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The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor

Scott E. Sundby

University of Miami School of Law, ssundby@law.miami.edu

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The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor

Scott E. Sundby*

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Whether examined in the context of what is happening in the nation's courtrooms or in the arena of public opinion and legislative action, many indicators suggest that the death penalty in America is on the ropes. In the courtroom, death sentences have been in a steady nationwide decline for the past ten years even though the capital murder rate has remained relatively constant.¹ Indeed, the years 2004 and 2005 saw the lowest number of annual

* Sydney and Frances Lewis Professor of Law, Washington and Lee University, School of Law. I would like to thank Darryl Brown, David Bruck, Jeffrey Fagan, and Calvin Massey, as well as the participants in the Texas Law Review *Punishment Law and Policy* symposium for their valuable insights. The Frances Lewis Law Center provided financial assistance for the research and writing of the Article.

1. Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2004*, BUREAU JUST. STAT. BULL., Nov. 2005, at 14 app. tbl.2 [hereinafter Bonczar & Snell, *Capital Punishment, 2004*], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf>. Although the overall homicide rate has declined significantly during this time, the capital murder rate in states with the death penalty has

death sentences imposed since 1973.² The 125 new death sentences handed down in each of those years constitute a 61% drop from a post-*Furman* high of 317 death sentences imposed in 1996.³

On a more general level, opinion polls show some erosion in support for the death penalty among the public, from a high of 80% in a September 1994 Gallup poll to 64% in Gallup's October 2005 poll.⁴ Moreover, qualms are appearing within the institutions of state governments, with the New Jersey legislature recently enacting a moratorium⁵ and the New York legislature declining to re-enact the death penalty after the existing statute was ruled unconstitutional by the New York Court of Appeals.⁶ The Massachusetts House of Representatives voted 100–53 against a bill to bring back the death

remained relatively stable, generally ranging each year between one and two capital murders per 100,000 population. Jeffrey Fagan, Franklin E. Zimring & Amanda Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEXAS L. REV. 1803, 1824–26 (2006). The decline in the overall homicide rate has occurred primarily in the area of noncapital homicides. *Id.*

2. See Bonczar & Snell, *Capital Punishment, 2004*, *supra* note 1, at 8 (indicating that the number of new death sentences in 2004 (125) was the lowest recorded since 1973); Press Release, Am. Judicature Soc'y, National Jury Center Reports 139, Death Sentences in 2005 (March 27, 2006), available at http://www.ajs.org/include/story.asp?content_id=478 (reporting that 125 new sentences were imposed in 2005).

3. Bonczar & Snell, *Capital Punishment, 2004*, *supra* note 1, at 14 app. tbl.2. Because *Furman v. Georgia*, 408 U.S. 238 (1972), struck down all existing death penalty statutes and created the need to pass the statutes that are the basis today for imposing the death penalty, the case is seen as marking the beginning of the modern era of capital punishment.

The 61% drop in annual death sentences considerably outpaced the 18% fall in annual murders over a similar time period (1996 to 2004). See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.6.79.2004 (Ann L. Pastore & Kathleen Maguire eds., 2004), <http://www.albany.edu/sourcebook/pdf/t6792004.pdf> (reporting 19,645 murders occurred in 1996 and 16,137 in 2004). Even when the decline in the number of murders is measured against the year with the most murders (24,703 in 1991), the 35% decline in annual murders is far less than the 61% drop in annual death sentences from its high in 1996. See *id.*; Bonczar & Snell, *Capital Punishment, 2004*, *supra* note 1, at 14 app. tbl.2. Moreover, the drop in homicides during this time period was primarily in the area of noncapital homicides; the capital murder rate, by contrast, remained fairly steady, Fagan et al., *supra* note 1, at 1829, producing a relatively constant pool of death penalty-eligible defendants from which fewer defendants have been sentenced to death each year.

For a further discussion of the relationship between the homicide rate and the rate of imposition of the death penalty, see Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 102–07 (2002) (examining the thesis that death penalty use depends on the homicide rate and concluding that “high homicide rates are neither necessary nor sufficient for the formal retention or vigorous use of capital punishment, and that low homicide rates are neither necessary nor sufficient for its abolition or more modest use”).

4. Lydia Saad, *Support for Death Penalty Steady at 64%*, THE GALLUP POLL TUESDAY BRIEFING, Dec. 2005, at 9, 9.

5. *Death Penalty Suspension Tops Busy Day*, DAILY J. (Vineland, N.J.), Jan. 10, 2006, at A5. The bill passed 55–21 in the Assembly and 30–6 in the Senate. *Id.*

6. *People v. LaValle*, 817 N.E.2d 341, 356–68 (N.Y. 2004) (ruling that New York's “deadlock instruction”—which required judges to advise sentencing juries that failure to agree on a unanimous sentence of death or life without parole would result in a parole-eligible sentence—was unconstitutional); Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment: Accidental Execution of the Innocent Cited*, WASH. POST, Apr. 13, 2005, at A3.

penalty under a statute that proponents had argued would be the “gold standard” for capital punishment by reducing the risk of wrongful executions.⁷

Yet while those favoring abolition of the death penalty understandably take heart from this trend, there are reasons to be cautious in extrapolating too far and too fast from these figures. At various other moments in our history the United States has appeared to be at a crossroads over the use of capital punishment, only to continue down the death penalty path in the end.⁸ As recently as the 1960s and early '70s, for instance, public support had fallen below 50%—indeed for a brief moment more Americans opposed capital punishment than favored it⁹—and the number of annual death sentences had dwindled even more dramatically than this past decade's decline.¹⁰ But by the mid-1970s public support for the death penalty had risen back above 60%,¹¹ and the number of annual death sentences rose steadily from 1977 to 1996,¹² evidencing an upward trend that statistically appeared as unstoppable as the downward trend of the past ten years appears now.¹³

Sounding this word of caution is not to argue that the death penalty is a permanent fixture on America's punishment landscape. Indeed, this Article will conclude that forces are at work that ultimately may spell the end for the death penalty in the United States. The road to abolition, however, is likely

7. Scott Helman, *Death Penalty Bill Fails in House; Romney Initiative Roundly Defeated*, BOSTON GLOBE, Nov. 16, 2005, at B1, available at 2005 WLNR 18511109 (“[T]he decisive outcome underscores how capital punishment has lost support among [Massachusetts] state lawmakers since it was a hotly contested issue in the 1980s and 1990s.”). See generally Symposium, *Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report*, 80 IND. L.J. 1 (2005) (discussing the merits of the proposed Massachusetts statute).

8. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 208, 267 (2003) (stating that despite the decline in capital punishment that occurred during the first half of the twentieth century, “[b]y the end of the twentieth century capital punishment [was] back with a vengeance”); Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 419 (2002) (discussing how the temporary moratorium on the death penalty imposed by the 1972 Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972), was followed by the reinstatement of the death penalty pursuant to the 1976 decision in *Gregg v. Georgia*, 428 U.S. 153 (1976)).

9. THE GALLUP POLL: PUBLIC OPINION 1986, at 57 (George Gallup, Jr. ed., 1987).

10. The nation's death rows grew by an average of only fifteen inmates a year between 1960 and 1965. See Bureau of Justice Statistics, Key Facts at a Glance: Prisoners on Death Row, <http://www.ojp.usdoj.gov/bjs/glance/tables/drtab.htm>.

11. THE GALLUP POLL: PUBLIC OPINION 1986, *supra* note 9, at 57.

12. See Bonczar & Snell, *Capital Punishment, 2004*, *supra* note 1, at 14 app. tbl.2 (charting admissions to and removals from death sentences between 1977 and 2004).

13. See *id.* Carol and Jordan Steiker have suggested with “gloomy irony” that the abolition efforts directed at the Supreme Court through use of the Eighth Amendment during the *Furman* period may in fact have provided legitimacy to the death penalty and “helped to stabilize and entrench the practice of capital punishment in the United States.” Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995).

to be more complicated and rocky at both the courtroom and public opinion levels than a simple linear extrapolation of recent trends might suggest. At the courtroom level, for example, while there has been a steady drop in the number of death sentences over the past decade, it is uncertain how much further the decline will go without significant developments, such as forensic proof that an innocent person has been executed. Similarly, while it is true that public support for the death penalty has waned slightly since the mid-1990s, approximately two out of every three Americans continue to voice approval of capital punishment,¹⁴ making it unlikely that public opposition will lead to widespread legislative repeals of the death penalty without further catalysts coming into play.

This Article argues, therefore, that what has occurred over the past decade with the death penalty requires a more nuanced understanding than simply assuming that the decline in annual death sentences reflects a gradual and inexorable erosion in support for the death penalty that eventually will lead to its abolition. Plausible scenarios exist that would make the abolition of the death penalty possible,¹⁵ but it seems unlikely that the death penalty will end simply because an unstoppable downward momentum toward fewer death sentences has developed. An exploration of the reasons for the decline in death sentences over the past decade, therefore, not only sheds light on the current state of capital punishment, but also helps to identify those factors that are likely to determine the future course of the death penalty in America.

1. Thinking Small About the Decline in Death Sentences

The past decade's decline in death sentences has understandably triggered speculation that capital punishment as an institution is in a state of decay.¹⁶ A declining number of death sentences can also have important legal consequences, because the Supreme Court has used jury behavior as a "significant and reliable objective index of contemporary values" in assessing whether a particular use of the death penalty violates the Eighth Amendment ban on "cruel and unusual punishments."¹⁷

Before exploring the possible causes for the decline in death sentences, however, it is important to note two major difficulties in confidently making general predictions and statements about how the death penalty is being

14. Saad, *supra* note 4, at 9.

15. *See infra* Part III.

16. Newspaper headlines often try to capture this speculation in the wording of their headlines. *See, e.g.*, Editorial, *The Death of the Death Penalty?*, NAPA VALLEY REG., Feb. 26, 2006, http://www.napavalleyregister.com/articles/2006/02/26/opinion/cditorial/iq_3315425.txt; David Greenberg, *The Unkillable Death Penalty: DNA Tests Won't Stop Capital Punishment*, SLATE, June 2, 2000, <http://www.slate.com/id/83569/>; Robert Tharp, *Death Penalty Losing Capital*, DALLAS MORNING NEWS, Dec. 29, 2005, at 1A; Benjamin Wittes, *The Executioner's Swan Song?*, ATLANTIC MONTHLY, Oct. 2005, at 42.

17. U.S. CONST. amend. VIII; *Coker v. Georgia*, 433 U.S. 584, 596 (1977).

implemented as a contemporary practice. First, the pool of cases involving the death penalty is a relatively small one, especially when considered in the context of the entire criminal justice system. Even in 1996, when death sentences reached their post-*Furman* high-water mark, the 317 capital sentences that were imposed constituted only a fraction of the sentences handed down for all murder convictions that year.¹⁸ And because the numbers are relatively small in absolute terms, a drop or rise of even two to three death sentences in an individual state can produce misleading statistics. In Virginia, for instance, an observer could accurately report that death sentences dropped a full 25% in the single year between 2001 and 2002, only to double in number from 2002 to 2003, before plummeting by two-thirds in 2004.¹⁹ Yet in absolute numbers, the annual total of death sentences in Virginia between 2001 and 2004 was relatively stable, ranging from a high of six death sentences in 2003 to a low of two death sentences in 2004.²⁰ Thus, while on a nationwide basis a distinctive downward trend in death sentences can be discerned over the past decade, care must be exercised in making conclusions about long-term trends and causes, especially when looking at individual states, given the relatively small statistical base involved.

A second complicating factor is that a death sentence results only after a lengthy process involving numerous actors responding to a wide variety of factors. This is not a novel observation; since the Supreme Court's decision in *Gregg v. Georgia*,²¹ the multiplicity of actors and factors involved in a

18. The Bureau of Justice Statistics reported 8,564 sentences for state murder convictions in 1996 (excluding manslaughter convictions). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 1996, at 3 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf96.pdf>. The 315 death sentences handed down in 1996 at the state level (two death sentences that year were at the federal level) therefore constituted 3.67% of all sentences for murder handed down that year at the state level. Bonczar & Snell, *Capital Punishment*, 2004, *supra* note 1, at 14 app. tbl.2. In addition to the actual number of death sentences declining since 1996, the death penalty rate when compared to all murder sentences also has dropped. In 2002, for instance, the 154 state death sentences constituted 2.39% of all (6,430) state sentences for the crime of murder compared to the 3.67% in 1996. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002, at 5 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf>; Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment*, 2002, BUREAU JUST. STAT. BULL., Nov. 2003, at 4 [hereinafter Bonczar & Snell, *Capital Punishment*, 2002], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf>.

19. See Bonczar & Snell, *Capital Punishment*, 2004, *supra* note 1, at 5 tbl.4 (reporting two new death sentences); Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment*, 2003, BUREAU JUST. STAT. BULL., Nov. 2004, at 5 tbl.4 [hereinafter Bonczar & Snell, *Capital Punishment*, 2003], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf> (reporting six new death sentences); Bonczar & Snell, *Capital Punishment*, 2002, *supra* note 18, at 5 tbl.4 (reporting three new death sentences); Tracy L. Snell & Laura M. Maruschak, *Capital Punishment 2001*, BUREAU JUST. STAT. BULL., Dec. 2002, at 6 tbl.5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf> (reporting four new death sentences in Virginia).

20. See *supra* note 19.

21. See *Gregg v. Georgia*, 428 U.S. 153, 199 & n.50 (1976) (rejecting the petitioner's argument that continuing practices—such as the prosecutor's exercise of discretion—still allowed the death

capital sentence has served as the basis for an ongoing constitutional objection that the criminal justice system contains too many opportunities for arbitrary and capricious discretion.²² Beyond the constitutional objection that arises from such widespread discretion, however, the existence of so many actors responding to differing incentives also considerably complicates the effort to gain a clear picture of what factors are influencing the death sentence rate. A prosecutor in any one case, for example, may decide to not pursue a death sentence for a variety of reasons: the victim's survivors might not support the death penalty; the cost of pursuing the case as a capital crime might be too great; the defendant might be willing to plead guilty in exchange for a life sentence; the defendant might reveal important information in return for a life sentence; or some combination of these and other reasons might exist.²³

In similar fashion, a variety of factors can influence whether a jury in any one case decides for or against the death penalty, such as the strength of the defendant's mitigating evidence, the defense attorneys' skill, the victim's role in the crime, the articulateness of the victim's mother, or the racial composition of the jury. And, of course, numerous other actors—including the judge, the defense lawyers, the victim's survivors, expert witnesses, and the media—will influence the course of a capital case, starting from the pretrial stage and extending through the post-conviction process.

Discerning cause and effect with death sentence rates, therefore, is tricky both because the death penalty decision-making process is a very complex one (in that so many actors and factors are at work) and because

penalty to be applied in an arbitrary and capricious fashion and calling the argument “nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use”).

