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Capital Attrition: Error Rates in Capital Cases, 1973-1995

James S. Liebman,[*] Jeffrey Fagan,[**] Valerie West,[***] and Jonathan Lloyd[****]

I. Introduction

Americans seem to be of two minds about the death penalty.[1] In the last several years, the overall number of executions has risen steeply, reaching a fifty year high this year.[2] Although two-thirds of the public support the penalty,[3] this figure represents a sharp decline from the four-

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1. *See, e.g.*, Paul Duggan, *Rising Number of Executions Welcomed, Decried*, WASH. POST, Dec. 13, 1999, at A3, *available in* 1999 WL 30308153; Abraham McLaughlin, *98 Executions in '99 Reignite a Capital Debate*, CHRISTIAN SCI. MONITOR, Dec. 27, 1999, at 1, *available in* 1999 WL 5384560 (both generally discussing death penalty issues and the arguments for and against capital punishment).

2. *See* Linda Greenhouse, *Death Penalty Gets Attention of High Court*, N.Y. TIMES, Oct. 30, 1999, at A1, *available in* LEXIS, News Library, NYT File ("[T]here [were] 82 executions in the first 10 months of [1999], a pace unequaled since the early 1950's."). From 1984 to 1991, an average of about 15 people were executed each year in the United States. The average rose to about 30 each year between 1992 and 1994, to about 60 in the next four years, and to 98 (the most in a single year since 1951) in 1999. *See* Greenhouse *supra*; NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW U.S.A. REPORTER CURRENT SERVICE 1465 (Winter 2000). Notably, however, two states—Texas and Virginia—account for almost half of the executions in the United States during the last 15 years. *See Statistics on the DP in the USA* <http://agitator.com/dp/statistics/index.html> (last modified Feb. 17, 2000) (reporting that of the 612 people executed in the United States since 1876, Texas and Virginia are responsible for 281 of those executions); *infra* note 53 and accompanying text (discussing the death penalty in Virginia). Other states with large death row populations—California, Ohio, Pennsylvania, Mississippi, and Tennessee, for example—rarely execute more than one person in any year. See *infra* note 43. Moreover, since 1976, the number executed annually in the United States has never exceeded three percent of the nation's death row population, and stayed continuously within the one-half to two percent range from 1984 to 1998. *See infra* Figure 3, notes 58-65 and accompanying text. The likelihood that any given death row prisoner will be executed has been, and remains, low.

3. *See* Dalia Sussman, *Split Decision on Death Penalty* (Jan. 19, 2000) <http://abcnews.go.com/sections/politics/dailynews/poll000119.html> (reporting that in an ABCNEWS.com poll, 64% of Americans say they support the death penalty for people convicted of murder); Frank Newport, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%*, GALLUP NEWS SERVICE, (Feb. 24, 2000) <http://www.gallup.com/poll/ releases/pr000224.asp>. *See also* David Frum, *The Justice Americans Demand*, N.Y. TIMES, Feb. 4, 2000, at A29, *available in* LEXIS, News

fifths of the population that endorsed the death penalty only six years ago, leaving support for capital punishment at a twenty year low.[4] When life without parole is offered as an alternative, support for the penalty drops even more—often below a majority.[5] Grants of executive clemency reached a twenty year high in 1999.[6]

Library, NYT File (questioning the democratic legitimacy of a moratorium on executions in light of broad popular support for the penalty); Eugene H. Methvin, *Death Penalty Is Fairer Than Ever*, WALL ST. J., May 10, 2000, at A26, *available in* 2000 WL-WSJ 3028765 (arguing that due to lengthy appeals and DNA testing, death penalty convictions are more reliable than ever).

4. *Compare* Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, J. SOC. ISSUES, Summer 1994, at 19, 20 fig.1 (showing data indicating increasing popular support for the death penalty from 1967 to 1994) *with* Mark Gillespie, *Public Opinion Supports Death Penalty*, GALLUP NEWS SERV. (Feb. 24, 1999) <http://www.gallup.com/poll/releases/pr99024.asp> (noting that support for the death penalty has declined about 10% over the past six years); Newport, *supra* note 3 (noting a 4% decline in public support for the death penalty in 2000); Kathy Walt, *Death Penalty's Support Plunges to a 30-year Low*, HOUS. CHRON., Mar. 15, 1998, at A1, *available in* Westlaw, News File, HSTNCHR database (reporting that "Texans' support for the death penalty has slipped to its lowest point in more than three decades"—declining by 18%—a shift that is consistent with national attitudes); and Editorial, *A Moratorium on Killing*, ST. LOUIS POST-DISPATCH, Dec. 26, 1999, at B2, *available in* 1999 WL 3062342 ("Could this [rise in opposition to the death penalty] be the start of a shift in public opinion . . . ?").

