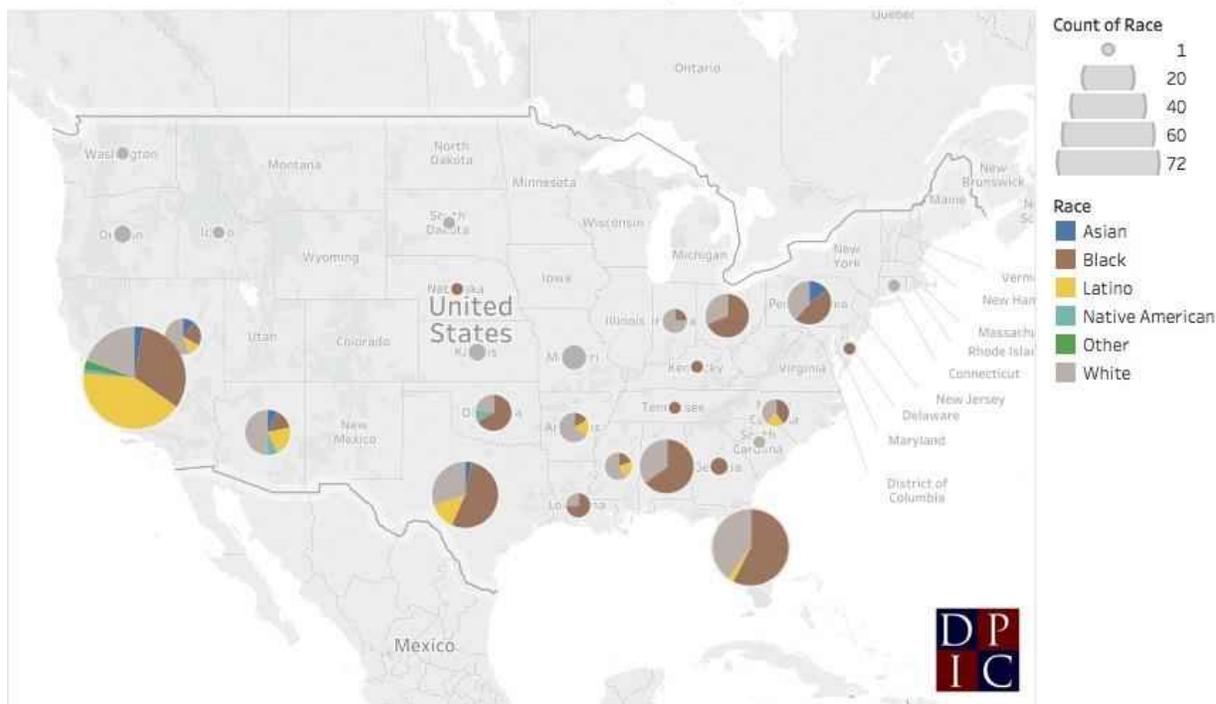


**Of the 46 defendants sentenced to death in Philadelphia since 1997,
44 have been people of color.**

been falling in Harris County (Houston), Texas, which is responsible for more executions than any other county in the United States. But between December 2004 and the end of last year, every one of the 18 new death sentences imposed in the county had been imposed on a defendant of color: 15 African American, three Latino. Issues of race continue to permeate death penalty cases, even in states in which the evidence suggests prosecutors have not discriminated. A 2014 study concluded that, even though it found no evidence that Washington State prosecutors had discriminated on the basis of race in their death-penalty charging practices, Washington juries still disproportionately sentenced Black defendants to death. The juries, the study found, “were four and one half times more likely to impose a sentence of death when the defendant was black than they were in cases involving similarly situated white defendants.”¹⁴⁹

¹⁴⁹ Katherine Beckett and Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014*, at 33 (Oct. 2014), <https://deathpenaltyinfo.org/documents/WashRaceUPDATE.pdf>.

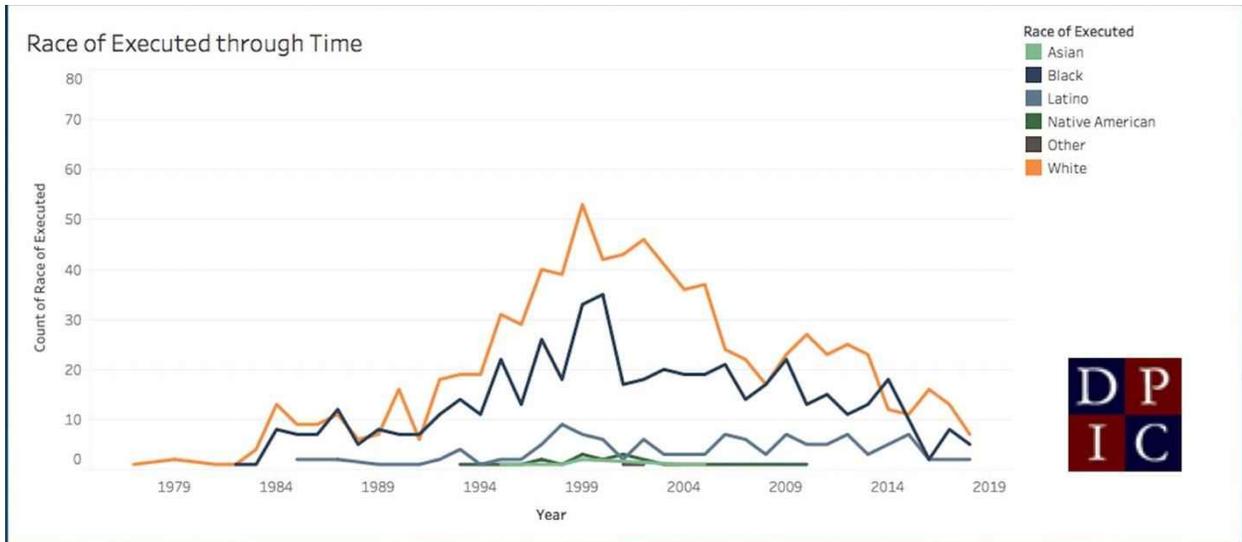
Number of Death Sentences by State 2013-2017 (Race)



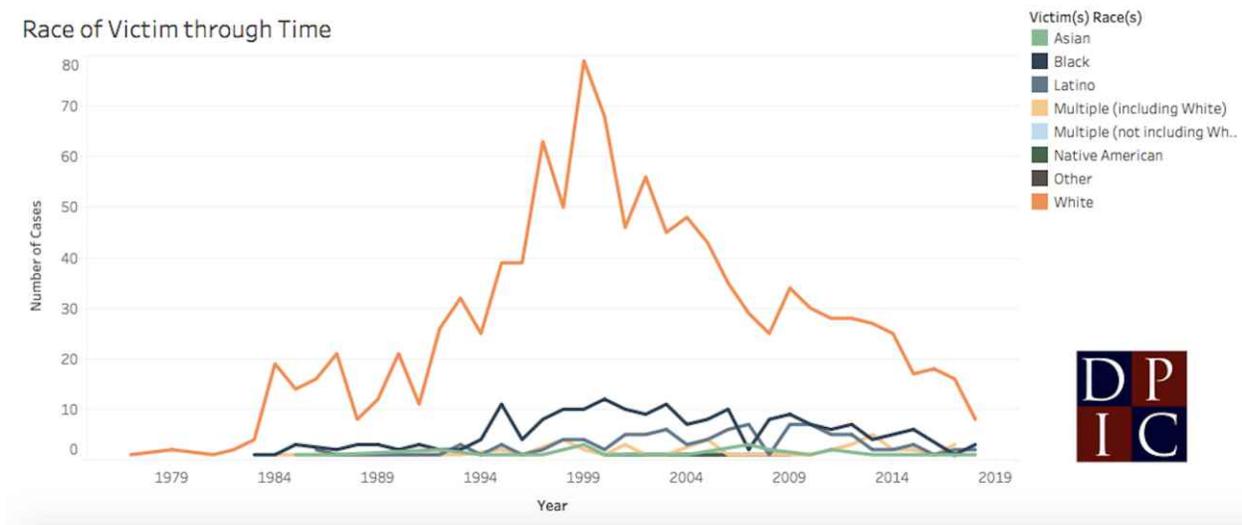
We always knew that race affected death sentencing in numerous different ways. The expectation in a non-arbitrary system of capital punishment would be that as the death penalty is imposed less frequently, the impact of arbitrary factors like race would diminish. It hasn't. In fact, the opposite seems to be the case. As you can see from the state-by-state race map of death sentences imposed in the past five years, the most recent death sentences have been more likely to be imposed upon defendants of color, with African-American and Latino defendants most at risk in Southern California, Arizona, and Texas – where they have historically borne the brunt of harsh discrimination – and African-American defendants at elevated risk virtually everywhere.