22. See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 399–401 (1990) (concluding that “[p]rosecutorial discretion continues to dominate the system and . . . only a small portion of the death-eligible cases actually result in a death sentence” and that “defendants with white victims face average odds of receiving a death sentence that are 4.3 times larger than those faced by similarly situated defendants with black victims”).

23. Several recent high-profile cases provide a sense of the reasons why a prosecutor might accept a guilty plea in return for not pursuing a death sentence. In the case of Eric Rudolph, who had committed the 1996 bombing at the Atlanta Olympic games as well as attacks on abortion clinics and a gay nightclub, prosecutors stated that they accepted a plea rather than pursuing the death penalty because of a fear that Rudolph might become a “martyr,” as well as the fact that Rudolph had agreed to reveal where he had hidden 250 pounds of dynamite. See Tom Regan, *Eric Rudolph—“American Terrorist,”* CHRISTIAN SCI. MONITOR, Apr. 15, 2005, <http://www.csmonitor.com/2005/0415/dailyUpdate.html>. In the notorious “Green River” and “Killer Nurse” cases, the prosecutors in each case cited the need to obtain information about the serial killer's many victims in justifying the negotiation of life sentences. See Jeffrey Gentleman, *Nurse Who Killed 29 Is Sentenced to 11 Life Terms*, N.Y. TIMES, Mar. 3, 2006, at B2 (reporting that prosecutors agreed to life sentences in return for Cullen's revealing which patients he had killed with hard-to-detect drug injections); Gene Johnson, *Green River Killer Given Life in Prison*, WASH. POST, Dec. 19, 2003, at A4 (reporting that prosecutors agreed to let Gary Ridgway, the “Green River” killer, avoid the death penalty in return for helping to locate and identify the remains of his forty-eight victims).

imposing a capital sentence is a case-specific decision that is highly dependent on the facts of each case. Moreover, given the relatively small number of death sentences, a factor that may influence only a handful of cases can have a significant proportional impact on the number of death sentences that result. For instance, assuming a steady pool of capital eligible cases from 2005 to 2006, if in 2006 five more local prosecutors decide not to pursue death sentences because of budgetary concerns, three additional juries vote for life because of heightened concerns over wrongful convictions, and five more cases result in life sentences because the defense attorneys are better trained at presenting the defendant's case for life, the number of death sentences from 2005 to 2006 would drop a full ten percent (from 125 to 112 death sentences).²⁴ In other words, the current number of death sentences being imposed is at such a low level that a factor which tips only a small number of cases nationwide from death to life can be viewed as a significant factor in explaining a decline in the death sentencing rate. At the same time, because the numbers are so small, trying to empirically identify such factors (especially when any one death penalty decision is the result of a complex interaction of factors) is extremely challenging. The following analysis surveys a number of factors that might be at work based on recent discoveries about capital jury behavior²⁵ and other developments in capital punishment. What emerges is an analysis suggesting that the decline in death sentences cannot be attributed to any single factor, but is likely the result of the convergence of a number of influences.

A. The Jury at the Threshold of Decision-Making: Understanding Each Jury as Its Own Microsystem

When looking at case outcomes in the aggregate, the tendency is to think of the final verdict as the product of a monolithic entity, the jury. This monolithic perspective, in turn, encourages thinking on the macro level and looking for blockbuster circumstances that explain why twelve jurors at a time will decide whether a life or a death sentence is the proper verdict. Focusing on these blockbuster factors is misguided, however, because most capital juries reach their verdicts only after considerable deliberation in which individual jurors must be persuaded to join the majority until

24. See Death Penalty Info. Ctr., *Death Sentences in the United States from 1977 to 2005*, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=847> (reporting 125 death sentences in 2005).

25. Unless otherwise indicated, any jury data in this Article is from the California segment of the Capital Jury Project, for which the author served as the Principal Investigator. The data for this Article was gathered by interviewing jurors from thirty-seven cases in which the death penalty was sought. Nineteen of the cases resulted in an imposition of a death sentence, seventeen led to a sentence of life without parole (LWOP), and one ended in a hung jury over the penalty. Each juror participated in an interview that on average lasted three to four hours, answering questions designed to elicit both quantitative and qualitative data regarding how his or her jury deliberated and what factors influenced his or her decision.

unanimity is reached.²⁶ It is important, therefore, to think on the micro level and recognize that an issue or factor that might influence only a handful of individual jurors can affect how a capital jury deliberates as a whole and reaches the final verdict.

This need to think about the jury as a collection of individuals becomes especially crucial once attention is focused on what factors might be leading juries to return more life sentences. The heightened importance arises because of a critical finding by Professors Eisenberg, Garvey, and Wells about capital jury behavior: it takes significantly fewer votes on the first ballot to secure a life sentence than a death sentence.²⁷ If the defense is able to secure five votes for “life” or “undecided” on the first ballot, the result is almost invariably a life sentence;²⁸ indeed, in some instances, as few as four votes for “life” or “undecided” can still result in a life sentence.²⁹ By contrast, unless at least eight jurors vote for death on the first ballot, there is hardly any possibility that the jury will return a death sentence,³⁰ and a death sentence is assured only if at least nine jurors vote for death on the first ballot.³¹ These findings are good news for defense attorneys because it means that to obtain a life sentence they need to gain only five votes for life at the outset of the jury’s deliberations and will have a chance at a life sentence even if as few as four jurors are for life on the first ballot.³²

These findings, however, are not simply encouraging news for capital defense attorneys. They also emphasize the necessity of “thinking small” when looking for factors that might be leading juries to return life sentences when in the past they would have returned a death sentence. Because only five votes are needed for a life sentence (and sometimes as few as four), such a factor need not be of such a magnitude that it will change the minds of

26. In the South Carolina segment of the Capital Jury Project, only nine of fifty-three juries (17%) were unanimous on the first vote. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 303 (2001). The rate of unanimity was even lower among the California juries that were studied, with only three of thirty-seven cases (8%) reporting unanimity on the first ballot. See *supra* note 25.

27. See Eisenberg et al., *supra* note 26, at 304 (“Death verdicts are therefore relatively more difficult to orchestrate [than life verdicts].”).

28. See *id.* at 303 tbl.7 (reporting that in the twenty-one South Carolina cases in which fewer than two-thirds of jurors voted for death on the first ballot, none resulted in a death sentence).

29. See *id.* Of the eleven South Carolina cases the authors studied that had eight votes for death on the first ballot, seven came back death and four came back life. *Id.* A key factor in this band of cases appeared to be whether those jurors not voting for death were voting “life” or “undecided.” *Id.* at 304 n.91.

30. *Id.* at 303 tbl.7.

31. *Id.*

32. For instance, in the trial of Lee Boyd Malvo—one of the snipers who terrorized Washington, D.C. and the surrounding area in the fall of 2002—jurors described how a “core group” of four individuals who favored life were eventually able to bring the entire jury to a life sentence even though some of the other jurors had strongly favored a death sentence. Tom Jackman, *Death Penalty Deliberations Tore Malvo Jury Apart*, WASH. POST, June 19, 2004, at B5.

twelve jurors, or eight jurors, or even half the jury, to have a potentially significant effect. In fact, given that juries that voted for death were rarely unanimous on the first ballot and often had two or three votes for life, a factor need not even affect four or five jurors to have an impact. If a factor merely increases the chances that an additional one or two jurors on any one jury are likely to vote for life or “undecided,” the factor can have a significant impact on the aggregate of cases.

The search, therefore, is not for new earth-shattering factors that are turning large percentages of capital jurors toward a life sentence, but for what might be called “tipping factors”—factors that are now tipping one or two members of a jury toward voting for “life” (or at least “undecided”) who before might have been inclined to vote for death on the first ballot.³³ These “tipped” jurors, if coupled with two or three jurors who already would have been voting for life, can shift an entire jury that in previous years would have gone death.³⁴ A number of possible factors might play this tipping role and provide insight into the reasons why juries may be more reluctant to return death sentences than in the past.

1. *Rising Residual Doubt?*—One of the explanations most frequently forwarded to explain the drop in death sentences is the increased public awareness of the number of inmates on death rows who have been exonerated by DNA evidence.³⁵ Governor Ryan’s high-profile emptying of Illinois’s death row, increasing legislative support for moratoria, and the growing number of commutations based on concerns over innocence have added governmental legitimacy to the concern that there is a significant risk that innocent persons are being executed. Opinion polls indicate that the lesson has not been lost on the public. In a 2005 Gallup poll, almost six out of ten Americans stated that they believed an innocent person had been executed within the previous five years.³⁶

33. See Eisenberg et al., *supra* note 26, at 303–04 (identifying the eighth vote for death on the first ballot as “the tipping point” for whether a jury will end up with a death sentence); cf. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 7–8 (2002) (discussing how certain self-replicating behavior can quickly cause dramatic change in society).

34. Cf. John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1220–21 (2001) (observing based on the South Carolina study that “[t]he final outcome swings precipitously on a difference of only two votes” given that nine votes for death essentially guarantees a death sentence, but if only seven votes are cast for death, a life sentence almost always follows).

35. See, e.g., Mike Chalmers, *Jurors Less Likely to Vote for Execution: Exonerations Based on DNA Evidence Turned Tide Since 1990s*, NEWS J. (Wilmington, Del.), Jan. 12, 2006, at 1A (reporting the opinion of certain observers who trace a decline in support for the death penalty to the exoneration of high profile death row inmates).

36. Jeffrey M. Jones, *Americans’ Views of Death Penalty More Positive This Year*, THE GALLUP POLL TUESDAY BRIEFING, May 2005, at 104, 105 [hereinafter Jones, *Americans’ Views*]. In a 2003 Gallup poll the figure was even higher, with close to three-quarters (73%) of respondents

The public's recognition of the problem of wrongful convictions no doubt helps to explain the growing support for a moratorium on the death penalty.³⁷ The question of how this generalized concern translates in the jury room, however, is a more difficult one. It may very well be, as anecdotal evidence suggests, that the concern over wrongful convictions, when coupled with what is popularly dubbed the "CSI effect,"³⁸ will make juries less inclined to convict defendants for a crime without forensic evidence. More acquittals at the guilt phase of death-eligible crimes would, of course, affect the number of death sentences, assuming that these are the types of cases in which prosecutors would have sought the death penalty and juries would have returned a death verdict.

Once beyond the guilt phase, though, the effect of the wrongful conviction phenomenon becomes even more subtle and speculative. Capital Jury Project research has found that while jurors are aware of the general problem of wrongful convictions and hypothetically offer "residual doubt" as one of the most powerful reasons why they would vote for a life sentence, very few jurors actually believe that the risk of wrongful conviction existed in their own case³⁹ (a phenomenon perhaps analogous to polls that show respondents do not trust politicians generally but think that their own representative is the exception to the rule). As the number of exonerations continues to rise over time, it may be that more jurors will come to worry that their jury made a mistake in convicting the defendant, and residual doubt will lead them to affirmatively advocate a life sentence.⁴⁰ At present, however, once jurors have convicted a defendant of capital murder they do not appear inclined to either individually or collectively revisit their decision at the sentencing phase; in fact, capital jurors sometimes react with indignation when asked if they had any "residual doubts" at the sentencing

believing that an innocent person had been executed in the previous five years. Jeffrey M. Jones, *Support for the Death Penalty Remains High at 74%*, THE GALLUP POLL TUESDAY BRIEFING, May 2003, at 28, 29.

37. See *infra* notes 148–53 and accompanying text.

38. See, e.g., Richard Willing, "CSI Effect" Has Juries Wanting More Evidence, USA TODAY, Aug. 5, 2004, at 1A (reporting how lawyers believe that juries increasingly want forensic evidence before convicting). But see Kimberlianne Podlas, "The CSI Effect": Exposing the Media Myth, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2006) (reporting a study of jury-eligible adults that showed no significant difference between those who watched CSI and those who did not); Simon Cole & Rachel Dioso, *Law and the Lab: Do TV Shows Really Affect How Juries Vote? Let's Look at the Evidence*, WALL ST. J., May 13, 2005, at W13 ("[T]o argue that 'C.S.I.' and similar shows are actually raising the number of acquittals is a staggering claim, and the remarkable thing is that, speaking forensically, there is not a shred of evidence to back it up. There is a robust field of research on jury decision-making but no study finding any 'C.S.I. effect.'").

39. See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1577–78 (1998) (reporting that few jurors have residual doubt in the sentencing stage).

40. Ongoing studies by the Capital Jury Project, investigating the way capital juries operate, should help in identifying any such development.

stage, insisting that they never would have convicted the defendant in the first place if they had harbored such doubts.⁴¹

While a rise in residual doubt among jurors does not appear to play the blockbuster role that is often attributed to it in explaining the wholesale decline in death sentences, the possible effects of the wrongful conviction phenomenon in the jury room should not be totally discounted. Keeping in mind that a factor can trigger more life sentences even if it affects only one or two jurors, it is possible that accounts of wrongful convictions are causing a few jurors who before might have voted for death on the first ballot to act more cautiously and instead initially vote for "life" or "undecided." Jurors sometimes report, for example, that they voted "undecided" or "life" on the first ballot because of a general unease about deciding the defendant's fate; the wrongful conviction problem might be increasing the number of such jurors who are hesitant to vote for death on the first ballot. If this is happening, it is possible that even a slight upward trend in the number of such "caution votes" on the first ballot, when combined with the votes of several other jurors already favoring life, might be putting more juries across the first-ballot threshold necessary to trigger a life sentence. In this way, a growing awareness of the problem of wrongful convictions could be causing some juries to return life sentences that in the past would have voted for death.⁴²

The wrongful conviction phenomenon, therefore, may be influencing the death sentencing rate, albeit in a more subtle fashion than often is supposed. It also should be noted, however, that the wrongful conviction problem—if misunderstood by defense lawyers—could actually increase the odds of a death sentence in certain types of cases. The Capital Jury Project has found that a guilt-phase defense that tries to argue complete innocence in the face of strong evidence of guilt actually increases the chances that the jury will return a death sentence.⁴³ Consequently, if lawyers begin banking

41. Sundby, *supra* note 39, at 1557, 1577–85. Only 5% of jurors stated that they had even entertained the "thought" that the defendant might be completely innocent. *Id.* at 1578 n.48. By contrast, jurors were far more likely to express lingering doubts about specific aspects of the crime such as the defendant's intent or level of participation. *Id.* at 1584–85 & n.65.

42. It is also quite possible that where the jury is divided over the proper sentence, the life jurors can effectively use even the remote possibility of an erroneous conviction as a wedge argument to persuade death holdouts to settle for a sentence of life without parole. In most cases, though, such an argument is likely only to hasten the crossover of those jurors favoring death who are beginning to realize that insufficient jury support exists to obtain a death sentence anyway. In other words, the jury's discussion of the possibility of a wrongful conviction may serve more as a vehicle for jurors favoring life to provide a rationale for death holdouts to join the majority, rather than as an independent reason that sways a jury that otherwise would vote for death.