For statewide trends in public opinion, see Death Penalty Information Center, *Recent Poll Findings*, (visited May 17, 2000), <http://www.essential.org/dpic/po.html> [hereinafter DPIC] (reporting that polls reveal declining support for the death penalty in Michigan, New Jersey, North Carolina, Kentucky, Illinois, Minnesota, and Virginia); *Death Penalty Support Declines*, PR NEWSWIRE, *available in* Westlaw, News File, ALLNEWSPLUS database, Mar. 6, 2000 (reporting that public support in Illinois for the death penalty fell from 76% in August of 1994 to 63% in March of 1999, and 58% in 2000); Greg Lucas, *Poll Takes Snapshot of Californians' Views*, S.F. CHRON., Jan. 14, 2000, at A20, *available in* 2000 WL 6472849 ("In California, only 49 percent of those surveyed favor the death penalty compared to 56 percent nationally . . . ."); *Support for Death Penalty Slips in Minnesota*, ASSOCIATED PRESS NEWSWIRES, Mar. 21, 2000, *available in* Westlaw, News File, APWIRES database (reporting that the number of Minnesotans who favor the death penalty dropped from 73% in 1996 to 57% in 2000); Walt, *supra* (reporting that support for the death penalty in Texas fell by 18% from 1994 to 1998).

5. *See* Snssman, *supra* note 3 (discussing an ABCNEWS.com poll that found 64% of Americans say they support the death penalty for murder convictions, but that the number drops to 48% when life without parole is a sentencing option). State-specific polls reveal similar trends. *See* Kathy Barrett Carter, *63% of Jerseyans Favor Death Penalty—But Support Drops 9% Since '94 Polls Show*, STAR-LEDGER (Newark), Oct. 10, 1999, at O25 (reporting that in New Jersey, a 63% approval for capital punishment drops to 44% when life without parole is a choice); DPIC, *supra* note 4 (visited Feb. 23, 2000) (noting that Missouri residents "overwhelmingly support" the death penalty); *A Moratorium on Killing*, *supra* note 4 (noting that the number of Missouri residents who support the death penalty drops to 46% when life without parole is available); Lucas, *supra* note 4, at A20 (reporting a recent California poll that asked respondents to choose between death or life without parole as the appropriate punishment for murder: 49% chose death and 47% chose life without parole); Eric Zorn, *Prosecutors Deaf to Outcry Against Death Penalty*, CHIC. TRIB., Mar. 7, 2000, at 1, *available in* 2000 WL 3643214 (showing a 15-point drop in support for the death penalty—from 58% to 43%—when life without parole is an option). Forty-two states (including most of the 11 noncapital sentencing states) offer life without parole as a sentencing option. *See* Editorial, *Rising Doubts on Death Penalty*, USA TODAY, Dec. 22, 1999, at 17A, *available in* 1999 WL 6861984.

6. *See* Jim Yardley, *Texas' Busy Death Chamber Helps Define Bush's Tenure*, N.Y. TIMES, Jan. 7, 2000, at A1, *available in* LEXIS, News Library, NYT File (presenting statistics on grants of executive clemency post-*Furman*).