And at the other end of the process, are the people who are being executed the worst of the worst? In a non-arbitrary system, that is what one would expect to see. The evidence, however, suggests there is no basis for saying that is the case.

Executions have fallen to the lowest level in a quarter century. But like new death sentences, they have not become less arbitrary as the numbers decline. As with new death sentences, there is a racial dimension to the decline in executions. As executions have fallen, they have fallen for blacks and whites — though not for Latinos — and they have fallen more for whites than for any other racial or ethnic group.



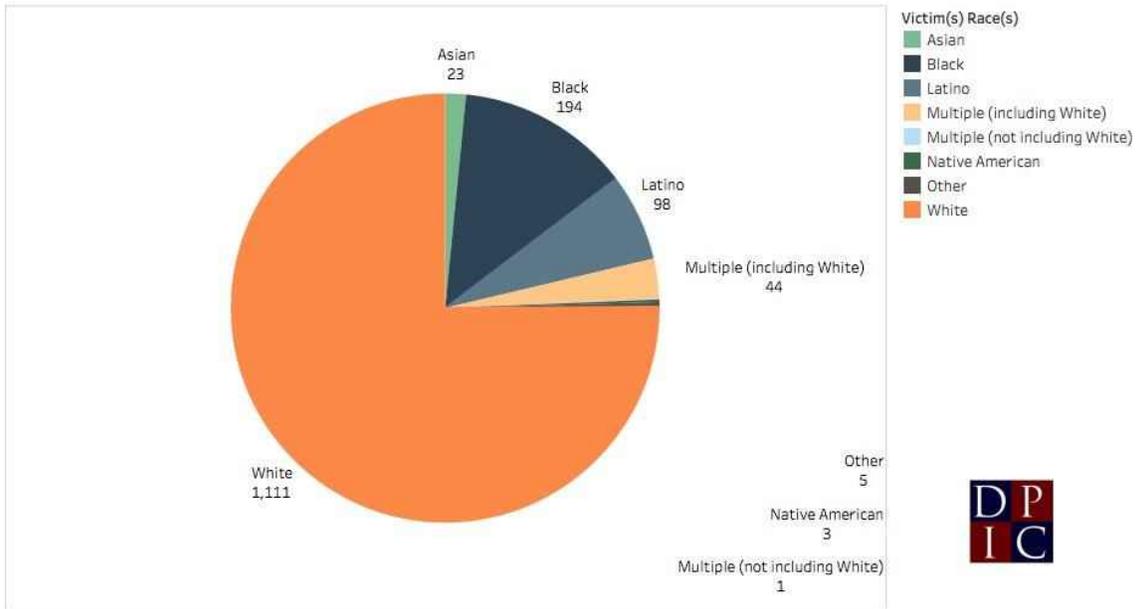
But that may be explained by a different racial fact of death-penalty life: executions are driven by the race of the victim. Though only about half of murder victims are white, more than three-quarters of the capital cases that result in executions involve victims who are white.¹⁵⁰ When executions peaked in the late 1990s, one demographic fact accounted for the increase more than any other: the victims of those murders overwhelmingly were white. As the politics of fear peaked in the 1990s, the victims in the execution cases most resembled those who perpetuated and fell prey to the fearmongering. They were white. And as the great fear subsided, the greatest decline was in white-victim cases.



The fact is, the United States primarily executes prisoners for killing white victims.

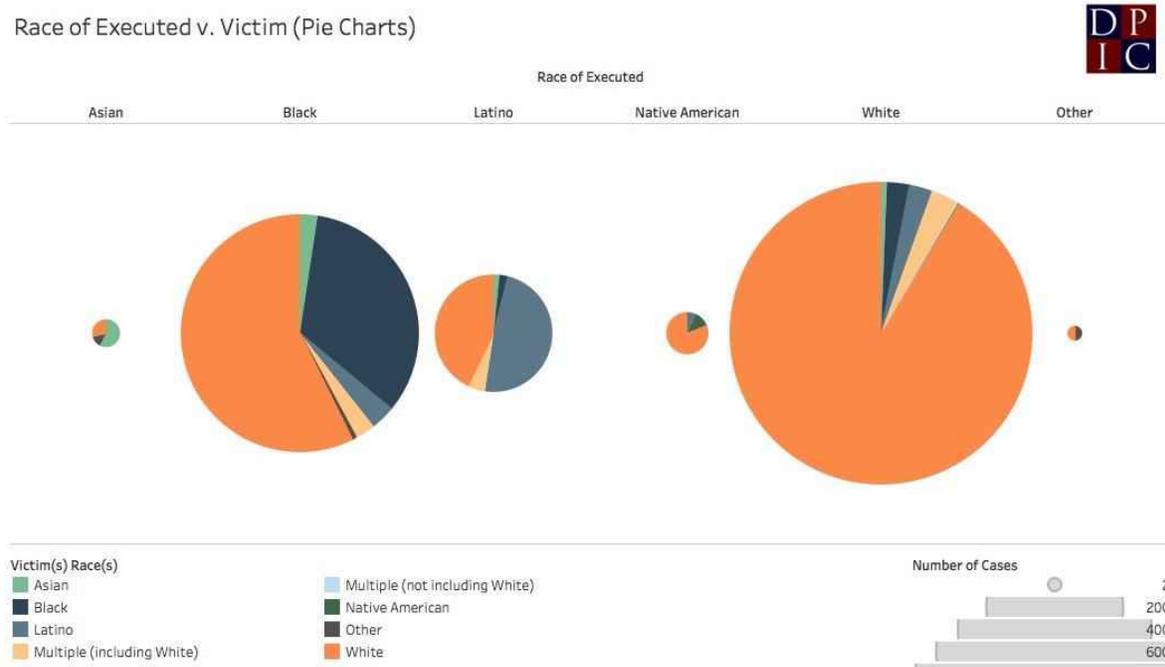
¹⁵⁰ See DPIC Fact Sheet, <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

Victim Race Distribution



And that holds true irrespective of the defendant's race – and disproportionately so for defendants of color.

Race of Executed v. Victim (Pie Charts)



That executions disproportionately occur in cases involving white victims suggests that the U.S. death penalty turns on an inappropriate race-based conception of what constitutes the “worst of the worst” killings.