43. Sundby, *supra* note 39, at 1574–83; *see also* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1614–16 (1998) (noting that defendants who deny any culpability or role in the crime have more trouble convincing the jury of their remorse at the sentencing phase); *cf.* Florida v. Nixon, 543 U.S. 175, 178–79 (2004)

on jurors' concerns over a wrongful conviction as a reason to try and create "residual doubt" where evidence of guilt is strong, the wrongful conviction phenomenon could cause some cases to go death that if presented differently to the jury might have resulted in a life sentence.

2. *More Representative Juries.*—The importance of thinking about capital juries in terms of individual jurors is dramatically highlighted when attention is turned to the role of the jury's racial composition. A recent study by Professor Bowers and his colleagues made the eye-opening discovery that in cases involving an African American defendant accused of killing a white victim, the seating of a single African American male dramatically reduced the likelihood that the jury would return a death sentence; juries with one African American male juror returned death sentences in 42.9% of such cases—a far lower rate than the 71.9% of the cases where no African American males were on the jury.⁴⁴

The Bowers study found that the difference in the death sentence rate reflects the fact that male African American jurors (and to a lesser extent female African American jurors) were more likely than whites to perceive the evidence in a manner supportive of those factors that lead jurors to vote for life sentences: they were more likely to see the defendant as remorseful, to believe that the defendant's background had adversely influenced his life, to have lingering doubts about the defendant's role in the crime, and to believe that the defendant did not pose a future danger if given a life sentence.⁴⁵ These differences in perception existed in all cases, but were particularly noticeable when an African American defendant was accused of killing a white victim,⁴⁶ the category of cases that research has consistently identified as raising the gravest concerns about racial discrimination in the death penalty.⁴⁷

The Bowers study's findings suggest, therefore, that one key explanation for the decline in death sentences may be greater diversity of racial representation on capital juries. This hypothesis may at first seem to ignore reality given the well-documented problems with obtaining petit juries

(finding that a lawyer's strategy of conceding guilt to increase the chances of avoiding a death sentence did not necessarily violate the defendant's right to effective assistance of counsel).

44. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193–94 (2001). Also important was the independent effect of the number of white males on the jury. Cases involving a black-on-white killing that had four or fewer white males on the jury returned a death sentence in 30% of the cases, but if the jury included five or more white males the chances of a death sentence increased "dramatically," with 70.7% of such cases resulting in death sentences. *Id.* at 193.

45. *Id.* at 215–26.

46. *Id.* at 241–44.

47. *Id.* at 259–66; see BALDUS ET AL., *supra* note 22, at 159 (noting that the presence of a racially antagonistic motive in cases with a white victim and an African American defendant increased the likelihood of a death sentence).

that are racially representative. *Batson v. Kentucky*,⁴⁸ for instance, has widely been criticized as a failed remedy for eliminating discriminatory peremptory strikes,⁴⁹ and studies have found that jury pools continue to under-represent minorities.⁵⁰

In the very specific context of looking for factors that help explain the drop in the number of death sentences, however, even an imperfect cure for the problem of minority under-representation on juries can have a significant effect. If defense attorneys' use of *Batson* over the past decade has led to the inclusion of a single African American male on even a portion of juries that otherwise might have been all white, the Bowers study's finding suggests that some cases will have gone life that would otherwise have gone death.⁵¹ And while *Batson* may have fallen far short of completely ending the discriminatory use of peremptory challenges, it has very likely kept prosecutors in at least some capital cases from engaging in wholesale exclusion of African American jurors because of concerns over reversal.⁵² Likewise,

48. 476 U.S. 79 (1986) (allowing defendants to prove purposeful discrimination by the prosecution in peremptory challenges).

49. See *People v. Randall*, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (describing the “*Batson* process” as a “charade”). See generally Albert W. Alshuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989) (noting that the *Batson* decision has created procedural burdens on litigation and has led to other forms of discrimination in peremptory challenges); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (using a study of Philadelphia murder trials to reveal persistent racial and gender discrimination in peremptory challenges despite *Batson*).

50. See, e.g., PA. SUPREME COURT COMM'N, FINAL REPORT ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 52–92 (2003) (summarizing findings of various state task forces that all have found minority under-representation in jury pools).

51. The Bowers study found that it was the seating of one African American male juror that was the key in precipitating the drop in the death sentence rate, as the presence of additional African American males on the jury only marginally brought the death sentence rate down further. Bowers et al., *supra* note 44, at 193–95. Juries with two or more African American males returned death sentences in 37.5% of the cases compared to the 42.9% with a single African American juror. *Id.*

52. An extensive study conducted by the Dallas Morning News in 2005, for example, found that more African American jurors were serving on Dallas juries: “The all-white jury . . . is a fading sight *The News*’ study showed that blacks served on Dallas juries in proportion to their population—because prosecutors did not eliminate all blacks and defense attorneys excluded white jurors at three times the rate they rejected blacks.” Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don’t Discriminate, but Analysis Shows They Are More Likely to Reject Black Jurors*, DALLAS MORNING NEWS, Aug. 21, 2005, at A1. The increased representation of blacks on juries was despite the fact that racially based strikes are still common in jury selection. *Id.* (finding, *inter alia*, that “[p]rosecutors excluded eligible blacks from juries at more than twice the rate they rejected eligible whites”). While it is deplorable that racial discrimination is still occurring through peremptory strikes, the very fact that more African American jurors are now serving on juries means—according to the Bowers study—that more jurors favoring life are likely to be serving in capital cases. If *Batson* is having a deterrent effect on the exercise of some race-based peremptory challenges, that effect is likely to have been enhanced by the Supreme Court’s impatient tone in *Miller-El v. Dretke*, in which it reversed the state court’s finding of race-neutral reasons for peremptory strikes as wrong by “clear and convincing” evidence. 125 S. Ct. 2317, 2340 (2005).

while venire pools may still not adequately reflect the minority population, greater attention to the issue makes it probable that an increasing number of capital juries include minority jurors compared to the past.

Nor is the inclusion of more minority jurors on capital juries the only way in which jury composition has made it more likely that cases that previously would have gone death are now going life. Some observers believe that the pool of death-qualified jurors from which the petit jury is chosen now includes an increasing number of potential jurors who, although they could impose the death penalty, are more troubled by capital punishment and thus more open to the defense's argument for life without parole.⁵³ If this observation is correct and the pool has changed to include more jurors who are inclined to apply the death penalty narrowly, this obviously would increase the likelihood that the petit jury will include jurors who will help the defense obtain the threshold votes for life, especially if defense attorneys are capable of identifying such jurors at voir dire.

Improved training of capital defense counsel will be addressed shortly, but a key part of the effort to improve capital representation has been to develop a better understanding of the profile of jurors who are most likely to vote life or death.⁵⁴ This enhanced understanding, when coupled with the improved use of tools like juror questionnaires, increases the odds not only that defense counsel will identify potential jurors favorable to their case, but also potential jurors who are most likely to vote for death no matter how strong the defendant's case for life.⁵⁵ The exclusion of such strongly pro-death-penalty jurors—through either peremptory challenges or challenges for cause⁵⁶—is especially critical to the defense, because jurors who tend to believe that the death penalty is the only proper sentence for an intentional killing also tend to be particularly strong and vocal advocates for death

53. See Phillip Reese, *Fewer Are Sent to Death*, SACRAMENTO BEE, Feb. 18, 2006, at A1 (“Jury attitudes have helped drive [the] number [of death sentences] down When we (pick juries), it’s very clear that the number of people who have problems with the death penalty has increased pretty significantly than what we saw in the 1980s and early 1990s.”) (quoting George Williamson, co-chair of the Capital Case Litigation Committee of the California District Attorneys Association).

54. For an excellent summary and review of voir dire techniques for capital defense counsel, see generally Blume et al., *supra* note 34.

55. See generally SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 125–30 (2005) (describing the attitudes of jurors who believe that a death sentence is the only proper sentence for an intentional killing).

56. Jurors who can be identified as individuals “who will automatically vote for death in every case” are not allowed to serve because they cannot be impartial and consider mitigating evidence. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The Capital Jury Project’s findings indicate, however, that at least some capital jurors who ascribe to this view are serving and that voir dire is ineffective at fully screening out such jurors. See Blume et al., *supra* note 34, at 1220–24, 1237–39 (citing data from South Carolina and Kentucky showing that some jurors who have actually served on capital cases hold the view that the death penalty is the only acceptable punishment upon a murder conviction).

within the jury room.⁵⁷ The removal of such a strongly pro-death juror can profoundly affect the jury's dynamic even if the replacement juror is someone who is inclined to impose a death sentence for murder but is at least open to the idea that mitigating circumstances may justify a life sentence. And, of course, if a strongly pro-death-penalty juror is replaced by a juror whose worldview makes him or her inclined toward a life sentence, the defense will have significantly increased the chances that the jury will have the threshold of jurors on the first ballot necessary to obtain a life sentence.⁵⁸

3. *The Role of Life Without Parole.*—Another commonly cited factor for the drop in death sentences is the increased availability of life without parole and the fact that jurors in states that utilize life without parole must now expressly be told that “life” means “life without parole.”⁵⁹ North Carolina, for example, has seen a drastic drop in death sentences since it adopted life without parole in 2001, a decline that some have attributed to the availability of life without parole as an option.⁶⁰ This factor is certain to gain even more attention as Texas—which since 1998 has imposed more death sentences each year than any other state⁶¹—institutes a life without parole option.⁶²

The increased availability of life without parole as a sentencing option undoubtedly has contributed to a decline in death sentences both at the pretrial and trial stages. At the pretrial stage, prosecutors will be more willing to accept a guilty plea and forego death if they can assure the public and the victim's survivors that the defendant will remain in prison for the rest of his life.⁶³ And at the trial stage, life without parole offers the defense a means of assuring jurors that the defendant will not pose a future danger⁶⁴

57. SUNDBY, *supra* note 55, at 128–30 (describing how jurors who strongly favor the imposition of the death penalty influence deliberations).

58. *Id.* at 72–74 (describing “Hope jurors” attitudes); see also Theodore Eisenberg & Stephen Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165, 187–93 (2004) (identifying the characteristics of jurors inclined to show mercy and vote for a life sentence).

59. *Simmons v. South Carolina*, 512 U.S. 154, 161–62 (1994) (holding that the state court's failure to inform the jury that the defendant would be ineligible for parole if not sentenced to death constituted a denial of due process).

60. Editorial, *New Parole Directive Overlooks Death Row*, GREENSBORO NEWS & REC. (Greensboro, N.C.), Nov. 7, 2005, at A12. See generally Peter Finn, *Given Choice, Virginia Juries Vote for Life*, WASH. POST, Feb. 3, 1997, at A1 (quoting experts who attribute a decline in death sentences to the increased availability of life without parole); Tharp, *supra* note 16 (same).

61. See Death Penalty Info. Ctr., *supra* note 24.

62. Life Without Parole Act, 79th Leg., R.S., ch. 787, §§ 1–11, 2005 Tex. Gen. Laws 2705.

63. For further discussion of the role of the prosecutor in explaining the decline in the number of death sentences, see *infra* notes 82–96 and accompanying text.

64. The future dangerousness of the defendant is a primary concern for all capital juries. Even in California, which only offers a choice of “life without parole” or death, 52% of jurors cited the concern that the defendant would kill again as a “great” concern and an additional 20% stated it was a “fairly” important concern. Scott E. Sundby, *The Jury as Critic: An Empirical Look at How*

and that the defendant will suffer a severe punishment as just deserts for his crime.

A caveat should be noted, though, when trying to determine just how much of the decline in death sentences is attributable to the life without parole option. Even in states that had life without parole from the beginning, such as California and Pennsylvania, the death rates have shown a steady decline over roughly the same time period. The number of death sentences in California, for instance, began a distinct decline after reaching a high of forty-three in 1999, falling to only eleven in 2004.⁶⁵ Pennsylvania has seen a similar drop from fifteen death sentences in 1999 to five in 2004.⁶⁶

That the overall national drop in death sentences cannot be fully explained by the fact that more states have moved to life without parole is not to discount the effect of the increased availability of the life without parole option. Indeed, one possibility is that the effect of life without parole on death sentences has in fact been similar for both the “new” and “old” life without parole states. One difficulty defendants faced in “old” life without parole states was a great skepticism among jurors that “life” really meant “life.”⁶⁷ If that skepticism has been tempered in recent years, it may be that at least part of what is reflected in the declining death sentence rates in the “old” states is an increased receptivity to the idea that “life” really means “life.”⁶⁸ If this should turn out to be the case—that jurors in the “old” states

Capital Juries Perceive Expert and Lay Testimony, 83 VA. L. REV. 1109, 1166 & n.119 (1997); see also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 4–9 (1993) (finding that other than the facts of the crime, future dangerousness was the most discussed topic among South Carolina capital jurors).

65. Bonczar & Snell, *Capital Punishment, 2004*, *supra* note 1, at 5 tbl.4 (reporting that California received eleven new prisoners under sentence of death in 2004); Tracy L. Snell, *Capital Punishment 1999*, BUREAU JUST. STAT. BULL., Dec. 2000, at 8 tbl.5 [hereinafter Snell, *Capital Punishment 1999*], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp99.pdf> (reporting that California received forty-three new prisoners under sentence of death in 1999).

66. Bonczar & Snell, *Capital Punishment, 2004*, *supra* note 1, at 5 tbl.4 (reporting that Pennsylvania received five new prisoners under sentence of death in 2004); Snell, *Capital Punishment 1999*, *supra* note 65, at 8 tbl.5 (reporting that Pennsylvania received fifteen new prisoners under sentence of death in 1999).

67. William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEXAS L. REV. 605, 670–71 (1998) (detailing how jurors in every studied state consistently underestimated the meaning of a life sentence).

68. Although the most critical measure is whether attitudes have changed among capital jurors, public opinion polls in California (one of the “old” states) indicate some increase in acceptance of the idea that “life without parole” means the defendant will not be released; a majority, however, still believes that “life without parole” does not provide such a guarantee. MARK DICAMILLO & MERVIN FIELD, FIELD POLL, WHILE STILL STRONGLY SUPPORTING DEATH PENALTY, CALIFORNIANS HAVE MIXED VIEWS ON SOME ASPECTS OF CAPITAL PUNISHMENT: MAJORITY OPPOSES DELAY IN THE MORALES EXECUTION 4–5 (2006), available at <http://field.com/fieldpollonline/subscribers/RLS2183.pdf> (finding that 35% of 2006 respondents believed “life without parole” guaranteed against release, compared to 25% in 1992; 54% of 2006 respondents believed that it does not provide a guarantee, compared to 64% in 1992; 11% in both the 2006 and 1992 polls were undecided).

have come to a new acceptance of the meaning of life without parole—then the de facto effect would be the same as the adoption of a “new” statute instituting life without parole as the “true” alternative to death. On the other hand, if juror skepticism exists in the “new” states as well as the “old” states, that would suggest that the effect of the expanded availability of the life without parole option has not been as great as is often assumed. In short, as with many of the factors being examined, the increased availability of life without parole as a sentencing factor appears to offer only a partial explanation for the decline in death sentences.