In 1999 and 2000, governors, attorneys general and legislators in Alabama, Arizona, Florida, and Tennessee fought high-profile campaigns to increase the speed and number of executions.[7] In the same period, however:

- The Republican Governor of Illinois, with support from a majority of the electorate, declared a moratorium on executions in that state.[8]

- The Nebraska Legislature attempted to enact a similar moratorium. Although the Governor vetoed the legislation, the legislature appropriated money for a comprehensive study of the even-handedness of the state's exercise of capital punishment.[9]

- Similar studies have been ordered in Illinois by the Chief Justice, task forces of both houses of the state legislature, and the governor.[10]

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7. *See Alabama Looks to Speed Up Executions*, ASSOCIATED PRESS, Mar. 3, 2000; Yoji Cole, *Napolitano Wants to Find Ways to Speed Executions*, ARIZ. REPUB., Feb. 16, 2000, at B7; Sara Rimer, *Florida Passes Bill to Quicken Execution Pace*, N.Y. TIMES, Jan. 6, 2000 *available in* LEXIS, News Library, NYT File, at A1; John Shiffman, *Tennessee May Limit Death Row Appeals*, NASHVILLE TENNESSEAN, Apr. 10, 2000 <http://www.tennessean.com>; Bobby Ross, Jr., *Most Oklahomans Favor Death Penalty—Poll Finds Most Want Shorter Appeals Process*, THE OKLAHOMAN, Mar. 13, 2000 <http://www.oklahoman.com> ("Seventy five percent [of Oklahomans] . . . favor the death penalty."). Among the states mentioned, only Florida actually adopted speed-up legislation, and it was unanimously invalidated under the state constitution by the Florida Supreme Court. *See* David Cox, *Court Strikes Down GOP's Death Row Appeal Plan*, SUN-SENTINEL (Ft. Lauderdale), Apr. 15, 2000, at 1A ("In a major blow to Gov. Jeb Bush and state Republican leaders, the Florida Supreme Court on Friday unanimously struck down the Legislature's overhaul of the appeals process for Death Row inmates.").

8. *See* William Claiborne, *Ill. Governor, Citing Errors, Will Block Executions*, WASH. POST, Jan. 31, 2000, at A1, *available in* 2000 WL 2283005 (reporting that Governor George Ryan imposed a moratorium on the death penalty in Illinois by indefinitely staying all proposed executions until an inquiry has been conducted into why more death row inmates have been exonerated than executed since capital punishment was reinstated in 1977); Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1, *available in* LEXIS, News Library, NYT File ("Citing a 'shameful record of convicting innocent people and putting them on death row,' Gov. George Ryan of Illinois today halted all executions in the state, the first such moratorium in the nation."). *See also* Steve Mills & Ken Armstrong, *Gov. George Ryan Plans to Block the Execution of Any Death Row Inmate*, CHI. TRIB., Jan. 30, 2000, *available in* 2000 WL 3631638 (citing a March 1999 poll showing that Illinois death row exonerations have prompted 54% of the state's voters to favor and only 37% to oppose a moratorium, notwithstanding majority support for the death penalty in the abstract).

9. In 1999, Nebraska's unicameral legislature passed a death penalty moratorium bill co-sponsored by Republican Senator Kermit Brashear and Democrat Senator Ernie Chambers. *See* Robynn Tysyer, *Execution Suspension Approved: Senators Hand Johanns Life-and-Death Decision*, OMAHA WORLD-HERALD, May 20, 1999, at 1, *available in* Westlaw, News File, ALLNEWS database. Governor Mike Johanns vetoed the bill, *see* Robynn Tysyer, *Moratorium Vetoed: Death Penalty Timeout is Poor Policy, Johanns Says*, OMAHA WORLD-HERALD, May 27, 1999, at 1, *available in* Westlaw, News file, ALLNEWS database, but the legislature unanimously overrode the veto as to the part of the bill that allocated $165,000 to study the issue. *See* Robynn Tysyer, *Death Penalty Study OK'd*, OMAHA WORLD-HERALD, May 28, 1999, at 1, *available in* Westlaw, News File, ALLNEWS database.

10. *See, e.g.*, Ken Armstrong & Steve Mills, *String of Exonerations Spurs Legislative, Judicial*

Indiana, Maryland, and the Attorney General of the United States have followed suit.[11]

- Serious campaigns to abolish the death penalty are under way in New Hampshire[12] and (with the support of the governor and a popular former Republican senator) in Oregon.[13]

- The Florida Supreme Court and Mississippi Legislature recently acted to improve the quality of counsel in capital cases,[14] and bills with