The data on executions becomes even more disturbing when one looks at the characteristics of the people who are being executed. Are we executing people who, for the most part, can be considered the worst of the worst? By any objective measure, the answer has to be “no.”

In their 2017 book, *Deadly Justice: A Statistical Portrait of the Death Penalty*,¹⁵¹ a team of researchers led by University of North Carolina-Chapel Hill political science professor Frank Baumgartner looked at forty years of empirical data to assess whether the modern death penalty avoids the defects that led the U.S. Supreme Court to declare it unconstitutional in *Furman*. Their conclusion: “A reasoned assessment based on the facts suggests not only that the modern system flunks the Furman test but that it surpasses the historical death penalty in the depth and breadth of the flaws apparent in its application.”

Baumgartner’s team examined every 21st century execution through 2015 and came to the conclusion that “that the death penalty actually targets those who have mental illnesses.”¹⁵² Now, that doesn’t mean that prosecutors seek out homicide defendants with mental illness so they can impose the death penalty against them; that’s not how it works. But the way the system does work, as it pulls people out of the system – through plea deals, through non-capital convictions, through life sentencing verdicts – the most vulnerable are the ones who get sentenced to death.

It turns out that a hugely disproportionate number of people being executed suffer from mental illness. This is despite the fact that Americans, by a margin of two to one, oppose the death penalty for those with mental illness.¹⁵³

Recent executions suggest even more clearly that those being executed are the most vulnerable but not the worst of the worst. Our review of executions in 2017 showed that 85% of the 23 prisoners executed last year showed evidence of significant trauma, mental illness, and/or brain injury.¹⁵⁴

¹⁵¹ Frank R. Baumgartner, *et al.*, *DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* (Oxford University Press, 2017).

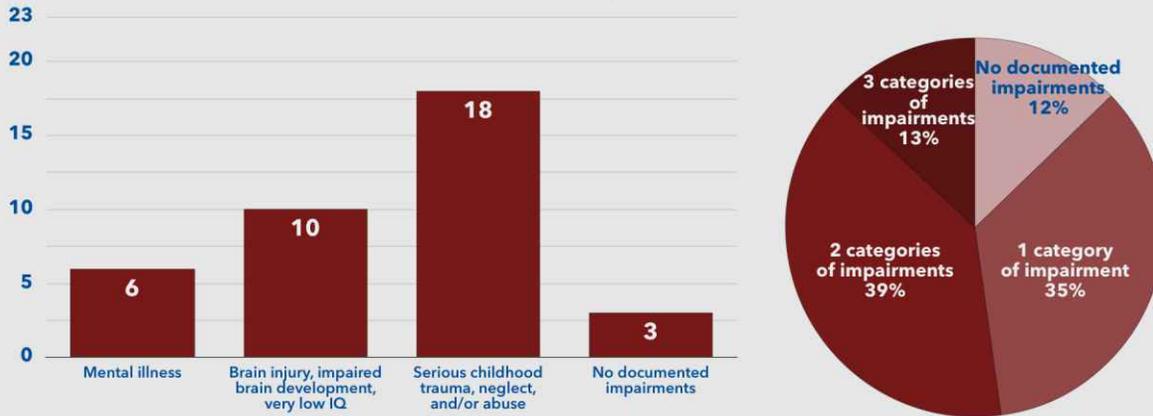
¹⁵² Frank R. Baumgartner and Betsy Neill, *Does the death penalty target people who are mentally ill? We checked.*, *THE WASHINGTON POST*, April 3, 2017.

¹⁵³ *Multi-State Voter Survey: Death Penalty and Mental Illness*, David Binder Research (2015). Survey conducted: November 30 – December 7, 2015.

¹⁵⁴ DPIC, *The Death Penalty in 2017: Year End Report* at 8 (Dec. 2017), <https://deathpenaltyinfo.org/documents/2017YrEnd.pdf>.

THE DEATH PENALTY IN 2017

More than 85% of the 23 prisoners executed in 2017 showed significant evidence of mental illness, brain impairment and/or severe trauma.



DEATH PENALTY INFORMATION CENTER

One way to assess whether states are executing the worst of the worst is to see which executions would or would not survive the evolutions of our law and our contemporary standards of decency. We are working with a number of researchers who are reviewing the people who have been executed since the 1970s in an attempt to figure out how many of those put to death by the states were unconstitutionally executed. We don't yet have the answer. But we know of more than 200 cases in which prisoners have been executed even though they would never be eligible for the death penalty today.

Karen and Meredith have talked about some of them already. By our current count:

- 43 intellectually disabled people were executed before the Supreme Court ruled in *Atkins v. Virginia*¹⁵⁵ in 2002 that subjecting the intellectually disabled to capital punishment was cruel and unusual punishment. After *Atkins*, another 20 people were executed in Texas under that state's unconstitutional scheme for determining intellectual disability. Georgia continues to execute intellectually disabled prisoners with its insurmountable requirement of proving intellectual disability beyond a reasonable doubt.
- 22 prisoners who were younger than age 18 at the time of their offenses were executed before the United States Supreme Court ruled in *Roper v. Simmons*¹⁵⁶ in 2005 that executing juveniles was cruel and unusual punishment.

¹⁵⁵ 536 U.S. 304 (2002).

¹⁵⁶ 543 U.S. 551 (2005).

- 16 people were executed before *Hitchcock v. Dugger*¹⁵⁷ unanimously overturned Florida's unconstitutional limitation on the what evidence judges and juries were permitted to consider in deciding whether to spare a defendant's life.
- 92 people were executed in Texas under a statute that the U.S. Supreme Court eventually said did not provide a vehicle for the jury to give effect to mitigating evidence.
- 22 people were executed in Arizona before the U.S. Supreme Court decided in *Ring v. Arizona*¹⁵⁸ that a capital defendant has a Sixth Amendment right (which was not afforded to these 22 people) to a jury determination of all facts that the state must prove before the death penalty may be imposed. After *Ring*, an additional 41 people were executed in Florida before the U.S. Supreme Court decided in *Hurst v. Florida*¹⁵⁹ that Florida's sentencing statute also violated a capital defendant's right to jury factfinding in the penalty phase.

Moreover, this does not include the estimated hundreds of death-row prisoners whose meritorious constitutional claims never received any federal review because the Supreme Court's ruling in *Teague v. Lane*¹⁶⁰ prevented federal courts from redressing federal constitutional violations that the Supreme Court had not had the occasion to address until after the prisoner's direct appeal had become final.

And it goes on and on and on. In 2004, the Supreme Court ruled in *Schriro v. Summerlin*¹⁶¹ that it would not enforce the Sixth Amendment right to jury factfinding in cases whose direct appeal became final before *Ring* was decided in June 2002. Arizona has since executed 15 death-row prisoners whose death sentences are unconstitutional under *Ring*. 130 or more people stand to be executed by Florida because their direct appeals became final before *Ring* was decided, notwithstanding the Florida courts' admission that these non-unanimous death sentences violated *Hurst* and were imposed under an unconstitutional death-penalty statute.