B. The Professionalization of the Capital Defense Bar

The years following *Gregg* saw a number of cases in which the defense lawyer's representation was so abysmal as to be almost beyond belief.⁶⁹ But cases with sleeping lawyers, drunk lawyers, “high” lawyers, and lawyers who failed to do any investigation are merely the most spectacular examples of the criminal justice system's systematic failure to ensure adequate representation. A startling number of capital defense lawyers have eventually been disbarred or disciplined after their representation; in North Carolina, for example, more than one in six death row inmates had an attorney who was eventually disciplined or disbarred.⁷⁰ These are staggering numbers for a category of cases where the demands of lawyering are the legal equivalent of neurosurgery.

This distressing state of representation was aided and abetted by the judiciary at both the trial and the appellate levels.⁷¹ Many trial judges appeared to not comprehend that capital representation required an expertise not possessed by all lawyers, even lawyers with considerable criminal defense experience.⁷² As a result, attorneys were appointed in capital cases who lacked a basic understanding of the necessity of crafting a “case for life,” let alone the knowledge of how to effectively construct such a case through exhaustive investigation of the defendant's past.⁷³ These failings at

69. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (summarizing capital cases with abysmal lawyering).

70. N.C. COAL. FOR A MORATORIUM, POOR LAWYERING AND THE DEATH PENALTY 1, http://www.ncmoratorium.org/documents/issue_poorlawyer.pdf.

71. See generally William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995) (arguing that the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), has undermined the right to counsel).

72. See *id.* at 156–60 (detailing several cases where the defendant's appointed counsel failed to provide effective assistance).

73. See *id.* at 157–60 (arguing that a mitigation investigation that “at least extends to collecting every available document on which the client's name appears” should be required to render reasonably effective assistance and detailing several cases where defendant's counsel failed to present readily available mitigation evidence).

the trial level were exacerbated by an appellate standard for assessing ineffective assistance of counsel that largely turned a blind eye to the unique demands and skills required in all capital cases.⁷⁴

This indictment of the state of capital representation in the aftermath of *Gregg* is not to overlook that there were superb lawyers at the time who were developing the art of defending death penalty cases and who were litigating the miscarriages of justice that were occurring. The process took time, however, and by necessity much of the emerging capital defense bar's initial energy after *Gregg* was devoted to trying to undo the damage of trials that had already taken place.⁷⁵ Ultimately, though, pushed by organizations like the American Bar Association and reacting to commission reports finding that incompetent representation was a key cause of the plague of wrongful convictions, legislatures and courts began to acknowledge that at least minimal standards needed to be implemented.⁷⁶ Indeed, the concern over competent capital representation is now sufficiently high profile that President Bush pledged in his 2005 State of the Union "to fund special training for defense counsel in capital cases, because people on trial for their lives must have competent lawyers by their side."⁷⁷

Even the Supreme Court, which for decades had been exceedingly deferential to capital defense attorneys' "strategic decisions" to forego even rudimentary investigations, has recently begun to react. Although the Sixth Amendment standard for competent representation in capital cases remains far below what research has shown is required to mount a successful "case for life," the Court finally appears to be patrolling at least the outermost parameters of ineffective representation.⁷⁸

74. See *id.* at 155–60 (describing various appellate decisions where deficient performance claims were denied).

75. That these post-conviction challenges were uncovering a high rate of error is evidenced by the high reversal rates for death sentences from this time period. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEXAS L. REV. 1839, 1850 (2000) (finding that 68% of all death sentences that were reviewed between 1973 and 1995 were overturned because of serious error).

76. See, e.g., Jonathan Alter & Mark Miller, *A Life or Death Gamble*, NEWSWEEK, May 29, 2000, at 22 (reporting that the death penalty is "on the defensive" after the recent increase in evidence pointing to wrongful convictions and implying that many wrongful convictions are due to "the problem of poor legal counsel"); Catherine Cowan, *States Revisit the Death Penalty*, ST. GOV'T NEWS, May 1, 2001, at 12 (noting that the "most pervasive reason for wrongful death-row convictions is incompetent defense" and describing how the increased exoneration of death row inmates due to DNA evidence has prompted states to consider changes in state procedures and laws); Wendy N. Davis, *Inching Away from Death?*, A.B.A. J., Sept. 2005, at 14 (arguing that recent decisions from the Supreme Court indicate a wariness of the lawyering in capital cases and noting that the Court relied on ABA guidelines in its most recent ineffective assistance case, *Rompilla v. Beard*, 125 S. Ct. 2456 (2005)).

77. President George W. Bush, State of the Union Address (Feb. 2, 2005), in WASH. POST, Feb. 3, 2005, at A15.

78. See, e.g., *Rompilla v. Beard*, 125 S. Ct. 2456, 2468 (2005) (finding a defense attorney's failure to look at the file regarding the defendant's prior convictions to be ineffective assistance of counsel); *Wiggins v. Smith*, 539 U.S. 510, 535–38 (2003) (holding that defense counsel's

The result of these decades' worth of developments is a discernable improvement in the quality of representation.⁷⁹ The need for a lawyer to be specially trained in capital defense is now widely recognized and has fostered the emergence of a professional capital defense bar. Some states that have had particularly troubling histories with incompetent capital representation, such as Georgia, North Carolina, and Virginia, have created statewide systems specifically devoted to capital representation.⁸⁰ While much remains to be done for the criminal justice system to fully address the problem of providing quality capital representation in all cases,⁸¹ even modest improvements in capital representation will have contributed to the decline in death sentences in two significant ways.

inadequate investigation into the defendant's background prejudiced the defendant); Terry Williams v. Taylor, 529 U.S. 362, 388–89 (2000) (finding ineffective assistance where a defense attorney failed to investigate mitigating evidence during the penalty phase of the trial).

79. In explaining the decline in Georgia's death sentences, Stephen Bright, Director of the Southern Center for Human Rights, who has been involved in capital litigation since 1982, offered the observation that

[t]he quality of defense lawyering is much better . . . Georgia went away from a system where local judges appointed local lawyers, and many of those lawyers were unqualified. Instead of just any local yokel who happens to have a bar card, it will now be somebody who has experience and is trained and knows how to investigate a case and put on mitigating evidence.

Mike Tolson, *Fewer Killers Getting Sentenced to Death: Sharp Drop Seen Across the Nation, Including in Texas*, HOUSTON CHRON., May 22, 2005, at A1.

80. See GA. CODE ANN. § 17-12-121 (2004) (creating the Office of the Georgia Capital Defender to represent indigent persons charged with a capital felony for which the death penalty is being sought); N.C. GEN. STAT. § 7A-498.2 (2005) (establishing the Office of Indigent Defense Services in North Carolina); VA. CODE ANN. § 19.2-163.8(A) (2004) (mandating the Virginia Indigent Defense Commission to adopt standards for attorneys who represent capital defendants).

81. While the overall quality of capital defense has improved, the system continues to be confronted with disparities in the quality of representation that raise concerns over arbitrariness. Even among competent capital lawyers, some will be more skilled than others in the art of presenting a case for life to the jury. Although disparity in quality of representation is present in all areas of lawyering, its effect is particularly enhanced at a capital penalty phase where the argument is not simply over what happened as a historical fact (did the defendant kill the victim?) but over what morality requires as the penalty (does the defendant deserve to die?). This latter type of argument requires both Shakespearean talent and Blackstone-like mastery of the law. See Scott E. Sundby, *Moral Accuracy and "Wobble" in Capital Sentencing*, 80 IND. L.J. 56, 57–58 (2005).

Moreover, the Court's minimal standard for assessing what constitutes effective assistance of counsel provides no guarantee that a defendant who was represented by a "competent" lawyer under the Sixth Amendment would not have received a death sentence if represented by a more conscientious lawyer. Studies of capital juries show that the difference between a life and a death sentence will often depend on the defense providing a compelling story for life. SUNDBY, *supra* note 55, at 137. Because a routine investigation of a defendant's background will satisfy the Court's definition of "effective assistance of counsel," a lawyer who fails to conduct the arduous process actually required to effectively construct a case for life can still meet the constitutional standard for effective assistance. *Id.* The lawyer, therefore, will have been just competent enough to get his client executed: doing sufficient investigation to make it over the Sixth Amendment bar but not enough to have ever given his client a realistic chance for a life verdict. *Id.* at 136–37.

The first is obvious: better lawyers can concretely change the outcome of cases through more sophisticated jury selection, more exhaustive investigation, and better presentation of cases for life. And keep in mind that for improved representation to have an impact, it is not necessary for the quality of representation to have taken such quantum leaps forward that defense attorneys suddenly are presenting cases that lead twelve jurors at a time to immediately embrace a life verdict. Because a life sentence in any one case may depend only on whether one or two additional jurors can be persuaded to vote "life" or "undecided" on the initial ballot, even small improvements in capital lawyers' skills at jury selection, investigation, and presentation can move cases from the "death" to the "life" category when measured over time in a large run of cases.

C. More Cautious Prosecutors

The second major impact of improved capital representation takes us outside the jury room and into the realm of the prosecutor. And if we are searching for actors besides the jury who can cause a significant case-by-case drop in the death penalty rate by their actions alone, prosecutors must be the primary focus. Indeed, given that the prosecutor controls the initial decision over whether to seek the death penalty and, later, whether to accept or reject a plea that avoids a death sentence, the prosecutor's actions are probably the most influential of any actor in affecting death sentencing rates.

As noted earlier, the prosecutor's decision whether to seek the death penalty in a case will be driven by a multitude of factors.⁸² But while a prosecutor's decision to some extent inevitably will be idiosyncratic, certain factors are likely to enter into almost all of the decisions, including how vigorous the prosecutor expects the defense to be.

A prosecutor will recognize, for instance, that well-trained capital defenders will request the appointment of a number of experts and resources to construct the type of case for life at the penalty phase required by the Sixth Amendment's duty of effective representation. It is difficult to conceive of a case, for example, where a mental health expert would not be utilized at least for evaluation.⁸³ Most cases will also require additional experts, such as individuals with an expertise specific to the defendant's circumstances (for example, an expert on child abuse or drug abuse), mitigation investigators to undertake the painstaking reconstruction of the defendant's life, a jury selection expert, and forensic experts with specialties in areas such as

82. See *supra* note 23 and accompanying text.

83. Some states provide mental health experts as a matter of statutory right in capital cases. See OHIO REV. CODE § 2929.03(D)(1) (1997) ("When death may be imposed as a penalty, the court . . . upon the request of the defendant, shall require a mental examination to be made."); VA. CODE ANN. § 19.2-264.3:1 (2004) (giving indigent capital defendants the right to the assistance of a court-appointed psychiatrist or clinical psychologist).

pathology, DNA testing, fingerprinting, and ballistics.⁸⁴ And while trial judges still may not provide every resource requested by the defense, courts appear to be increasingly receptive to an emerging model of capital representation that, for both fairness and constitutional reasons, includes a defense team of investigators and experts—a model to which the Supreme Court's recent ineffective assistance of counsel decisions give added impetus.⁸⁵

Not surprisingly, this basic model is expensive.⁸⁶ Nor are we talking about the costs of assembling a “dream team” or hiring the leading experts in a field. For capital defense, experts and investigators are “necessities, not luxuries,”⁸⁷ and in an area where the law is continually evolving, extensive pretrial preparation to properly develop legal challenges is a fundamental part of the job—especially in a world where procedural default has come to have draconian consequences for post-conviction relief. The professionalization of capital defense has therefore made the cost of a capital case a necessary part of a prosecutor's decision of whether to file a case as capital;⁸⁸ indeed, depending on the funding scheme used by the state, a major

84. In the “sniper trial” of Lee Boyd Malvo, for instance, the defense needed funds not only to have extensive mental health examinations but also for travel to interview witnesses from Malvo's childhood, most of whom were in the Caribbean, making the case “one of the most expensive defenses in recent memory.” Jeff Green, *Most Expensive Defense: Malvo's Defense Team Granted Advance to Transport More Than 60 Witnesses from Washington, Louisiana and Jamaica*, SPRINGFIELD CONNECTION (Springfield, Va.), Sept. 4, 2003, <http://www.connectionnewspapers.com/printarticle.asp?article=23230&archive=true>. The jury ultimately heard from 140 witnesses over the three-week trial and returned a life sentence. Jim McElhatton, *Malvo Sentenced to Life in Prison; Victims' Kin Sorry Sniper Avoids Death*, WASH. TIMES, Dec. 24, 2003, at A1.

85. See *supra* note 78 and accompanying text.

86. States with the death penalty have consistently found that the death penalty is more costly to administer than life imprisonment. *Costs of the Death Penalty and Related Issues: Hearing Before the Assembled Standing Comms. on Codes, Judiciary, and Correction*, 228th Sess. 6–10 (N.Y. 2005) (statement of Richard C. Dieter, Executive Director, Death Penalty Information Center). A state-sponsored study of Kansas's death penalty, for example, concluded that capital cases are 70% more expensive than noncapital cases; the trial costs alone were almost sixteen times greater for capital cases and the appellate process twenty-one times greater. *Id.* at 8 (citing BARBARA J. HINTON, LEGISLATIVE DIV. OF POST AUDIT, STATE OF KAN., PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 11–13 (2003), http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf). A study of capital cases in the state of Washington found that “death penalty cases at the trial level are far more expensive and lengthy than ordinary aggravated murder cases.” RICHARD P. GUY, STATUS REPORT ON THE DEATH PENALTY IN WASHINGTON STATE 7 (2000), <http://www.courts.wa.gov/newsinfo/content/deathpenalty/deathpenalty.pdf>. In King County, for example, aggravated murder cases that were pursued at trial as death penalty cases averaged \$433,262 compared to \$195,538 for aggravated murder cases without a death penalty component. *Id.* at 10.

87. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

88. See, e.g., Matthai Chakko Kuruvila, *DA Says He Won't Seek Death Penalty*, SAN JOSE MERCURY NEWS, Aug. 24, 2004, at B1 (reporting the decision by the district attorney's office to accept a plea bargain for a life sentence and not seek a death sentence on retrial in part because the

capital prosecution can push a county to the brink of bankruptcy.⁸⁹ And this is merely the cost at the trial stage; if a death sentence is returned, the jury's verdict is simply the first step in a long appeals process that will escalate the cost over time.

The impact of a professionalized capital defense bar on the prosecution's decision-making, however, goes far beyond increasing the state's monetary expenditures. To the extent that risk averseness is a factor affecting prosecutors,⁹⁰ a professionalized capital defense bar will heighten the importance of that factor in prosecutorial decision-making. A prosecutor who seeks death not only provides the defense with access to extensive resources at the penalty phase, but also ensures that the *guilt* phase will receive enhanced scrutiny and additional resources.⁹¹ Thus, a prosecutor's decision to seek the death penalty will in most cases make his or her task at the guilt phase more difficult if the case goes to trial.