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Panels to Study Reforms, CHI. TRIB., Nov. 16, 1999, at N8, *available in* 1999 WL 2932558 (noting that the Illinois General Assembly and Illinois Supreme Court have created four committees to study the death penalty); Bob Chiarito, *House Panel Set to Consider Moratorium on Executions*, CHI. DAILY L. BULL., Jan. 26, 2000, at 3, *available in* Westlaw, News Library, ALLNEWS File (discussing a proposed bill that would create an eight-member commission to study the law governing the death penalty and its administration); Ryan Keith, *Task Force on Capital Cases Calls for Videotaping of Suspects*, CHI. TRIB., Mar. 16, 2000, at M6, *available in* 2000 WL 3646355 (summarizing proposed legislation that would give defendants in capital cases more legal rights); Steve Mills & Ken Armstrong, *Prosecutors Under Glare at Reform Hearing*, CHI. TRIB., Jan. 28, 2000, at N20, *available in* 2000 WL 3631173 (noting that during hearings on the reform of the Illinois death penalty system, it was suggested that an independent commission be formed to investigate wrongful convictions); Evan Osnos & David Heinzmann, *Death Penalty Remains an Option*, CHI. TRIB., Jan. 31, 2000, *available in* 2000 WL 3631835 (stating that Governor Ryan "intends to postpone any executions by granting reprieves to Death Row inmates until a special panel can be created"); Maurice Possley & Ken Armstrong, *Revamp Urged in Handling of Capital Cases*, CHI. TRIB., Nov. 4, 1999, at N1, *available in* 1999 WL 2928957 [hereinafter Possley & Armstrong, *Revamp Urged*] (describing efforts for the creation of a special capital litigation trial bar).

11. *See Moratorium Now!* (visited May 16, 2000) <http: //www.quixote.org/ej>; *see also* Benjamin Wallace-Wells, *States Follow Illinois Lead on Death Penalty*, BOSTON GLOBE, Feb. 9, 2000, at A3, *available in* 2000 WL 3311890 (discussing reactions in various states to Governor Ryan's moratorium on the death penalty).

12. *See* John DiStaso & John Toole, *Death Penalty Fate Still Up in Air in Senate*, UNION LEADER (Manchester), Mar. 13, 2000, at A1, *available in* LEXIS, News Library, Union Leader File (reporting that on March 9, 2000, New Hampshire's majority-Republican House of Representatives voted to abolish the death penalty); Gene Johnson, *N.H. Votes to Repeal Death Penalty*, ASSOCIATED PRESS, May 19, 2000, *available in* 2000 WL 20910239 (reporting the New Hampshire Senate vote to repeal the death penalty); Robert Anthony Phillips, *N.H. Considers Abolishing Unused Death Penalty*, (visited Mar. 10, 2000) <http://www.apbnews.com>.

13. *See* Brad Cain, *Two Oregon Titans Want Death Penalty Ended*, THE COLUMBIAN (Apr. 7, 2000) at B5, *available in* 2000 WL 4478664 ("[Governor John] Kitzhaber and [former Senator Mark] Hatfield—two of Oregon's most popular political figures—have lent their names to an effort to ask voters to outlaw capital punishment in November.").

14. *See* Jack Elliott Jr., *Death Row-Defense Bills Move Through Legislature*, BILOXI SUN HERALD, Mar. 2, 2000, at A5, *available in* Westlaw, News Library, BILSUNH File (discussing proposals in the Mississippi Legislature to make state money available to smaller Mississippi counties to alleviate the expense of competent trial and state post-conviction representation in capital cases); Carol Marbin Miller, *State High Court Raises Standards for Lawyers in Death Row Cases*, MIAMI DAILY BUS. REV., Nov. 5, 1999, at B1 (discussing the Florida Supreme Court's adoption of rules setting minimum standards for defense attorneys in capital cases that require lead capital defense attorneys to have at least five years trial experience in criminal cases—including at least nine jury trials in serious or complex matters and at least two capital cases—and encourage trial judges to appoint two defense lawyers in each case). *See also* Possley & Armstrong, *Revamp Urged*, *supra* note 10 (reporting that at least a dozen states "have established minimum standards for defense attorneys in capital cases,"

> bipartisan sponsorship aiming to do the same and to improve capital prisoners' access to DNA evidence have been introduced in both houses of the United States Congress.[15]

Observers in the *Wall Street Journal*, *New York Times Magazine*, *Salon*, and on *ABC This Week* see "a tectonic shift in the politics of the death penalty."[16]

In April 2000 alone, George Will[17] and Reverend Pat Robertson—both strong death penalty supporters—expressed doubts about the manner

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which typically "require that at least two attorneys be appointed in capital cases and that they have a certain number of years of experience in trying criminal matters").