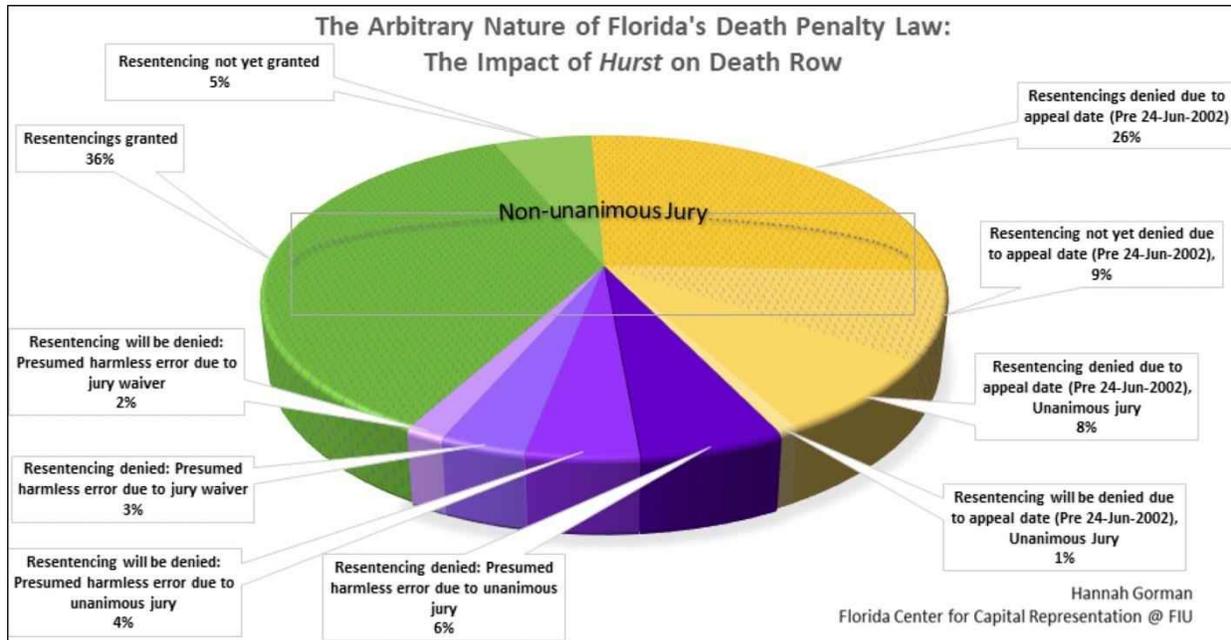
¹⁵⁷ 481 U.S. 393 (1987).

¹⁵⁸ 536 U.S. 584 (2002).

¹⁵⁹ 136 S. Ct. 616 (2016).

¹⁶⁰ 489 US 288 (1989).

¹⁶¹ 542 U.S. 348 (2004).



Add to that the fact that 10% of all of the people who have been executed were volunteers. We can have no assurances that the death sentences imposed in those cases were constitutional, and no sense that their trials were reliable, because the prisoners waived judicial review.

Then, there's the ultimate problem, both in terms of the myth that the death penalty is reserved for the worst of the worst and in terms of the unreliability of the system to identify who should be executed. That problem is: Innocence. For every nine people who have been executed in the United States, one has been exonerated. And we know that at least a dozen and probably a significantly higher number of innocent people have been executed in the United States since the 1970s.¹⁶² So, we've got a problem. We've got a very serious problem.

We want to believe that the courts are able to handle these issues, that judicial review in what is advertised as the best judicial system in the world will catch and correct are errors. But the courts are not doing a very good job of this. I'll give you one example, which although inflammatory, accurately illustrates how broken the system can be.

A very recent study done in Harris County¹⁶³ (which includes Houston) – the county that has executed more people than any other county in the United States and more than any state except the rest of Texas – showed that in 96% of the death-penalty cases in which there were contested factual issues, the courts literally adopted the prosecutor's fact finding verbatim. That's word-for-word. Many times, these rubberstamped orders included the heading,

¹⁶² DPIC, *Executed But Possibly Innocent*, <https://deathpenaltyinfo.org/executed-possibly-innocent>.

¹⁶³ Jordan M. Steiker, James W. Marcus, and Thea J. Posel, *Commentary, The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 HOUSTON L. REV. 890 (2018).

“Proposed Facts,” plus the prosecutors’ typos and misspellings. Many times, they included mistakes of fact and mistakes of law. Sometimes the court signed the proposed findings before it was humanly possible to even read them, often before the prisoner’s lawyers had time to respond. This kind of corruption of the factfinding process has consequences, because under the 1990s amendments to the federal habeas corpus statute, federal courts are bound by most state court fact findings. And habeas corpus courts have deferred to these fact findings – even when they have contained glaring errors and even when the state court could not possibly have exercised independent judgment in issuing the rulings. The result is that the federal courts rubberstamp the state post-conviction courts’ already rubberstamped rulings.

This phenomenon is one of the reasons Harris County has executed more prisoners than anybody else and why Texas executes the second highest percentage of its prisoners than any other state. But the practice goes far beyond Harris County.¹⁶⁴ And the U.S. Supreme Court has refused to address it. There is no meaningful federal judicial oversight in these cases. It is as if the prosecutor were the ventriloquist, the judge were the dummy, and the federal courts were the audience pretending not to see the ventriloquist’s lips move.

If we’re going to have a death penalty, we need to pay more than lip service to fair process. Rubberstamping is not reliable judicial review. That is not the way anyone remotely interested in the rule of law would want any case to be resolved. And that, along with all these other factors we have discussed today, highlights why, if the death penalty hasn’t become an anachronism, it has become an unreliable disgrace.

Ronald Tabak: Thank you very much, Rob.

I’d like to make an observation before turning things over to Cardinal Cupich.

I’ve mentioned before that the Supreme Court in 1976 in *Gregg* and other cases upheld some of the new death penalty statutes that had been enacted after the 1972 *Furman* case had held unconstitutional all existing death penalty statutes. But after 1976, four of the seven justices who upheld death penalty statutes in *Gregg* and other cases concluded that in light of the way that the death penalty had been implemented after *Gregg*, they would hold it completely unconstitutional. Justice Blackmun, dissenting in *Callins v. Collins* in 1994, said he would no longer be part of the machinery of death, and never again voted to uphold a death sentence. Justice Powell, after going on to write the infamous opinion of the Court in *McCleskey*, later told his official biographer and former law clerk that the decision in *McCleskey* was the worst decision in which he had ever taken part -- not because of its holding about racial disparities but rather because he now felt that the death penalty should be completely abolished. Justice John

¹⁶⁴ DPIC, *STUDY: Pervasive Rubberstamping by State Courts Undermines Legitimacy of Harris County, Texas Death Sentences* (May 23, 2018), <https://deathpenaltyinfo.org/node/7106>. See, e.g., DPIC, *Texas Executes Juan Castillo Without a Hearing on His Claims of Innocence and Ineffective Representation* (May 17, 2018), <https://deathpenaltyinfo.org/node/7103>; DPIC, *Defendant Seeks Supreme Court Review of Prosecutorial Ghostwriting, A Widespread Practice in Capital Cases* (July 26, 2016), <https://deathpenaltyinfo.org/node/6511>.

Paul Stevens said in a 2008 concurrence that he now believed capital punishment to be unconstitutional, and in 2010 (a few months after retiring from the Court) he said that the Court's jurisprudence in the years since *Gregg* was so inconsistent with the premise of the crucial concurring opinion in *Gregg* – in which Justices Blackmun, Stewart and he had joined – that he was sure that were he still alive, Justice Stewart, as well as Justice Blackmun and himself – would also have held the death penalty unconstitutional.

When you add in Justices Brennan and Marshall, who dissented in 1976 in *Gregg*, to the four justices I have discussed above, it's clear that six of the nine justices on the *Gregg* court would have held the death penalty unconstitutional had they known how the Court would permit it to be carried out thereafter.