A prosecutor faced with a professionally prepared capital defense, therefore, may find a plea to a sentence of life without parole attractive for a variety of reasons: it avoids the unique costs of a capital trial and appeal; it ensures an outcome that will satisfy the community's concerns over the defendant's dangerousness while avoiding the risk that a jury will acquit or convict on a lesser offense; it avoids a perceived "defeat" for the prosecutor if the jury fails to return a sentence of death; and it allows a prosecutor to communicate the desirability of such a plea to the victim's survivors in a persuasive way by pointing out that the defendant's attorneys are mounting a

first trial had cost almost \$500,000 and pursuing another capital trial would cost taxpayers millions more).

89. Funding for capital prosecutions varies from state to state. In states such as Washington where the funding is by the county, a capital case can cause a county significant financial hardship. By agreeing to accept life pleas in the "Green River Killer" case, for instance, King County was estimated to have saved \$6 million by not going to trial. Keith Ervin, *Ridgway's Plea Frees Up \$6 Million for County*, SEATTLE TIMES, Nov. 15, 2003, at B2 (reporting that allowing the Green River serial killer to plead to life in return for agreeing to cooperate with investigators "produced a minor financial windfall for the financially struggling . . . [c]ounty" by allowing it to avoid the cost of funding a capital trial). The potential for such prosecutions to "devastate" a county's budget led the state to pass legislation in 1999 allowing state reimbursement of smaller counties for some of the expenses of a capital prosecution. GUY, *supra* note 86, at 7-8.

90. Defense counsel in the Eric Rudolph bombing case, for example, showed great skill in understanding how to negotiate a life plea given the prosecution's concerns about "risking an acquittal or spending the millions of dollars it would take to bring the cases to trial." Jonathan Ringel, *Rudolph Defenders Read Feds' Signals to Make a Plea Deal*, FULTON COUNTY DAILY REP. (Atlanta, Ga.), Apr. 19, 2005, at 1. See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2473 (2004) (noting that prosecutors can "bargain away" their weak cases by making irresistible plea offers to defendants); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1535 (1981) (suggesting that prosecutors may offer the greatest incentives to plead to defendants with the best chance of acquittal).

91. This is not to suggest that noncapital cases should not receive the same level of attention and resources, but simply to describe the reality of the current situation. See Adam Liptak, *Serving Life, with No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at A1 (reporting that death cases receive far greater resources and review than life cases).

skilled defense that may carry a risk of acquittal—the most dreaded outcome from the survivors' viewpoint—and that a plea to life will also keep the process from dragging out for what, from the survivors' viewpoint, will seem an interminable time.

Consideration of how to use these incentives to obtain a noncapital disposition is now a standard part of capital defense strategy. Indeed, part of the capital defense bar's process of professionalization has been an increasing focus on how to get the possibility of a death sentence out of a case early.⁹² Courses and training sessions for capital defense attorneys now frequently address how to structure a case so that the issue of death never reaches the jury.⁹³

In addition to a greater receptivity to plea bargaining to a noncapital disposition, increased prosecutorial caution has manifested itself in other ways. In response to studies documenting the death penalty's problems with discrimination and fairness, at least some prosecutorial offices now have screening procedures in place that are designed to foster a more selective approach in deciding which cases are pursued as capital.⁹⁴ It may also be that as the rate of violent crime has dropped over the past decade and public concern over crime has moved down the list of "hot button" issues, local prosecutors are feeling less community pressure to pursue death sentences in as wide a range of murder cases. This may be especially true in large urban areas where the voting public's perception of a prosecutorial office is not as likely to be driven by specific murder cases, unlike in less populous areas where murder cases are rare and the public may judge a prosecutor on whether he or she seeks the death sentence on a case-by-case basis.⁹⁵

92. See generally Russell Stetler, *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases*, 31 HOFSTRA L. REV. 1157, 1157 (2003) (highlighting the need for defense attorneys to negotiate pleas and arguing that the number of death sentences since *Furman* would have been "greatly diminished" if defense counsel had been aggressively seeking pleas).

93. This aspect of litigation strategy takes on increasing importance as access to habeas corpus is tightened. The number of death sentences may be declining, but trying to overturn a death sentence is becoming more difficult. See Leigh B. Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, LAW & CONTEMP. PROBS., Autumn 1998, at 193, 193 (reporting that restrictions on federal habeas corpus have made it very difficult to constitutionally challenge state death sentences and indicating that the political climate surrounding judicial elections has made it more difficult for state judges to overturn death sentences).

94. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 406–19 (1999) (describing the review process within the Department of Justice for deciding whether a federal death penalty prosecution may proceed).

95. Cf. JOINT LEGISLATIVE AUDIT & REVIEW COMM'N, VA. ASSEMBLY, COMM'N DRAFT: REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 50 (2001), <http://jlarc.state.va.us/Meetings/December01/capital.pdf> (finding that prosecutors in high-density urban areas sought the death penalty 15% less often than those in areas with lower population density). But see SCATTERED JUSTICE: GEOGRAPHIC DISPARITIES OF THE DEATH PENALTY, AMERICAN CIVIL LIBERTIES UNION, (2004),

As with the other factors, it is difficult to gauge just how many cases are now tried as life cases or are pled out to life that in prior years would have resulted in a death sentence.⁹⁶ Indeed, prosecutorial discretion illustrates well how the interdependence between the various micro-factors makes gauging the effect of any one factor particularly difficult. Greater jury reluctance to return death sentences, for instance, undoubtedly has made prosecutors less inclined to pursue the death penalty in certain cases. Ironically though, this effect on prosecutors eventually could result in statistics showing that juries are returning death sentences in a higher percentage of cases than before and create the misleading impression that juries have suddenly become more willing to impose death sentences. In fact, however, such a higher percentage return of death sentences would merely reflect that prosecutors were now seeking death in only the most aggravated cases, a process that itself would have begun because juries had become increasingly reluctant to impose death sentences. In short, as with the other factors, we can state with some confidence that prosecutorial discretion has played a role in the decline in death sentences, but its role is a complex one that both influences and is influenced by the other factors at work.

D. The Impact of Categorical Exclusions of Death-Eligible Defendants

Finally, of course, the drop in death sentences can be partly attributed to the exclusion of certain categories of defendants. While the Supreme Court's 2005 holding in *Roper v. Simmons*⁹⁷ ruled that the juvenile death penalty was unconstitutional, it only formalized what already had happened in the courtroom.⁹⁸ By the time *Simmons* was decided, imposition of the juvenile death penalty had declined to the point that it was only being imposed in the rarest of instances (which, of course, was part of the Court's rationale in *Simmons*).⁹⁹ Indeed, the post-*Gregg* experience with the juvenile death penalty largely mirrors the overall trend with death sentences: use of the

<http://www.aclu.org/capital/unequal/10532pub20040305.html> (reviewing studies showing that in some states urban prosecutors seek the death penalty at a higher rate).

96. Some prosecutors maintain that the decline in death sentences is not because prosecutors are exercising greater selectivity, but because fewer cases are now arising that call for prosecution as death penalty cases. See Reese, *supra* note 53 (quoting prosecutors who maintain that the number of "outrageous" murders justifying a death sentence has declined and that tougher stances on recidivism, such as California's Three Strikes law, have removed many of the worst criminals before they could commit a capital crime). Other commentators, however, maintain that "there are always more potential capital punishment cases than there are capital punishment prosecutions." *Id.* (summarizing the views of Professor Franklin Zimring). It may be true that in some localities there are simply fewer capital cases, but given that felony-murder is an aggravating factor in most jurisdictions and that most states have a broadly applicable aggravator such as "heinous and cruel" or "wantonly vile," it is difficult to imagine that on a national scale a greater exercise of prosecutorial selectivity is not playing a role in winnowing down the number of cases where the death penalty is actually sought at trial.

97. 543 U.S. 551 (2005).

98. *Id.*

99. *Id.* at 564-65.

juvenile death penalty peaked in 1994—when seventeen death sentences were imposed on juvenile offenders¹⁰⁰—and then began a fairly steady decline. By the years 2003 and 2004 only two juvenile death sentences were imposed annually, constituting less than 2% of the total death sentences imposed for each of those years.¹⁰¹

Abolition of the juvenile death sentence was undeniably an important victory for opponents of the death penalty, particularly because it was first won at the non-constitutional level (thus demonstrating that limits on the death penalty, and perhaps eventually abolition, can be won without grand constitutional pronouncements). For our more immediate purpose of tracing causes for the decline in overall death sentences, however, the demise of the juvenile death penalty can provide only a sliver of an explanation. Even at its peak the juvenile death penalty constituted only roughly 5% of the annual number of death sentences being imposed.¹⁰² Thus, even though the juvenile death penalty itself declined almost 90% over the ten-year period between 1994 and 2004, the aggregate impact on the total number of death sentences was not that significant in terms of absolute numbers.

The other major exclusion of death-eligible defendants in the past decade was to place mentally retarded defendants beyond the reach of capital punishment. As with the juvenile death penalty, the proper marking point is not the Supreme Court decision finding that execution of mentally retarded individuals violated the Eighth Amendment's ban on cruel and unusual punishment. By the time the Court made that ruling in 2002 in *Atkins v. Virginia*,¹⁰³ the Court was merely recognizing a phenomenon already occurring in the state and federal legislatures. As the *Atkins* majority recounted, the movement started in Georgia with a legislatively enacted ban on executing mentally retarded defendants in 1986 after the execution of a mentally retarded defendant engendered a public outcry.¹⁰⁴ Congress soon followed with a similar ban when re-enacting the federal death penalty in 1989 and was joined by Maryland that same year.¹⁰⁵ Despite the Court's refusal to recognize a constitutional ban in 1989,¹⁰⁶ the trickle of legislation quickly gained momentum. By 2001 sixteen jurisdictions had enacted such bans and

100. VICTOR STREIB, REPORT ON THE STATUS OF THE JUVENILE DEATH PENALTY 9 (2005), <http://www.law.onu.edu/faculty/streib/documents/juvdeath.pdf>.

101. *Id.*

102. *Id.* In 1994, the seventeen juvenile death sentences represented 5.4% of the 315 death sentences imposed. *Id.*

103. 536 U.S. 304 (2002).

104. *Id.* at 313–14.

105. *Id.* at 314.

106. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (“[A]t present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.”).

more were under active consideration.¹⁰⁷ The *Atkins* Court noted that at the time of its decision in 2002, only five states were actively executing defendants with IQs under 70, making the practice “truly unusual.”¹⁰⁸

It is difficult to quantify just how much of the drop in death sentences over the past decade is attributable to the fact that mentally retarded defendants are no longer subject to the death penalty. One study found that thirty-five mentally retarded defendants had been executed between 1976 and 1997,¹⁰⁹ but because the execution rate is far below the sentencing rate, that does not reveal how many mentally retarded defendants were in fact being sentenced to death on an annual basis between *Gregg* and *Atkins*.¹¹⁰ Post-*Atkins* challenges may provide a better sense as inmates attempt to overturn death sentences based on an argument that they are mentally retarded and, therefore, that their death sentences are now unconstitutional.¹¹¹ Whatever the final figure for releases based on *Atkins*, however, it will unavoidably undercount the effect that the movement to ban the death penalty for mentally retarded defendants has had on the annual death sentencing rate. This undercounting will occur for two reasons: first, because the total will not include defendants in states that banned the execution of mentally retarded individuals prior to *Atkins*; and second, because some prosecutors even in states that still formally allowed such executions prior to *Atkins* almost

107. *Atkins*, 536 U.S. at 314–15.

108. *Id.* at 316 & n.20.

109. Denis Keyes et al., *People with Mental Retardation Are Dying, Legally*, 35 MENTAL RETARDATION 59, 59–60 (1997). An electronic copy of a chart summarizing the study, along with video interviews with two of the mentally retarded death row prisoners mentioned in the study, can be found at AdvocacyOne’s website, <http://advocacyone.org/deathpenalty.html>.

110. North Carolina’s experience offers some insight. Following the adoption of a 2001 law banning the execution of mentally retarded defendants, claims of mental retardation by death row inmates resulted in the commutation of six sentences by the end of 2003 from a total death row population of 195. Scott Michels, *Liberty Man May Avoid Execution*, NEWS & REC. (Greensboro, N.C.), Dec. 10, 2003, at B1 (noting release of inementally retarded death row inmates). See generally Bonczar & Snell, *Capital Punishment, 2003*, supra note 19, at 1 (reporting that at the end of 2003, North Carolina had a death row population of 195).

111. For example, Louisiana granted clemency to Herbert Welcome after *Atkins* because of his mental retardation. Gwen Filosa, *Mentally Disabled Inmate Spared*, TIMES-PICAYUNE (New Orleans, La.), May 10, 2003, at 4. Welcome’s retardation had been recognized prior to *Atkins*, but three prior governors had refused to grant clemency despite a recommendation from the clemency board and the support of the prosecutor and the victim’s family. Amnesty Int’l, Open Letter to the President on the Death Penalty (Jan. 1, 1994), <http://web.amnesty.org/library/index/ENGAMR510011994>.

The fate of the petitioner in *Atkins*, Daryl Atkins, remains unclear. On remand a jury was empanelled to determine the sole issue of whether Atkins was retarded. *Atkins v. Commonwealth*, 2006 WL 1550010, at *2 (Va. June 8, 2006). After a trial, the jury found that he was not inementally retarded and the trial judge reinstated his death sentence. *Id.* The Supreme Court of Virginia, however, reversed the jury’s finding because of procedural errors. *Id.* at *5–*8. The Court found that a prosecution witness had improperly been allowed to testify as an expert and that the judge had erred in informing the jury, which was to decide only if Atkins was mentally retarded, that a previous jury had sentenced him to death. *Id.* The case was remanded for another trial on whether Atkins was mentally retarded. *Id.* at *9.

certainly chose not to pursue death sentences because of a sense that public sentiment was turning against the death penalty for mentally retarded defendants.

As with the juvenile death penalty, then, the exclusion of mentally retarded defendants does account for some of the decline in the number of death sentences in the past decade. Trying to quantify this impact is difficult, however, and can account for only a portion of the decline in annual sentences over the past decade. For instance, Georgia—which banned death sentences for the mentally retarded as early as 1986—saw the most significant decline long after the ban had come into effect.¹¹² More importantly, though, for our purpose of trying to chart the death penalty's future is the need to account for the fact that the nationwide bans instituted by *Simmons* and *Atkins* were, in a sense, one-shot deals; that is, even if the removal of juvenile and mentally retarded defendants from the death-eligible pool accounts for a significant percentage of the decline in death sentences between 1996 and 2005, that removal has now run its course because death sentences are no longer being imposed on juveniles and mentally retarded individuals. Any further erosion in the number of annual death sentences will have to come from the continued effect of other factors, such as improving capital representation, or from new factors that have yet to come into play.