15. *See, e.g.*, Mike Dorning, *Death Penalty Reforms Gain Backers in D.C.*, CHI. TRIB., Mar. 31, 2000, at N1, *available in* 2000 WL 3651265 (describing bipartisan support and sponsorship for a House bill—paralleling one proposed in the Senate by Sen. Patrick Leahy—aimed at improving capital defendants' access to DNA evidence and adequate representation, and providing for other protective procedures); Mike Dorning, *Senator to Propose Death Row Safeguards*, CHI. TRIB., Feb. 10, 2000, at N1, *available in* 2000 WL 3635167 (summarizing federal legislation proposed by Vermont Senator Patrick Leahy that would, *inter alia*, give states incentives to "require that indigent death penalty defendants be allowed a team of at least two court-appointed attorneys" who "meet competency standards set by the U.S. Administrative Office of the Courts").

16. *ABC This Week* (ABC television broadcast, Apr. 9, 2000) <http://abcnews.go.com/onair/thisweek/ThisWeekIndex.html> (roundtable discussion based on George Will's column, cited *infra* note 17, and Reverend Pat Robertson's expression of support for a death penalty moratorium, in which all four panelists agreed with Robertson, prompting Stephanopoulos to discern "really a tectonic shift in the politics of the death penalty"). *See also* John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, WALL ST. J., Mar. 21, 2000, at A28, *available in* 2000 WL-WSJ 3022420 (noting the "remarkable . . . absence of public protest" when Governor Ryan declared the Illinois moratorium on executions and discerning "a national shift in the politics of capital punishment"); Michael Kroll, *Executioner's Swan Song?* (Feb. 8, 2000) <http://www.salon.com/news/feature/2000/02/08/death_penalty/index.html> (asserting that Governor Ryan's decision to suspend the death penalty represents a "public shift"); Bruce Shapiro, *Capital Offense*, N.Y. TIMES MAG., Mar. 26, 2000 ("But suddenly . . . death-row innocence cases have taken hold of the public mind, and capital punishment itself seems to be approaching a political tipping point."). *See also* Steven A. Holmes, *Look Who's Questioning the Death Penalty*, N.Y. TIMES, Apr. 16, 2000, § 4, at 3, *available in* LEXIS, News Library, NYT File (noting that the "conservative rethinking" of the death penalty is exemplified by Governor Ryan's imposed moratorium on the death penalty in his state); Johnson, *supra* note 8 (reporting that the issue of wrongful executions "is gaining resonance around the nation, after many years in which it was seen as essentially a dead letter in American politics"); Lucas, *supra* note 4 (stating that recent public opinion polls suggest that politicians need not be so rigid in their stance and their perception of the public's opinion on the use of the death penalty); Clarence Page, *Close Calls on Death Row Finally Prompting Second Thoughts*, DALLAS MORNING NEWS, Apr. 16, 2000, *available in* 2000 WL 7572819 (discussing Governor Ryan's actions in the context of national movements related to the death penalty).

17. In an opinion column discussing a recently published book by Barry Scheck, Peter Neufeld, and Jim Dwyer entitled *Actual Innocence*, George Will concluded:

> You could fill a book with such hair-curling true stories of blighted lives and justice traduced [as a result of the capital conviction of innocent defendants]. Three authors have filled one. It should change the argument about capital punishment and other aspects of the criminal justice system. Conservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.