But that is not what happened.

With this further background, I am now pleased to call upon Cardinal Cupich.

Cardinal Cupich:

First of all, I'm really grateful to be here, especially with such distinguished professors and attorneys who studied this problem. They really have put us in touch with the systemic injustices that are involved and the application of the death penalty in our country. And so that's why I'm very glad to be here because I hope that this really will be a story that is covered by our own media to bring home. The difficulties that are involved in the death penalty in our country and the statistics that we have just heard would show that it should make everyone sit up and think about what we're doing in this country.

As you may have heard, Pope Francis made a bit of news today in revising the Catechism of the Catholic Church to say that capital punishment is “inadmissible because it is an attack of the viability and dignity of the person.” This dignity persists, the revision continues, “even after the commission of very serious crimes.” Adding this language to the Catechism, the Pope has made official a development of Church teaching that gained steam under Pope John Paul II, who repeatedly described capital punishment as virtually never acceptable, and called for an end to state-sanctioned executions the world over. And this development was carried on by his successor, Benedict XVI. And now, today, the Magisterium, that is the teaching office of the Church, affirms the doctrine, the moral doctrine, against capital punishment, and the fact that the Church “works with determination for its abolition worldwide,” as Pope Francis said in the revision to the Catechism today.

For close observers of the Holy Father, this development does not come as a surprise. He has consistently called for the abolition of the death penalty, and he did early on in his papacy at a meeting with representatives of the International Association of Penal Law in the summer of 2014. At that time he referred to a “penal populism” that promises to solve society's problems by punishing crime instead of pursuing social justice. He admitted that according to the Catechism of the Catholic Church, “the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor,” but, as the Catechism has long emphasized, he noted that modern advances in protecting society from dangerous criminals mean that cases in which the

execution of the offender is an absolute necessity are indeed very rare, if not practically nonexistent.

Now in the discussions leading up to today's meeting, I was told that the advocates of the so-called doctrine of "evolving standards of decency" were intrigued by what Pope Francis said in that 2017 address about the development of Church teaching. I imagine they are even more intrigued today. On that occasion in 2017, the Pope observed that in the Catholic view "tradition is a living reality . . ." as "the word of God cannot be mothballed, as we heard earlier, like some old blanket in an attempt to keep insects at bay." Rather, it is "a dynamic" and it is "a living reality that develops and grows."¹⁶⁵

While I am not competent enough, and/or foolish enough to enter the debate about the Constitution being a "living document," I do want to say something about two important principles developed at the Second Vatican Council that have forced the Church to come to this new understanding of its position against the death penalty. Doing so will allow me to give a philosophical or theoretical understanding or grounding to the evidence of the inequality and inconsistency that others have pointed out here this afternoon.

The first principle has to do with how the Church, not to mention how every Christian, should understand his role in the modern world. We have entered, the Second Vatican Council noted, "a new stage in human history, the birth of a new humanism, where people are defined first of all by their responsibilities to their brothers and sisters and to history." As a result, the proper task of the Church and each Christian is to "work with everyone in building a more human world." In a word, Catholicism as a religion cannot be understood without a social commitment, to the point that salvation and the efforts toward transforming history are intertwined precisely because God has set out to "make people holy and save them, not as individuals without bonds or links between one another, but to bring them together as one people." God's work, which truly must be our own, is about bringing people together toward a more profound level of human intercommunion and shared life. And so, we have to do all that we can to make sure that no one is excluded. And we are especially to be attentive to those who live at the margins of society, the poor, the vulnerable, the weak, those whose lives are at risk, including those on death row, simply because God's plan is to bring people together and to make sure that no one is left behind. That's the first principle on which we base our teaching about the death penalty.

The second one has to do with the dignity of the human person and the inalienable right to life, which Pope Francis emphasizes in his decision to revise the Church's teaching in the Catechism. The Church has long held that "the dignity of the human person is rooted in his or her creation in the image and likeness of God." While this principle is often called upon by the

¹⁶⁵ *Pope Francis: The dynamic word of God cannot be moth-balled*, VATICAN RADIO, Oct. 11, 2017, http://en.radiovaticana.va/news/2017/10/11/pope_francis_the_dynamic_word_of_god_cannot_be_moth-balled/1342352 (containing English language translation of Pope Francis' prepared remarks).

pro-life movement, it has not been so prevalent in the death-penalty discussion, that is, until today.

Almost a dozen years ago, when I was the bishop of Rapid City, South Dakota, - a much smaller place by far than Chicago - I pointed this particular point out in an article that I wrote for America magazine. I simply asked the question: Is the right to life unconditional in all circumstances, or can it be forfeited by criminal behavior or advancing age?

Now the occasion for writing this article was the coincidence that voters and the legislature of South Dakota were simultaneously considering the issues of abortion and capital punishment. A law banning all abortions except to save a mother's life was up for a vote. Proponents forcefully argued that the right to life is universal and that it's God-given, a position that's held by the Catholic Church. The statute they supported did not refer to degrees or gradations of the right to life, nor did it rest on an individual's quality of life, their age or their moral worth.

At the same time, lawmakers were attempting to clarify the state death penalty statute, as it was discovered that the lethal injection drugs readied for the execution of a convicted murderer did not conform to state law. Now members of both houses rushed to announce their intention to fix what they call "the cocktail problem," so that the death penalty could proceed.

Now, I fully realize that the moral weight of these two issues differs greatly. Abortion, after all, involves the taking of an innocent human life. Yet, it occurred to me that the convergence of these debates on abortion and the death penalty provided an opportunity to reflect more deeply on this claim that the right to life is universal and God-given and unconditional.

I argued that the assertion that every human life has an inherent and inalienable value will only be strengthened if we apply this principle to the morality of defending both convicted criminals and the lives of the unborn. As I noted, "the death penalty confronts us with a penetrating moral question: Can even the monstrous crimes of those who are condemned to death and are truly guilty of such crimes erase their sacred dignity as human beings and their intrinsic right to life?" Despite today's news, I know that faithful Catholics will continue to struggle with this very question. And it is not hard to understand why.

There are, after all, impulses deep in the human heart that answer: yes, certain crimes do bring a forfeiture of human dignity. That response springs from compassion for the victims of the most barbarous crimes in society but also a desire to restore the order of justice that has been so viciously violated. At a profound human level, we tend to believe that by executing a murderer, we are somehow helping rebalance the scales of justice.

But I argue this is a very flawed view. It is a flaw in the way of thinking. For the real tragedy of murder is that there is no way to rebalance the scales of justice, no way to bring back life to those who have been killed or restore them to their grieving families. When the state imposes a death penalty, it proclaims that taking human life counterbalances the taking of another life, and this is profoundly mistaken. If there is any lesson we need to learn in this perilous age, it is that taking a human life in the name of retribution does not bring justice, and it

doesn't bring closure, even if it may feel that way in the particular moment. Rather, capital punishment only continues the cycle of violence and vengeance. The tragic truth is that nothing can restore a human life.

We are left confronting the unavoidable moral question posed by capital punishment: Is the right to life conditional, or is it unconditional? Can men and women forfeit their right to life by their behavior, or is that right irrevocably given by God? Can society — that is, we the people — determine that the crimes committed by human beings supersede their intrinsic claim to life?