E. Summary: The Micro View of the Decline in Death Sentences

For those who favor the abolition of the death penalty, much good news lies in the declining number of death sentences over the past decade. A distinctive and steady decline has been achieved, and the downward trend is observable in all of the death penalty states; not a single state showed an upward trend in the number of death sentences. Moreover, significant declines occurred in all of the states that historically have added the most new inmates to their death rows—California, Texas, Florida, North Carolina, Pennsylvania, Oklahoma, and Alabama.¹¹³

What is particularly striking about this decline is that it has been achieved essentially on a case-by-case basis. No major death penalty states abolished capital punishment. Nor did any blockbuster judicial opinions suddenly remove broad categories of cases from the death-eligible pool (as *McCleskey v. Kemp*¹¹⁴ might have if the Court had ruled that statistical evidence could be used to show racial bias). Toward the end of the period in

112. See Bonczar & Snell, *Capital Punishment, 2003*, *supra* note 19, at 15 (showing a sharp decline in death sentences handed down after the year 2000).

113. *Id.* Note that these are not necessarily the states with the highest annual execution rates. See *id.* at 1 (stating that the greatest numbers of executions since 1977 have been performed by Texas, Virginia, Oklahoma, Missouri, and Florida).

114. 481 U.S. 279 (1987) (holding that statistical evidence of systemic discrimination failed to prove that the individual defendant was a victim of discrimination).

question the Supreme Court did exclude two categories of defendants from the death penalty—juvenile offenders and the mentally retarded—but these exclusions can explain only a small part of the overall decline in real numbers, and the cases primarily constitutionalized what was already happening in the legislatures and courtrooms.

This case-by-case reduction in the death penalty raises several important considerations for those trying to understand the future of the death penalty as both a legal and a social phenomenon. The tendency when looking at a steady downward trend is to assume that large-scale factors are at work that will continue the trend until the natural endpoint—in this case no more death sentences—is reached. From this perspective, one might think of the death penalty as a candle burning itself out as the flames of criticism slowly consume it until nothing is left. If this viewpoint is correct, the abolition process is now an inevitable one that must simply run its course, and certainly many of the media reports on the decline in death sentences imply that this is what is occurring.

A further question, however, must be asked before confidently arriving at such a conclusion: is it possible that the factors that were traced above have gradually trimmed away those cases where the death penalty was most vulnerable and left us with a core of cases that may stubbornly resist further trimming? In other words, if, as argued above, a number of micro-factors are at work that explain on a case-by-case basis why a life sentence was obtained that ten years earlier would have come back death, then we need to look at the remaining pool of cases where death sentences are still being returned and ask whether these micro-factors can continue to knock off death sentences one-by-one until the death penalty is no more. From this perspective, abolition becomes a far more daunting challenge. It may still be possible that between the selection of more representative juries, the continued professionalization of the capital defense bar, and the growth of the various pressures that have made prosecutors more reluctant to seek death, the number of death sentences will dwindle toward zero. The abolitionist's challenge, though, is more akin to having to blow out a number of candles one-by-one while simultaneously keeping new ones from being lit, rather than the earlier comparison of watching a candle burn itself out. The next step, therefore, is to determine whether a category of death penalty cases exists that is likely to be resistant to further reduction.

II. The McVeigh Factor and the Death Penalty's Resilience

In his 1972 concurrence in *Furman v. Georgia*, Justice Marshall suggested that if the American public were fully informed about the realities of the death penalty they would oppose capital punishment.¹¹⁵ Interestingly, if one looks at the key issues that make for an "informed" public on capital

115. *Furman v. Georgia*, 408 U.S. 238, 361–63 (1972) (Marshall, J., concurring).

punishment, the results suggest a public that is increasingly aware of problems with the administration of the death penalty: 59% believe that an innocent person has been executed within the past five years,¹¹⁶ 65% believe that a poor person is more likely to receive a death sentence for committing the same crime than someone who is not poor,¹¹⁷ and 50% believe that a black person is more likely to receive a death sentence for committing the same crime than a white person.¹¹⁸

Perhaps most astonishing is the change over the years in the public's perception of whether the death penalty is a deterrent to murder. In a 2004 Gallup Poll, only 35% of respondents believed that the death penalty was a deterrent and 62% did not, an almost complete reversal from a 1985 Gallup Poll in which 62% believed that the death penalty was a deterrent and only 31% did not.¹¹⁹ Given that deterrence has been one of the primary pillars of America's support for the death penalty (and was one of the major topics that Justice Marshall argued was misunderstood by the public),¹²⁰ this dramatic shift would seem to be a major victory in undermining support for the death penalty.

Yet, despite these major shifts in the public's attitude on the fairness and efficacy of the death penalty, general support for the death penalty remains high. As recently as 2005, one Gallup poll found that 74% of respondents stated that they "favor[ed] the death penalty for a person convicted of murder."¹²¹ And despite some fluctuation both up and down, support for the death penalty has consistently averaged around two-thirds of respondents since the year 2000.¹²²

A danger exists in making too much of opinion polls, and, as will be argued later, support for the death penalty is probably softer than the basic poll results indicate.¹²³ Still, if we are asking if a core group of cases exists that may resist the micro-factors' pressure toward abolition, one cannot ignore the public's continued voicing of support for the death penalty despite an increasing awareness of capital punishment's problems. The question then becomes: what rationale explains the public's refusal to abandon

116. See *supra* note 36 and accompanying text.

117. THE GALLUP POLL: PUBLIC OPINION 1999, at 155, 156 (George Gallup, Jr. ed., 2000).

118. *Id.*

119. David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment Without Parole*, in THE GALLUP POLL: PUBLIC OPINION 2004, at 226, 227 (Alec M. Gallup & Frank Newport eds., 2006).

120. "The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent." *Furman*, 408 U.S. at 345 (Marshall, J., concurring); see also *id.* at 348-54 (detailing the argument that evidence does not support a deterrence effect for the death penalty).

121. Jones, *Americans' Views*, *supra* note 36, at 104.

122. Saad, *supra* note 4, at 9.

123. See *infra* notes 154-59 and accompanying text.

support of the death penalty despite its difficulties and even though they do not generally believe that the death penalty deters?

The label attached to that rationale is likely to be a loaded one, which may be why discussion of the death penalty is often fraught with misunderstanding. Before attaching a label, therefore, it may be helpful to approach the rationale indirectly.

First, one can ask if there is an archetypal case that would be most likely to result in a death sentence despite the convergence of all of the micro-factors that we have previously examined—that is, what type of case is likely to end in a death sentence despite superb defense lawyers and a representative death-qualified jury that fully believes that “life without parole” means the defendant will never be released? In identifying such a case, one should look for the characteristics that are most frequently seen in cases where jurors return death sentences—a defendant who takes the lives of innocent victims as they go about their everyday affairs, refuses to express any remorse for his cold-blooded actions, and has no circumstances showing that he lacked free will. The Timothy McVeigh case is one of the clearest examples of such a case, and, in the end, 80% of the public supported his execution, *including 20% who otherwise opposed the death penalty*.¹²⁴ There appears, therefore, to be certain defendants, like Timothy McVeigh, who commit a crime for which a large segment of the American populace will believe that death is the only proper sentence.

It is also helpful, when trying to identify the reason the death penalty commands continuing strong support, to look at the reasons that respondents in recent public opinion polls give for supporting the death penalty. Only 29% choose as their top priority a utilitarian reason related to either deterrence (11% pick general deterrence and 7% choose keeping the defendant from committing another crime) or cost (11% identify “sav[ing] taxpayers money”).¹²⁵ The other top choices, accounting for the responses of

124. THE GALLUP POLL: PUBLIC OPINION 2001, at 110 (George Gallup, Jr. ed., 2002); *see also* Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1604 & n.63 (2004) (describing McVeigh as “the poster child for the federal death penalty”).

125. Jeffrey M. Jones, *Understanding Americans' Support for the Death Penalty*, THE GALLUP POLL TUESDAY BRIEFING, June 2003, at 101, 101. The respondents identifying utilitarian reasons for supporting the death penalty may represent individuals who still are subject to Justice Marshall's premise that accurate information about the death penalty would erode public support. Those believing that the death penalty saves taxpayers' money, for example, are clearly wrong and arguably might no longer support the death penalty if given the actual cost figures. *See supra* note 86 (explaining that states have found the death penalty to be more costly to administer than life imprisonment).

Likewise, those respondents citing specific or general deterrence as their reasons for support can arguably be dissuaded if shown the empirical evidence. Although studies occasionally appear which contend that a deterrent effect can be empirically detected, *see, e.g.*, Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence From Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 369 (2003) (finding that on average an execution deters eighteen murders), the overwhelming weight of scholarly opinion is that empirical evidence of general

almost two-thirds of the respondents, revolved around a theme quite distinct from deterrence and cost: "an eye for an eye/they took a life/fits the crime" (37%), "they deserve it" (13%), "Biblical reasons" (5%), "serve justice" (4%), "fair punishment" (3%), and "would help/benefit families of victims" (2%).¹²⁶

As noted earlier, trying to attach a label to the theme reflected in these responses is difficult without appearing, even inadvertently, to show a bias. The Gallup summary of the above poll on why Americans favor the death penalty, for instance, described the results as showing that "more than half of those who favor the death penalty *cite something about revenge*."¹²⁷ One strongly suspects, however, that if "revenge" had specifically been given as a choice in the poll, few of the respondents would have chosen it, and that the respondents in the actual poll who chose "fair punishment," "justice," and even an "eye for an eye" would take umbrage at the recharacterization of their rationale as one of "revenge."

Certainly this has been the reaction of actual jurors who have imposed death sentences ("death jurors") and were asked to explain their reasoning. While 32% of death jurors stated that "the principle of an eye for an eye" was "very" or "fairly" important to their punishment decision, a mere 1% stated that "feelings of vengeance or revenge" were "very" important to their decision, and only an additional 4% stated it was "fairly important,"¹²⁸ the vast majority (83%) of the jurors who voted for death stated that such

deterrence is quite weak. *See generally* John Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. (forthcoming 2007).

Nor can the death penalty be any more effective than life without parole at preventing a specific defendant from committing another crime because either way the defendant is not getting back into public—unless, of course, the future crime is in prison. The evidence shows, however, that individuals convicted of murder are very unlikely to commit future violent crimes in prison. *See* Mark D. Cunningham & Thomas J. Reidy, *Don't Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 23–24 (1999) (reporting longitudinal studies from several jurisdictions which show that the rate of assault by death row, former death row, life without parole, and life with parole inmates is low); Thomas J. Reidy et al., *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62, 65–68, 79 (2001) (reporting longitudinal studies from several jurisdictions which show that the rate of assault by former death row inmates is low); *see also* John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?"*, 29 LAW & HUM. BEHAV. 55, 76 (2005).

Thus, the 29% of death penalty supporters who cite cost or deterrence reasons might be persuaded that their support is misguided; this assumes, of course, that they would not still favor the death penalty based on the "moral balance" rationale that most supporters of capital punishment cite. *See infra* notes 132–39 and accompanying text.

126. Jones, *supra* note 125, at 101.

127. *Id.*

128. The death jurors' response was even lower than jurors who served on life cases; among life jurors, 14% cited such feelings. *See supra* note 25.

feelings were “not at all” important.¹²⁹ In fact, the interviewed jurors sometimes reacted with a hint of anger that a motive such as revenge could be suggested, like the juror who objected to being asked if she had voted for death because she thought the defendant “deserved” to die for his crime: “I hate that word ‘deserved.’ It makes it sound like we voted for the [death] sentence for some crazy vengeful reason.”¹³⁰

Yet while capital jurors strongly rejected the idea that “vengeance” entered into their decision-making, both life and death jurors readily identified factors important to their decision that an outside observer might casually group under the rubric of “revenge” as the Gallup summary did. Jurors on both death and life cases, for instance, identified as important to their decision “a desire to see justice done” (91% describing the consideration as “very or fairly important”), “feelings about what such crimes deserve” (89%), “the vicious or brutal manner of killing” (81%), “the pain and suffering of the victim” (64%), and “the loss and grief of [the] victim’s family” (61%).¹³¹ So how might capital jurors view these considerations as distinct from revenge?

An important clue is that as strongly as jurors felt about the importance of the crime and the victim to their decision, both life and death jurors just as strongly rejected as important “the punishment wanted by members of the community” (18% describing the factor as “very or fairly important”), “community outrage over the crime” (17%), and “the punishment wanted by the victim’s family” (16%).¹³² In other words, most jurors when choosing a sentence—whether they returned life or death—felt that they were acting not to satisfy the community’s anger or even the survivors’ rage, but were trying to, in some sense, “balance out” or “right” the wrong that had occurred. As one would suspect, this was a difficult concept to capture in words (and one reason that a ready label is elusive), but one juror’s explanation of her vote for death captured it fairly well: “I guess I was trying to find a balance. If you take something, something should be put in its place to even it out I found his crime to be abhorrent and I don’t perceive prison as being the worst thing in the world that can happen to someone. It just didn’t seem like an equal. It didn’t seem to balance out that he was going to go on living.”¹³³

Given that jurors are focused on asking whether the death penalty is necessary in their case to restore the moral imbalance created by the murder, it is not surprising then that jurors were especially attuned to the victim’s role in the crime. If jurors saw the victim as innocent and vulnerable, as in a case

129. *See supra* note 25 and *infra* note 130.

130. All jurors’ quotes were obtained as part of the Capital Jury Project. *See supra* note 25. The author has verified all of the quotations and statistics in this Article for accuracy against the primary sources (i.e., the tape or interviewer’s notes). To protect confidentiality, the author maintains a file of all of the materials used in this Article.

131. *See supra* note 130.

132. *See supra* note 130.

133. *See supra* note 130.

where the victim was randomly chosen by the defendant, they were far more likely to favor a death sentence.¹³⁴ Indeed, jurors in random-victim cases often saw themselves as advocates for the victim and viewed the imposition of a death sentence on the defendant as a way to validate the victim's life and address the injustice of the victim's death.

The lesson, therefore, is that while an outside observer might label jurors' reasons as focused on "revenge," the jurors themselves view the process differently. When asked why they imposed the death penalty, death jurors would use a characterization such as "restoring moral balance" or "providing justice" rather than revenge or retribution. (Jurors who voted for life tended to use the same perspective, but in their cases saw the "moral balance" as tipping toward a life sentence.¹³⁵) This attempt to describe more fully the thought process and emotional responses of jurors who voted for death sentences is not an effort to wade into the thicket of determining what is a valid legal or philosophical justification for capital punishment.¹³⁶ Justice Marshall in his *Furman* concurrence, for instance, maintained that "retribution . . . is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment."¹³⁷ That is a question this Article will leave for the constitutional scholars.

Justice Marshall also argued, however, that "no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance."¹³⁸ On this score, it is not so clear that Justice Marshall correctly captured what "the American people" are reacting to when they support capital punishment either as an abstract principle or in the jury room. Most of the general public no longer believes that the death penalty deters,¹³⁹ and in the jury room concern over general

134. See Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 355–56 (2003) (providing data regarding the sentences returned in cases involving random victims and contrasting them with cases involving non-random victims).

135. See *infra* notes 168–73 and accompanying text.

136. For a thoughtful discussion of the role of retribution as a justification for the death penalty, see generally Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005). Professor Carol Steiker addresses the rationale of retribution and the death penalty in responding to the argument that, if the death penalty deters, the state has a moral obligation to institute it. Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (critiquing Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005)).

137. *Furman v. Georgia*, 408 U.S. 238, 363 (1972) (Marshall, J., concurring).

138. *Id.*

139. See *supra* note 119 and accompanying text.

deterrence plays a relatively minor role (only 32% of capital jurors stated it was an important consideration to their decision). Rather, it appears that the death penalty's resiliency does largely rest on the idea of "retribution," although those who ascribe to this view would describe it with language such as "restoring the moral balance" or "victim vindication" and contend that Justice Marshall's phrase "purposeless vengeance" fails to capture the moral issue at stake.

However one views the legitimacy of such a penological justification for the death penalty, the reality appears to be that a certain category of cases will be subject, at least for the foreseeable future, to what might be called "the McVeigh Factor": the belief that certain crimes can be adequately punished only by a sentence of death. And for those trying to understand the operation of the death penalty, the McVeigh Factor helps explain why support for the death penalty remains high despite growing public anxieties over capital punishment. One juror's explanation of his vote for death captured this tension well, because despite expressing great doubts about capital punishment, he still saw a death sentence as the proper punishment for the defendant:

I'm as close to being against the death penalty as you can be without being against it, meaning if there was an issue on the ballot abolishing the death penalty, I'd vote against the death penalty. Do you want to know why? Well, first of all I think it's applied unevenly by race. Anything that has an unfair impact based on race is not a good thing, especially when it comes to life and death. Second, there was this guy on death row and some judge found the trial totally unfair. The guy was almost executed and it was only through appeals he was released. Luckily they kept appealing. This guy would have been dead and he's innocent. So, anything that has a substantial chance of killing innocent people, I don't think it's a great thing. But I think when someone kills someone like in this case—a brutal, premeditated murder with rape—that they've given up their right for life. I thought this guy should get death, I thought "this is a death penalty case."¹⁴⁰

As this juror's comments reflect, certain cases will touch upon a core belief that for many people will override even broad systemic concerns about the death penalty and fairness. And as this juror's thoughts also make evident, this belief is not limited to high-profile crimes like the Oklahoma City bombing, but will apply whenever the individual believes that the taking of the victim's life can only be morally redressed through the taking of the defendant's life.¹⁴¹

140. See *supra* notes 25, 130.

141. Indeed, the Capital Jury Project found that defense closing arguments often backfired if they suggested to the jury that the defendant should be spared because the defendant was not on the same level as murderers like McVeigh or Manson or Bundy. Jurors frequently took offense at what they saw as the defense attorney's implicit suggestion that a victim's life was somehow worth less

III. When the Micro-Factors and the McVeigh Factor Converge: Implications for the Future of the Death Penalty

If the preceding picture of the current state of the death penalty both in the courtroom and the arena of public opinion is accurate, it suggests that the past decade's decline in death sentences is not a linear movement invariably tugged further down each year by broad societal forces turning against the death penalty. Rather, the picture that emerges is one of a capital punishment system finally being subjected to checks after feeding off of poor lawyering, unrepresentative juries, and unchecked prosecutorial discretion in the decades immediately following *Gregg*. This is a more complicated and messy picture that carries with it the possibility that the decline in death sentences brought about by procedural and systematic improvements may eventually plateau once it reaches a baseline of cases controlled by the McVeigh Factor. Indeed, those who oppose the death penalty might legitimately worry that the reforms of late—such as the emergence of better lawyering, the abolition of the juvenile death penalty, and the placing of mentally retarded defendants outside the death penalty's reach—may actually serve to add legitimacy to the remaining pool of death-eligible cases.¹⁴² The risk, in other words, is that the public may feel that the most unfair applications of the death penalty have been banished¹⁴³ without realizing that more subtle but every bit as deadly problems can still persist.¹⁴⁴ As abhorrent as sleeping lawyers are to procedural fairness, they do catch the public's attention in a way that statistical regressions cannot.

Whether opponents of the death penalty should be pessimistic, however, is unclear. For even with the McVeigh Factor at work, and even if the past decade's downward trend in death sentences has been largely attributable to a

merely because she was killed by someone who had not made front page news. See Sundby, *supra* note 134, at 344–45, 367–69.

142. Steiker & Steiker, *supra* note 8, at 424 (recognizing the concern that reforms may legitimate the death penalty but arguing that the problem must be addressed on an issue-by-issue basis); see also Steiker & Steiker, *supra* note 13, at 436–37 (noting that the Supreme Court's elaborate regulation of the death penalty has allowed “[t]he public [to] develop[] a strong but false sense that many levels of safeguards protect against unjust or arbitrary executions”).

143. Steiker & Steiker, *supra* note 8, at 421–22. The concerns generated by the type of “reforms” discussed in this Article are more properly described as ones of “entrenchment” because the “belief in the progress being made will . . . induce at least some satisfaction . . . and thus, will make people more comfortable . . . with the underlying practice, thereby dissipating continued scrutiny of the death penalty and energy toward abolition.” *Id.* at 424.

144. These would include problems such as poor lawyering that is not so mediocre that it falls to the depths necessary to constitute ineffective assistance of counsel under the Court's *Strickland v. Washington* standard. See *supra* notes 70–74 and accompanying text. Other persistent problems include the variability in juries asked to make a moral decision, racial discrimination in jury selection, racial bias in prosecutorial discretion, and the possibility of error even with forensic evidence. For arguments highlighting the inherent procedural difficulties of eliminating arbitrariness from the death penalty, see *Ring v. Arizona*, 536 U.S. 584, 613, 616–18 (2002) (Breyer, J., concurring); SUNDBY, *supra* note 55, at 177–87; Sundby, *supra* note 81, at 56–57.

complicated mix of micro-factors rather than to a grand sweeping turn against the death penalty, the death penalty's future is not necessarily secure. One can readily posit several plausible scenarios that would continue the decline in death sentences and potentially lead to the elimination of the death penalty.

A. Scenario One: A Wrongful Execution Against A Backdrop of "Soft" Public Support

If forensic evidence eventually proves that an innocent person has been executed, it could be the blockbuster type of event that becomes a catalyst for a collapse of the death penalty. While a substantial majority of Americans believes that an innocent person already has been executed,¹⁴⁵ the debate over the death penalty tends to be sensitive to individual cases. The start of the movement against the execution of mentally retarded defendants, for example, is attributed to Georgia's execution of Jerome Bowden and the ensuing public outcry.¹⁴⁶ As of now, however, the most recognizable "faces" of the death penalty tend to be the individuals who represent the McVeigh Factor—defendants like Timothy McVeigh, Ted Bundy, and Scott Peterson. And while the public might say that they believe an innocent person has been executed, at the moment they do not have a face to put with their belief. Individual stories of injustice invariably carry far more emotional weight than an abstract uneasiness that the system is not working properly—there is not, if you will, a person for whom to name the "Factor" to counterbalance the McVeigh Factor.¹⁴⁷

If a case emerges in which an innocent person has been executed, on the other hand, the media coverage will be extensive and intense. While the immediate repeal of death penalty statutes would be unlikely, forensic proof of a wrongful execution might provide the push that moratorium movements need to succeed.¹⁴⁸ A majority of Americans has already expressed general support for a moratorium on executions until further studies can be

145. See *supra* note 36 and accompanying text.

146. *Atkins v. Virginia*, 536 U.S. 304, 313–14 & n.8 (2002) (describing the Bowden execution and its effect on public opinion and legislative action).

147. Many thought that DNA tests performed on evidence in the case of Roger Coleman, an individual executed by Virginia in 1992, might reveal a case of an innocent person being executed, and the media attention leading up to the announcement of the results was extensive. The testing, however, showed that the sperm in the victim was Coleman's. Kristen Gelineau, *DNA Affirms Dead Man's Guilt: Killer Had Professed Innocence Until His Execution in 1992*, CHI. SUN-TIMES, Jan. 13, 2006, at 40.

148. On the other hand, without a significant precipitating event, many legislatures appear unlikely to implement moratoria. See, e.g., *State Officials Unfazed by Death Penalty Criticism*, ATLANTA J. CONST., Feb. 25, 2006, at B2 (describing "little interest" in a moratorium despite an ABA report detailing problems with Georgia's death penalty system and calling for a moratorium); Adam Tanner, *Liberal California Backs Death Penalty*, REUTERS, Mar. 3, 2006, available in LEXIS, News Library, Reuters File (reporting that "a California moratorium proposal has stalled").

completed.¹⁴⁹ In some states, public support for a moratorium has at points even exceeded support for the death penalty; in California, for example, a 2000 Field Poll found that although 63% favored the death penalty, 73% favored a moratorium “until a study of fairness [is done]” and only 17% opposed it.¹⁵⁰ New Jersey recently passed a moratorium by wide margins in its legislature.¹⁵¹ Given that significant public support for a moratorium already exists and that an increasing number of judges, law enforcement personnel, and prosecutors are publicly lending support to the movement,¹⁵² a documented case of a wrongful execution might create pressures that would trigger a widespread suspension of executions without political repercussions; in Illinois, for instance, 68% supported Governor Ryan’s suspension of executions in light of the state’s well-documented problems with the death penalty.¹⁵³

The key question in this scenario is whether the short-term measure of moratoria would eventually ripen into de facto abolition or whether a movement would eventually arise to lift these moratoria.¹⁵⁴ This is a difficult question to answer, but while the polls show fairly strong support for the death penalty in the abstract, that support also must be put in context, and

149. THE GALLUP POLL: PUBLIC OPINION 2001, *supra* note 124, at 94; Gary Langer, *Death Penalty Ambivalence: Poll Points to Support for Execution Moratorium in U.S.*, ABCNEWS.COM, May 2, 2001, http://www.abcnews.go.com/sections/us/DailyNews/poll010504_deathpenalty.html (reporting 51% support for a national moratorium).

150. MARK DICAMILLO & MERVIN FIELD, FIELD RESEARCH CORP., SIGNIFICANT DECLINE IN ONCE OVERWHELMING MAJORITY SUPPORT FOR CAPITAL PUNISHMENT: THREE OUT OF FOUR FAVOR GOVERNOR DAVIS DECLARING A DEATH PENALTY MORATORIUM (2000), available at <http://field.com/fieldpollonline/subscribers/Release1965.pdf>. The most recent Field poll again found 63% of respondents in favor of the death penalty, although the poll did not ask about support for a moratorium. MARK DICAMILLO & MERVIN FIELD, FIELD RESEARCH CORP., WHILE STILL STRONGLY SUPPORTING THE DEATH PENALTY, CALIFORNIANS HAVE MIXED VIEWS ON SOME ASPECTS OF CAPITAL PUNISHMENT: MAJORITY OPPOSES THE DELAY IN THE MORALES EXECUTION (2006), available at <http://field.com/fieldpollonline/subscribers/RLS2183.pdf>.

151. Angela Delli Santi, *Death Penalty: Legislators Back Suspension, Study*, PHILA. INQUIRER, Jan. 10, 2006, at B1, available at 2006 WLNR 496491.

152. See, e.g., Death Penalty Info. Ctr., California Moratorium Bill Gains Broad Support from Law Enforcement, Prosecutors and Judges (Jan. 9, 2006), <http://deathpenaltyinfo.org/article.php?did=1663>; Death Penalty Info. Ctr., Eight Former North Carolina Supreme Court Justices Call on the General Assembly for an Immediate Vote on the Moratorium Bill (June 29, 2004), <http://www.deathpenaltyinfo.org/article.php?did=1051>.

153. Kevin McDermott, *Support Holds for Gov. Ryan's Moratorium on Death Penalty: Two-Thirds in Poll Back the Freeze, but Equal Numbers Reject His Leadership*, ST. LOUIS POST-DISPATCH, Aug. 25, 2002, at A12. Support for Governor Ryan’s later decision to grant clemency to all death row inmates, on the other hand, was almost evenly split. See Kevin McDermott, *Illinoisans Are Split Closely on Ryan's Commutations*, ST. LOUIS POST-DISPATCH, Feb. 7, 2003, at A1 (finding that 50.55% opposed and 47.5% supported granting clemency).

154. In Illinois, for instance, the future of the moratorium now appears in doubt absent new developments. See Carlos Sadovi, *On Death Penalty, the Debate Is Over Time*, CHI. TRIB., Feb. 27, 2006, <http://www.chicagotribune.com/news/elections/chi-0602270220feb27,1,4989789.story> (reporting that each major candidate for governor favors lifting the moratorium, although they differ over timing).

indications are that the depth of support may not be that great. To begin with, a significant majority (57%) of those who say they support the death penalty *also* state that they do so with “reservations.”¹⁵⁵ These reservations are of course consistent with the polls that find support for moratoria and the polls that show that a significant percentage of Americans believe that an innocent person has been executed and that minority and poor defendants are more likely to receive a sentence of death.¹⁵⁶

Polls also show that abstract support for the death penalty falls if respondents are given a choice of life without parole. Over the past five years when the Gallup Poll has asked, “If you could choose between the following two approaches, which do you think is the better penalty for murder—the death penalty or life with absolutely no possibility of parole?,” on average 53% chose death and 43% picked life.¹⁵⁷ These are significant drops from those same polls’ results when respondents were simply asked if they favored (71%) or opposed (25%) the death penalty.¹⁵⁸ This difference suggests that the McVeigh Factor weakens considerably when Americans are given the choice of life without parole, although it should be noted that a majority still favors death, indicating that the McVeigh Factor—the belief that the death penalty is the only proper punishment for certain crimes—is at work.

Perhaps most importantly, since under this scenario the decision is ultimately a political one, the death penalty appears to have lost some of its power as an issue that decides elections. Thus, while a majority of voters might favor the death penalty in the abstract, the issue may not have the “third rail” effect that politicians once feared.¹⁵⁹

The most recent gubernatorial election in Virginia may serve as a harbinger for the future. The state has strong popular support for the death penalty, and as the election neared, the Republican candidate ran ads using the Democratic candidate’s personal opposition to the death penalty as a wedge issue.¹⁶⁰ The Democratic candidate, while pledging to enforce the

155. Jeffrey M. Jones, *Slim Majority of Americans Think Death Penalty Applied Fairly in This Country*, THE GALLUP POLL MONTHLY, June 2000, at 64, 65.

156. See *supra* notes 36, 116–17 and accompanying text.

157. The averages are based on the results of polls taken on the following dates: Feb. 19–21, 2001; May 10–14, 2001; May 6–9, 2002; May 5–7, 2003; May 2–4, 2004; May 2–5, 2005. See Moore, *supra* note 119, at 226. The averages have been rounded to the nearest whole number.