This question is all the more trenchant in an age when secure prisons and viable justice systems can virtually guarantee that those who have committed the most grievous acts against their fellow citizens will not pose a continuous danger to society. It means that when the state endorses or chooses to perform executions when there are other ways to protect society, it has concluded that the right to life is conditional after all. Such a state, even if it does not intend to do so, inevitably weakens the ability of its citizens to defend the sacredness of human life against all threats that imperil life in the present day. Erasing the innate value of individual lives because of crimes committed, and removing such criminals from the human family, is an echo, in my view, of the violence done to human dignity when pro-choice advocates imply that the life developing in the womb is not really human. Both conclusions assume that the right to life is contingent, rooted not in the free and absolute gift of a sovereign and loving God, but in the discernment of relative worth by society.

On the other hand, a state that rejects in principle the execution of even those individuals whose crimes are unspeakable bears powerful witness to the unconditional nature of the right to life. It asserts that every member of the human community shares a dignity that is not canceled by defects of health, age, or morality. A state that refuses to use the death penalty advances a culture of life with great power of witness precisely because it protects the lives of those who have been judged least worthy of its vindication.

The Church and now Pope Francis consider how this question bears on all issues related to human dignity. We live in an era when the dignity of human life is threatened. Wherever we turn we encounter mounting efforts to treat the lives of men and women as mere means to larger and allegedly more important goals. Global markets are developing for the sale of vital human organs by those driven, in the desperation of poverty, to risk death in order to provide food and shelter for their families. In our own land, a dominant cultural ethic asserts that the lives of immigrants are of less value because they are other, they're alien. The same ethic avows that unborn children have no sanctity when weighed against the wishes and needs of their pregnant mothers and that those in declining health are less worthy of continued care. And in terrorism, we see the chilling assertion that it is legitimate to kill innocent men and women in the service of political goals, religion, and revenge. This is why it is so vital for us to have this discussion, and especially for us to urge all elected officials and leaders to recognize their responsibility but also their vested interest, the vested interest of society in defending the sacredness and the value of every human life.

This principle of the dignity of human life has to underpin any reference that we make here today to inequality, inconsistency and systemic injustices. It is what holds together our

care for the poor, the weak, the migrant, the excluded. Our assertion that the value of a human life does not depend upon an individual's quality of life or age or moral worth must apply in all cases. For if we protect the sanctity of life for the least worthy among us, we surely witness to the need to protect the lives of those who are the most innocent, and most vulnerable.

Ronald Tabak: Thank you very much, Cardinal.

I am now going to ask you a question which I told you in advance that I would be asking. It remains timely even after Justice Antonin Scalia's death because he is in many circles held out as the paragon of what a Supreme Court Justice should be. The question concerns a lengthy quotation from a talk that Justice Scalia gave here in Chicago.

Earlier in his talk, Justice Scalia presented his perspectives on global changes over time regarding capital punishment, including changes from the times of the rule of kings. He mentioned then made the following statements:

So it is no accident, I think, that the modern view that the death penalty is immoral is centered in the West. That has little to do with the fact that the West has a Christian tradition, and everything to do with the fact that the West is the home of democracy. Indeed, it seems to me that the more Christian a country is the less likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe, and has least support in the church-going United States. I attribute that to the fact that, for the believing Christian, death is no big deal. Intentionally killing an innocent person is a big deal: it is a grave sin, which causes one to lose his soul. But losing this life, in exchange for the next? The Christian attitude is reflected in the words Robert Bolt's play has Thomas More saying to the headsman: "Friend, be not afraid of your office. You send me to God." And when Cranmer asks whether he is sure of that, More replies, "He will not refuse one who is so blithe to go to Him." For the nonbeliever, on the other hand, to deprive a man of his life is to end his existence. What a horrible act!¹⁶⁶

I was wondering what your reaction is to that.

Cardinal Cupich:

Would that he had lived to be here today, to see what the Pope has done, because I think it would maybe cause him to rethink that.

I think that his understanding of salvation has great limitations. It is an atomistic view of salvation, that is, as individuals. What I said in my first point is that what the Second Vatican Council has brought to our attention is that God saves a people; God doesn't just save by

¹⁶⁶ Scalia, *God's Justice and Ours* (article adapted from remarks given at a conference sponsored by the Pew Forum on Religion and Public Life at the University of Chicago Divinity School)(2002), <https://deathpenaltyinfo.org/article.php%3Fdid%3D2249#art>.

individuals. So, how is it that we integrate human beings into society, especially those who are on the margins? That's the question we should be posing here.

Yes, it's true that we all who are of the Christian faith believe in an afterlife, the immortal gift of life that God gives us. As we live our life here today, our task is not just thinking about me in terms of my own personal salvation, but how is it that I am cooperating with God to create a people where everyone feels that they are included. So I think he misses that point and he has a narrow view of what salvation means in the Christian tradition.

Ronald Tabak: I think now I would like to see if any of the panelists have any additional points that you want to make.

Cardinal Cupich:

Could I just put a little context to this moment in which I wrote that article [for American magazine]? I think it helps summarize several things. The case involved the murder of a young man who was severely tortured and beaten by three people. They were clear that they were guilty of this crime. There were three of them. The youngest was a young man who had lived in a family with a mother who was a prostitute, who put him out for prostitution at a very young age. He was physically and sexually abused when very young, and he was in and out of school, foster care, and all the rest,

He got in with these two older guys – 20 years old – they were older – and he decided to be tried before a judge, while they went through a trial with a jury. He got the death penalty, even though he was the least responsible of the three; the other two got life in prison. He wanted to die – his life was so terrible. And so as I spoke out about this, I said, "What we have here is not the death penalty. We have state-assisted suicide. That's what's involved here."

So just to sum up, what you have said is validated by the some of the experiences that I had here. Those kinds of things happen more often than we think. It's a story that we're not telling society about. And shame on us.

Meredith Martin Rountree:

I appreciate your comments. When we talk about 10% of people executed having "volunteered" for this, I think it really understates the tremendous hopelessness and depression and other struggles that some death row prisoners, and it also underestimates the impact of volunteers on the system. A number of people who may have given up at earlier points in the legal process are sometimes persuaded to take their appeals up again. The back and forth, however, often leads courts to impose procedural bars that keep the prisoner's case from getting a full hearing. It may look as though their case has received judicial review, but in truth, only in –sometimes severely – truncated form.

Ronald Tabak:

It's interesting that when we have legal ethics discussions about lawyers for death row inmates, one of the questions we often discuss is, "What do you do when your client, whom

you are convinced is seriously mentally ill, insists on dropping all of his appeals – and you believe his mental illness has led him to take that position?" Rob, could you discuss this?

Robert Dunham:

Having represented a number of volunteers, one of the things that you discover is that almost every person who is on death row has been failed by one authority figure after another for much of their lives. The amount of physical abuse, sexual abuse, neglect, and abandonment is unfathomable. The most ubiquitous feature of the lives of people who are on death row who were actually guilty is that they have experienced extreme and chronic trauma throughout their lives. Some are more resilient than others, but the ones who are the least resilient are even more vulnerable.

What we've seen with the volunteers is that they have largely been abandoned: they received very little assistance as they were coming to trial, or they were already so far along the path to suicide that they were beyond the point of being competent at trial. Yet, they have faced a court system that is extraordinarily poor at addressing issues of mental illness. As a result, you have people like Scott Panetti, who dresses up in a purple cowboy suit with delusions and is permitted to represent himself. You have other people who are not so flamingly crazy, who are able to articulate what appears to be a reasoned basis for ending their lives, but when you get beneath the surface you realize that it really is a suicide.