158. *Id.* The averages are based on the results of polls taken on the same dates as listed in note 157. The averages have been rounded to the nearest whole number.

159. Michael Dukakis’s answer in the presidential debates to a question about the death penalty, for example, was perceived as disastrous because it showed him to be unemotional and out of touch with public sentiment on the death penalty. Edward Walsh, *Dukakis Adds Emotion to Death-Penalty Answer; Cool Response in Debate Dismayed Aides*, WASH. POST, Nov. 2, 1988, at A23 (describing Dukakis’s answer to a hypothetical question posed during the presidential debate asking whether Dukakis would seek the death penalty for a person accused of raping and murdering Dukakis’s wife, Kitty, as “one of [the] most damaging moments in . . . the presidential campaign”).

160. Robert Barnes, *Kilgore Ads Seek to Divide Democrats*, WASH. POST, Oct. 13, 2005, at A1.

death penalty, had acknowledged his personal and religious opposition to capital punishment.¹⁶¹ Although in part because they were seen as too negative, the death penalty ads backfired; a poll found that 25% of those who had seen the ads were *less* likely to vote for the Republican candidate and only 10% were more likely.¹⁶² One conservative pundit, in trying to explain why the death penalty issue did not gain traction in the Virginia campaign, offered the observation that the death penalty was “an issue that is so early 1990s, when crime really was high on the agenda—it’s not that important now.”¹⁶³ Voter concern over crime as an election issue, therefore, appears to have fallen along with the drop in the violent-crime rate over the same period of time. Voters in the 2005 Virginia governor’s election were far more concerned with education (21% identifying it as the most important issue), taxes and spending (17%), and transportation (15%), than with crime (7%).¹⁶⁴

If politicians come to see the public’s support for the death penalty as “soft,” even if the abstract numbers are relatively high, it would make any effort to re-initiate the death penalty after a moratorium far more difficult. When cutting taxes is higher on the voters’ agenda than crime, a legislative vote to bring back the death penalty might not be a top political priority. And the findings that would come out of a moratorium to guard against future wrongful executions would no doubt push the already hefty price tag of the death penalty even higher, as costly procedural safeguards would need to be implemented to prevent another wrongful execution. Moreover, this higher price tag would fund a system that would probably make at most a handful of defendants eligible for the death penalty once requirements such as the necessity of forensic proof of guilt are instituted.¹⁶⁵ Either as a matter of election politics or as a legislative budgetary judgment,¹⁶⁶ the political will to bring back the death penalty under these circumstances might be lacking.

161. *Id.*

162. Warren Fiske, *Kilgore Not Aided in Poll by Death Penalty Ads*, VIRGINIAN-PILOT (Norfolk, Va.), Oct. 24, 2005, at B4.

163. *All Things Considered: Bush’s Battles and the Off-Year Election* (NPR radio broadcast, Nov. 11, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5009541> (quoting Richard Lowry, editor of *National Review*).

164. Fiske, *supra* note 162.

165. For instance, the Massachusetts Governor’s Council on Capital Punishment proposed the “creation of a fair capital punishment statute that is as narrowly tailored, and as infallible, as humanly possible.” JOSEPH L. HOFFMANN ET AL., GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT 3 (2004), available at <http://www.mass.gov/Agov2/docs/5-3-04%20MassDPRReportFinal.pdf>. The statute’s requirements of scientific proof, when coupled with the small number of factors that would make a defendant death-eligible, would probably produce a handful of possible capital cases a year. See Franklin E. Zimring, *Symbol and Substance in the Massachusetts Commission Report*, 80 IND. L.J. 115, 120 (2005) (questioning whether “there has been any single case in Massachusetts in the last four or five years that would meet the [proposed law’s] criteria”).

166. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–99 (2005) (explaining the role that budgetary concerns play in legislative decisions

Importantly, this scenario does not depend on the McVeigh Factor fading away. In fact, polls would probably show continued support for the death penalty even as it fell into disuse. The international experience, however, demonstrates that support for the death penalty in the abstract does not necessarily translate into the practice becoming law. Sometimes, as with countries abolishing the death penalty to gain entrance into the European Union, a tradeoff can occur to achieve larger political goals despite the need to abolish practices that maintain popular support.¹⁶⁷ In the United States, a circumstance like a wrongful execution might spark such a tradeoff because the costs of re-instituting an “improved” death penalty could be so high that it would not be seen as economically or politically wise.

B. Scenario Two: Capital Punishment’s “Death by a Thousand Cuts”

The previous scenario describes a situation in which a major event triggers a nationwide state-by-state movement that politically overrides the McVeigh Factor’s influence. Another possible scenario exists that results in abolition of the death penalty for similar political considerations but is based on a continued chipping away at the death sentencing rate. This scenario assumes that the McVeigh Factor will remain in effect, but proceeds on the premise that the number of cases in which a death-qualified jury would *always* return a death sentence is very small.

Remember that jurors who voice a “moral justice” rationale for the death penalty generally cast the rationale as one of “balance.” That is, the murder created a moral imbalance and the punishment must “fit” the circumstances in such a way that the balance is restored. For most jurors, however, the idea of balance also encompassed the idea that the whole of a case must be considered in deciding just what sentence “fits” the crime and can restore the balance.¹⁶⁸ Not surprisingly, then, many of the jurors who voted for life sentences also spoke in terms of balance in trying to decide what the defendant “deserved” and which punishment “fit” the crime. In

regarding sentencing reform and policies); Darryl K. Brown, *Rethinking Overcriminalization* 36–37 (ExpressO Preprint Series, Working Paper No. 995, 2006), available at <http://law.bepress.com/expresso/eps/995> (noting that legislatures can use the budget process to limit enforcement of criminal laws).

167. See Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 138–39 & n.49 (2002) (describing Turkey’s willingness to suspend the death penalty to gain admission to the European Union); Joshua Micah Marshall, *Death in Venice*, NEW REPUBLIC, July 31, 2000, at 12 (pointing out that abolition of the death penalty in most European countries was accomplished despite broad popular support). *But see* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1886–87 (2002) (describing the backlash in Caribbean Commonwealth countries and their withdrawal from an international human rights tribunal in part because of rulings restricting capital punishment in the face of strong popular support).

168. As noted earlier, however, some jurors were not open to the idea of balancing because, from their view, once an intentional murder was proven a death sentence was morally required. See *supra* notes 55–57 and accompanying text.

fact, life jurors were just as concerned “about what such crimes deserve” (87% stated that the consideration was “very” or “fairly” important to their punishment decision) as death jurors (90%).¹⁶⁹ And “the desire to see justice done” was equally important to the life jurors (91% described it as “very” or “fairly” important) as the death jurors (91%).¹⁷⁰

The critical difference in the life cases was that the defense was able to convince the jury that the defendant's life story was one that deserved its own weight on the moral balancing scales and tipped the scales to life.¹⁷¹ In most cases, the defense's placement of a moral weight on the scales in favor of life took the form of demonstrating to the jury that the defendant's life was one where he had never had a real opportunity to take the “high road.”¹⁷² If able to convince the jury that the defendant's life itself was a circumstance arguing for the “moral” outcome of a life sentence, defense attorneys were able to obtain life sentences even in cases with horrifying facts like torture murders and multiple victims.¹⁷³

The fact that many jurors bring to the jury box a “moral balancing” view, therefore, does not necessarily dictate that a murder case will end in a death sentence. Even a case with egregious facts like the Oklahoma City bombing can have additional facts that, if persuasively presented, may turn a jury to life. Terry Nichols, after all, was spared the death penalty not once, but twice, because twelve jurors were unable to agree that his level of participation warranted the same sentence as Timothy McVeigh.¹⁷⁴ That juries have decided to return life sentences even in cases that at first blush appear to be very strong candidates for a death sentence suggests that one must go fairly deep into the pool of death-eligible cases before hitting the McVeigh Factor.

If the hypothesis that ultimately the McVeigh Factor will control only a small number of cases is correct, then further downward movement in death sentences is still possible even though the annual total has been slipping toward one hundred. Moreover, although this process might initially be marked only by an incremental annual downward movement, over time a slow but steady rate of decline in the number of death sentences could eventually have a snowball effect. For if the number of death sentences continues to drop, and especially if prosecutors are witnessing juries refusing to return

169. *See supra* notes 128–35 and accompanying text.

170. *See supra* notes 128–35 and accompanying text.

171. First, though, the defense must have satisfied the jury that the defendant posed no realistic future danger if allowed to live—every capital jury saw its foremost duty as ensuring that the defendant would never kill again. *See supra* note 64 and accompanying text.

172. SUNDBY, *supra* note 55, at 140–41.

173. *Id.* at 133–59 (describing the case of George Brown).

174. *Hung Jury Spares Nichols A Second Time from Death*, N.Y. TIMES, June 12, 2004, at A7, available at 2004 WLNR 5460461 (reporting that the jurors in the state proceeding against Terry Nichols deadlocked regarding the sentencing, just as a federal jury had done six years earlier).

death sentences in cases that appear to be strong candidates for death, prosecutors will become all the more cautious in pursuing death sentences except in extreme cases like Timothy McVeigh's.

The effect may then end up like that in the first scenario, even if it takes longer to reach it: a death penalty so rarely implemented that it can no longer support the tradeoffs in terms of cost and the tremendous demands a death case makes on the criminal justice system. And if the demise of capital punishment should ultimately come through juries refusing to return death sentences in all but the rarest instances, it would not be the first time jury behavior has altered the death penalty's path. The turning away from a mandatory death penalty, for instance, is largely attributed to the refusal of juries to convict manifestly guilty defendants because they did not believe that the defendant deserved a death sentence.¹⁷⁵

For those opposed to the death penalty, therefore, this second scenario offers hope even without a blockbuster event. That optimism must be tempered by the understanding that its outcome depends on the continued progress of the micro-factors that were identified earlier and on an understanding that life sentences are obtained on a case-by-case basis. For although the number of death sentences may not yet have dwindled to only those subject to the McVeigh Factor, the cases in which prosecutors are still actively seeking death sentences are likely to be among the more shocking murders. To win life sentences in those cases, capital defense lawyers will have to become all the more adept at promoting those factors already at work that create plea bargains for life or that help provide the critical threshold votes for life if the case goes to trial.

Finally, of course, there are likely to be new micro-factors that in the future may cause cases to switch over from "death" to "life" (and remember, to have an impact on the aggregate number of death sentences these factors need not influence a large number of cases or, at the jury level, a large number of jurors). For example, several more cases a year may end up as life that would have gone death because of the expanding role of "defense-based victim outreach," an effort to establish contact with the victim's survivors to find ways to provide the survivors a sense of closure without seeking a sentence of death.¹⁷⁶

175. Hugo Adam Bedau, *Background and Developments, in THE DEATH PENALTY IN AMERICA* 9–11 (Hugo Adam Bedau ed., 3d ed. 1982).

176. See e.g., Tammy Krause, *Reaching Out to the Other Side: Defense-Based Victim Outreach, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 379, 388–93 (James A. Acker & David R. Karp eds., 2006). While contacting the victims' relatives can sometimes lead the prosecution to not seek the death penalty if the relatives do not want capital punishment, it also can play an important role even if the case goes to trial. After Zacarias Moussaoui had been convicted for his role in the 9/11 tragedy, for instance, and the prosecution was seeking the death penalty, the defense called a number of victims' survivors as witnesses, many of whom had approached the defense after learning that the defense was attempting to reach out to relatives of the victims. See, e.g., Jerry Markon & Timothy Dwyer, *Moussaoui Gets*

IV. Conclusion

The scenarios outlined above are, of course, only two possibilities out of a number of potential outcomes, many of which do not end in abolition. Those who study the death penalty quickly learn that predicting the future course of an institution that is so subject to the volatility of contemporary events is a hazardous undertaking at best. One major event, like proof that an innocent man was executed, might start a chain reaction that leads to abolition. On the other hand, a sharp rise in the murder rate or a string of terrorist attacks might lead to a reversal of the decline in death sentences. Still, despite the volatility, the steady decline in death sentences over the past decade suggests that capital punishment may be at another crossroads and it is worthwhile to try and discern what factors are at work.¹⁷⁷

This close look at what has happened with the decline in death penalty sentences over the past decade contains mixed news for the death penalty's opponents. The good news is that a "ground up" battle to curtail the death penalty is possible. The significant decline in death sentences over the past decade was primarily accomplished not through major court rulings that swept large categories of death penalty cases off the table, but through a case-by-case battle in the courtroom and an issue-by-issue campaign in the legislatures. Those advocating the abolition of the death penalty for mentally retarded defendants and juvenile offenders, for example, did not win their victories when the Supreme Court finally handed down *Atkins* and *Simmons*; rather, their real victories were won during the previous decade as juries, legislatures, and public opinion gradually turned against those practices.¹⁷⁸ Indeed, the past decade's decline in death sentences appears to be primarily attributable not to a broad renewed public debate over the death penalty, but to the operation of a number of micro-factors—such as improved capital representation and more representative juries—that each worked to take some cases out of the "death" category and move them over to "life." Together these micro-factors have had a noticeable and important impact on the decline in death sentences.

The less encouraging news for opponents is that although death sentences have steadily fallen over the past decade, the decline does not appear to indicate any broad turning against the death penalty by the American public. In fact, general support for the death penalty remains

Some Unusual Help: Some 9/11 Relatives Testify for Defense, WASH. POST, Apr. 20, 2006, at A10. The jury ultimately returned a life sentence, and the relatives' testimony for the defense may have acted as an important emotional counterweight to the powerful testimony of the survivors who earlier had testified for the prosecution at the penalty phase.

177. Steiker & Steiker, *supra* note 13, at 417 ("For the first time in several decades, across the United States, we stand at a moment of critical appraisal of our practice of capital punishment.").

178. Moreover, since these practices were banished because public support had turned against them, the Court's decisions produced no significant public backlash.

relatively high and is likely to stay there because of an abiding belief that certain crimes, like those committed by Timothy McVeigh, deserve only the death penalty. The strength of that support may be somewhat soft, but absent a major event like DNA proof that an innocent person was executed, continued erosion in the number of death sentences will in all likelihood depend upon the same strategy of the past decade: case-by-case battles in the courtrooms and issue-by-issue struggles in the legislatures. Eventually it may be that imposition of the death penalty will become so rare that it will no longer make political or economic sense to maintain the institution of capital punishment.¹⁷⁹ To reach that day, though, death penalty opponents should be prepared to “think small,” at least in the short term, and to focus on the micro-factors that will continue to move cases one by one from a sentence of death to a sentence of life.

179. The rare imposition of death sentences, especially if coupled with states rarely carrying out executions, also would give added credence to an argument that the death penalty will have become cruel and unusual in practice. See Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 338–39 (2003) (commenting on the use of low execution rates to form an argument that the death penalty violates the Eighth Amendment).