The question is, if you're going to have the death penalty, shouldn't it be limited to circumstances in which you can ensure that it is reliably imposed and reliably carried out? Shouldn't it be done in accordance with law and not in violation of the law? If state-assisted suicide – suicide at all – is illegal, why should we be facilitating it just because the prosecution wants the person to be dead? Why not let the other legal sanctions govern?

I find the abdication of judicial review in cases involving "volunteers" to be profoundly disturbing, because my goal when I was representing people who were on death row was to preserve their dignity and to give them a voice that they'd never had before; and to try to get the courts to see them as vulnerable human beings who never should have been sentenced to death in the first place. The fact that we are allowing "volunteers" to be executed without their constitutional claims ever heard by any court flies in the face of all of that.

The volunteers are also distorting the judicial-review process in ways that have systemic consequences. There are two cases right now in which volunteers have distorted lethal-injection litigation and litigation over state misconduct in obtaining execution drugs. Carey Dean Moore faces execution in Nebraska.¹⁶⁷ Scott Dozier faced execution last month in Nevada. Dozier has never had any meaningful appellate review of his case and neither has had meaningful review of the execution process because both have volunteered to be executed. The prosecution and the courts have for the most part been complicit in that. And, that I say with trepidation because these are people that we depend upon to enforce the law and to protect the dignity of the law.

¹⁶⁷ Moore was executed on August 14, 2018.

But they seem to have decided that it is better to conduct an execution quickly than to have meaningful review of the state's questionable activities in trying to obtain execution drugs.

There is a public interest in ensuring that the State does not violate law in the process of carrying out the law. Yet, in both Nebraska and Nevada, there is significant evidence that state actors lied to – or at least actively misled – drug manufacturers and drug distributors. So, medicines that manufacturers and distributors thought would be used to treat patients were obtained under false pretenses and stockpiled so they couldn't be used for legitimate medical services. The states then took these controlled substances that were supposed to be used only for medical purposes and diverted them for use in executions.

We should not be violating the law to carry out the law. These volunteers are making it impossible for courts to address those issues.

Audience Member: This is a question for the Cardinal. Greetings from Spokane. We miss you. **Cardinal Cupich:** Thank you.

Audience Member: There has been a lot of attention in the media about how a huge amount of support for the penalty in America is in the American South. And, in particular, this support is clearly rooted in their belief that the death penalty is consistent with the Old Testament's retributive teaching. I wonder if the U.S. Council of Bishops or maybe other progressive religious organizations in the country have reached out to religious leaders in the South.

Cardinal Cupich:

Not to my knowledge, but I would think that the development today might be the impetus for introducing that topic to the ongoing ecumenical dialogue that we have, and I would say that also, with the Muslim community, because I think that many Islamic countries still have the death penalty, and I don't know enough about their own teaching to be able to say whether or not it's justifiable in their teaching. But if in fact there are those strains within a text, whether it is in scriptures or the Koran that would lead **people** to that conclusion, then I think **it would be** an important dialogue about that. So I guess that's where I would begin to have that discussion. But I think that it should be introduced into the ongoing ecumenical dialogue we have already.

Ronald Tabak:

Let me add something to that. In 2001, I helped organize a program at Central Synagogue in New York City which is available online, concerning religion and the death penalty.¹⁶⁸

¹⁶⁸ Symposium- [The Death Penalty, Religion and the Law: Is Our Legal System's Implementation of Capital Punishment Consistent with Judaism or Christianity?](https://deathpenaltyinfo.org/article.php%3Fdid%3D2249#art) (March 31, 2001), 4 Rutgers J. of Law & Religion (2002), available at <https://deathpenaltyinfo.org/article.php%3Fdid%3D2249#art>.

One of the speakers was Talmudic scholar Dr. David Sperling, who spoke about several passages from what Christians refer to as the Old Testament. While he did not say that God in the Old Testament always came out against the death penalty, he pointed out numerous crimes for which capital punishment is authorized, such as failure to observe the Sabbath, for which there is absolutely no record of its having ever been imposed. Moreover, he discussed several passages from the "Old Testament" that are frequently cited by death penalty proponents as supporting capital punishment which do not, when translated properly and considered in context, support the death penalty. One example, an often cited passage from the story of Noah has, Dr. Sperling said, nothing to do with support for capital punishment.

Also on that program, a Protestant Minister, Reverend James Forbes, Jr., gave a sermon in which he pointed out that in response to the first murder in the Bible, in which Cain killed Abel, God caused the "mark of Cain" to be put on Cain in order to save him from being killed in revenge for his having murdered Abel.

In fact, when one considers the book of Deuteronomy, which is also part of Christian scripture, along with the Mishnah Sanhedrin portion of the Talmud, one finds that although many capital crimes were set forth, they made it virtually impossible to have the death penalty imposed. Among other things, before a capital crime was committed, at least two eyewitnesses had to come up to the person who was about to commit the capital crime, and say, "Do you realize that if you proceed to commit this crime and we witness it, you can receive the death penalty?" Unless that and other preconditions were met, the death penalty could not be sought. You can imagine how few times even those preconditions I have mentioned were actually satisfied. And as Rabbi Julie Schonfeld discussed, many additional protections were built in when a capital case got to the high court, the Sanhedrin. A common saying was that a Sanhedrin that upheld a death penalty more than once in seven years would be a reckless or tyrannical Sanhedrin. And the two rabbis who expressed the majority view in the second century (by which time the Temple in Jerusalem had been destroyed and no Jewish court would consider the death penalty – even though secular authorities would have let them do so), said that if they had been on the high court, no death penalty would ever have been upheld. Summing up the practice prior to the Temple's destruction, Rabbi Schonfeld said, "there was a theoretical possibility of a capital punishment that could not possibly be carried out."

In the State of Israel, there is no death penalty for murder, only for crimes against humanity. And it has been imposed only once, against Adolph Eichmann, the principal implementer of the "Final Solution."

A major reason why we had that symposium in 2001 was that we were greatly dismayed by well meaning Christian opponents of the death penalty who frequently said words to this effect: it's true that God in the "Old Testament" loved the death penalty but Jesus corrected everything in the New Testament. Neither Judaism nor Christianity supports such a statement, and the premise of that statement will inhibit, not help, any efforts to have a dialogue with Christians in the South.

Judaism has, in its interpretation of scripture, increasingly understood scripture as properly translated and in context, and has also recognized that, as Dr. Sperling said, "Because many Biblical texts are quite old, some more than 2,700 years old, I realized that I must be open

to the possibility that circumstances can improve over 2,700 years." Indeed, as the Talmud shows, circumstances had already improved by the time of Jesus and the century thereafter.

This appears to be a Jewish counterpart to the legal concept of the evolving standards of decency, and seems completely consistent with the Pope's pronouncement today – based as it is on his belief that Catholic doctrines are not like "mothballs" that can never change. Judaism, in all of its branches, has never taken the view that everything has been frozen in place for over 2,000 years.

Cardinal Cupich:

With regard to this whole business of interpretation of scriptures, which is part of the development of teaching, there was a document written when Benedict XVI was the head of an office called the Congregation for the Doctrine of the Faith in which the whole approach of fundamentalism was taken on. At that time, Benedict called it intellectual suicide. If in fact you are going to be so fundamental that you look at things so narrowly without any hermeneutic by which you can interpret scripture, then you are really turning off the brain, and that is the essence of what God created.

[An audience member then asked what can be done about disproportionality, particularly involving race, in the imposition of capital punishment about which Mr. Dunham had spoken prior to the previous audience question.]

Robert Dunham:

That's a really difficult question to answer because we have two different problems with regard to the death penalty. In addition to all the other problems, we have race issues at every stage of the process. Even before we consider the charging practices, we need to look at policing practices. Policing practices involve disproportionately arresting people of color. White people are arrested less frequently. After these disproportionate arrests there is, statistically, evidence of racially disproportionate charging practices. Then, because people of color are the most adversely affected by poverty, they are disproportionately affected by the consequences of poor indigent defense services. Police and prosecutorial misconduct are also not colorblind: they are more frequent in cases with black and brown defendants. You also see that juries view the same set of evidence differently with respect to white defendants than with regard to defendants of color. So, discrimination becomes more and more concentrated each step along the way.

Unless you address the social issue head on, you're not going to eliminate that problem relating to capital punishment.

Meredith Martin Rountree:

I really like your observation about the overproduction of the death penalty as being symptomatic of a pathological justice system. And death penalty and other racial disparities go hand in hand with other types of racial disparities in the criminal justice system. One of the many dismaying parts of the *McCleskey*, the case we referred to earlier, is that the Court

basically said that “If we talk about racial disparities here, it’s a slippery slope because this is everywhere. Where are we supposed to stop?”

I think there’s really could be important work done. I’ve become convinced that maybe the most important people in the system are prosecutors or district attorneys. I think we should have real conversations with district attorneys as political actors about what they’re running on – what their goals are – what they think are criminal problems and what they think are social problems that we should address in non-criminal ways. And what are they going to do about policing? Prosecutors have tremendous authority- literally, but also because of moral and political capital. What are they going to do about race problems in their jurisdiction?

I think that electing conscientious DAs is one of the most important things we can do.

Karen Gottlieb:

In Florida, one of the largest counties for producing death sentences for some years was Duval County in Jacksonville, Florida and a lot of that was attributed to the district attorney at the time, who never saw a homicide that wasn’t worthy of a death sentence. Statistics on who got death for killing whom in the County revealed blatant disparities. There was a concerted effort by many to change Duval’s criminal justice system, and ultimately, the district attorney was replaced by a prosecutor who spoke to the problems with the justice system and the arbitrariness and discrimination that plagued the county in the past. And we’re seeing real differences happening now.

Robert Dunham:

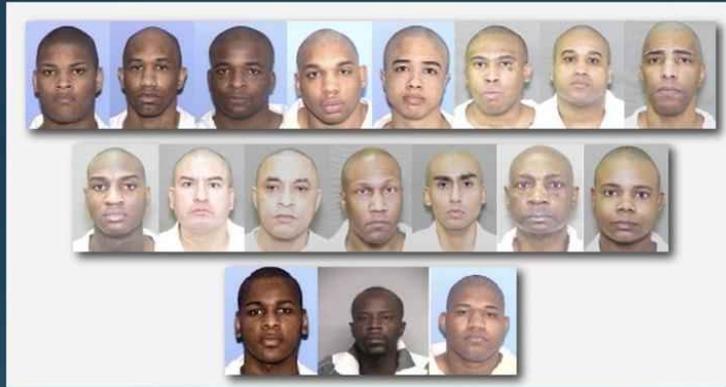
I think that Karen is right that the election of reform prosecutors can significantly change the rate at which counties impose death sentences. Experience shows that if you change policy to enhance criminal justice reform or if you elect prosecutors who are interested in fairness and criminal justice reform, that has the effect of significantly reducing the usage of the death penalty in that county.¹⁶⁹ While that won’t eliminate racial discrimination, it will reduce the number of people who are discriminatorily sentenced to death because fewer people will face capital sentencing phases in the first place. Simply put, there will be fewer opportunities for racial discrimination.

But, ironically, as the opportunities for individual discrimination have decreased, the racial disproportionality of death row has increased. In Houston and Philadelphia – the biggest death penalty jurisdictions that have recently elected reform prosecutors – the rates of death sentencing have plummeted. Yet, at the same time, the proportion of people of color sent to

¹⁶⁹ DPIC, Death Sentences Drop in Three High-Use Counties As Prosecutors Change (Aug. 12, 2015), <https://deathpenaltyinfo.org/node/6219>; Simone Seiver, *Why Three Counties That Loved the Death Penalty Have Almost Stopped Pursuing It*, THE MARSHALL PROJECT (Aug. 11, 2015), <https://www.themarshallproject.org/2015/08/11/why-three-counties-that-loved-the-death-penalty-have-almost-stopped-pursuing-it>.

death row in both cities has increased. So, while fewer people are being subject to sentencing discrimination, the distributive unfairness has increased.

Between December 2004 and the end of 2017, Harris County imposed 18 new death sentences.



**Each was imposed on a defendant of color
(15 black; 3 Latino)**



Ronald Tabak:

I find interesting what Chief Justice Roberts has said in two cases. One of them was his opinion for the Court last year in Duane Buck's case in which a defense expert said that the fact that the defendant was African American would make him more dangerous in the future than if he were white. In the other case, decided this year, *Foster*, the prosecutors' notes showed that they deliberately based their discretionary strikes of prospective jurors on the basis of race. These were uncovered and presented in post-conviction proceedings.

In both cases, Chief Justice Roberts said that we will not countenance in our criminal justice system discrimination on the basis of race. His opinions in these cases sound really good, taken in isolation. If one takes what the Court has done so far, you would have to say that the Court has not overruled *McCleskey* but perhaps has overruled it in cases in which hidden documents, hidden objections, and/or hidden conscious motivations are uncovered, or where there is a consciously racist witness.

It remains to be seen what this means. Certainly, the words in the Chief Justice's opinions in *Buck* and *Powell* are dramatically different from the words in Justice Powell's opinion for the Court in *McCleskey*. But time will tell, now that the Chief Justice appears about to become the Court's swing justice, what the outer limits are of the views he has expressed in these two opinions.

Cardinal Cupich:

It also seems to me that if you are going to be clear about the influence of race, not just in the courtroom, you also have to see what impact it has had in the whole process that brought this person to this situation. It is insufficient for a Judge of the Court to say that this will be a racially pure process without looking at what was the prelude in which racism was a very important factor in the person getting to this moment in his life. So, you can't just segment racism in that moment in court. You have to take all of that into consideration.

Ronald Tabak:

I am greatly impressed by the perceptiveness of the Cardinal's analysis – particularly because he did not attend a capital defense training program at which counsel were taught to take a holistic view of the effects of race on the defendant's life. This often includes the traumatic impact of lynchings many, many decades ago on entire African American communities – even those which emigrated to the North in the wake of such lynchings.

The continuing impact of lynchings is brought home to many of those who visit the new memorial to lynching victims, and the associated museum, which opened several months ago in Montgomery, Alabama. The death penalty was justified by some as a more genteel replacement for lynchings. Bryan Stevenson, whose Equal Justice Initiative has been the leading force behind the creation of the monument and the museum, is receiving the ABA Medal this weekend.

It is remarkable that the Cardinal has the perception that Bryan and those who developed the ABA capital punishment counsel guidelines are striving to be internalized and acted upon by lawyers for people facing the death penalty. Many of the people with the most unconscious racism and the least awareness of the importance of putting together a holistic presentation of the impact of race on defendants are defendants' own lawyers.

While groups like the ABA Death Penalty Representation Project continue to work to improve counsel's performance in these respects, it is wonderful that the Cardinal has highlighted this in his last comment today.

I want to thank all of you here today and all participating remotely for your involvement with this program. Many thanks, particularly, to our panelists.