George F. Will, *Innocent On Death Row*, WASH. POST, Apr. 6, 2000, at A23, *available in* 2000 WL 2295245.

in which government officials carry out the penalty in the United States, and Robertson subsequently advocated a moratorium on *Meet the Press*.[18] In response, Reverend Jerry Falwell called for continued—even swifter—execution of death sentences.[19]

Fueling these competing initiatives are two beliefs about the death penalty: One is that death sentences move too slowly from imposition to execution, undermining deterrence and retribution, subjecting our criminal laws and courts to ridicule, and increasing the agony of victims.[20] The other is that death sentences are fraught with error, causing justice too often to miscarry, and subjecting innocent and other undeserving defendants—mainly, racial minorities and the poor—to execution.[21]

Some observers attribute these seemingly conflicting events and opinions to "America's own schizophrenia. . . . We believe in the death penalty, but shrink from it as applied."[22] These views may not conflict, however, and Americans who hold *both* may not be irrational. It may be that capital sentences spend too much time under review *and* that they are fraught with disturbing amounts of error. Indeed, it may be that capital sentences spend so much time under judicial review precisely *because* they are persistently and systematically fraught with alarming amounts of error, and that the expanding production of death sentences may compound the production of error. We are led to this conclusion by a study of all 4,578 capital sentences that were finally reviewed by state direct appeal courts and all 599 capital sentences that were finally reviewed by federal habeas corpus courts between 1973 and 1995.[23]

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18. *See* Brooke A. Masters, *Pat Robertson Urges Moratorium On U.S. Executions*, WASH. POST, Apr. 8, 2000, at A1, *available in* 2000 WL 2295691 (quoting Robertson's statement that "a moratorium would be very appropriate); *Meet the Press* (NBC television broadcast, May 7, 2000) (interviewing Rev. Pat Robertson, who explains his simultaneous support for the death penalty and a moratorium on executions); *Robertson Backs Moratorium, Says Death Penalty Used Unfairly*, CHI. TRIB., Apr. 8, 2000, at N12, *available in* 2000 WL 3654070 (summarizing Robertson's views on the death penalty expressed during a symposium at the William and Mary Law School).

19. *See* Frank Green, *Falwell Opposes a Moratorium*, RICHMOND TIMES-DISPATCH, Apr. 11, 2000, at B4, *available in* 2000 WL 5035053 ("'Well, Pat and I do not disagree on many things, but on this one we do . . . . I don't think a moratorium is needed.").

20. See the views expressed by Falwell, Frum and Methvin, *supra* notes 3, 19 and accompanying text.

21. See the views expressed by Robertson, Will and others, *supra* notes 17-18 and accompanying text.

22. Kroll, *supra* note 16.

23. Much of the information reported here is contained in six electronically stored databases. The authors generated the first two of these databases in their entirety; the other four were generated by others.

The first database—referred to herein as "DADB" (for Direct Appeal Database)—contains information on all 4,578 state capital direct appeals that were finally decided between 1973 and 1995. To be "finally decided" within that time period, the highest state court with jurisdiction to review capital judgments in the relevant state must have taken one of two actions during the study period: (1) affirmed the capital judgment, or (2) overturned the capital judgment (conviction or sentence) on one or more grounds. (Capital judgments are overturned on direct appeal only on the basis of "serious

error," as defined *infra* note 29 and accompanying text.) If one of those two actions occurred prior to or during 1995 and the United States Supreme Court thereafter denied certiorari review, the case is nonetheless included in the study because the Supreme Court's action did not affect the finality of the state decision. If the Supreme Court instead *granted* certiorari in a case but did not decide the case before or during 1995, the case is omitted from the study because the Supreme Court's action withdrew the finality of the decision. DADB contains the name of the individual whose capital judgment was under review; the sentencing state; the year, outeome, citation, and subsequent judicial history (rehearing, certiorari) of the decision finally resolving the appeal; and information about the basis for reversal if a reversal occurred.

The second database—referred to herein as "HCDB" (for Habeas Corpus Database)—contains information on all 599 initial (*i.e.*, nonsuccessive) capital federal habeas corpus cases that were finally decided between 1973 and 1995. To be "finally decided" within that time period, all of the following events must have occurred in the case within the study period: (1) a United States District Court must have (a) denied habeas corpus relief, thereby approving the capital judgment, or (b) granted habeas corpus relief from the capital judgment (conviction or sentence) on one or more grounds; (2) if an appeal was timely filed, a United States Court of Appeals must have taken or approved action (1)(a) or (1)(b); and (3) if certiorari review was timely filed, the United States Supreme Court must have either (a) denied review or (b) granted review and taken or approved action (1)(a) or (1)(b). (Federal habeas relief from capital judgments is granted only on the basis of "serions error," as defined *infra* note 29 and accompanying text.) HCDB contains the name of the individual whose capital judgment was under review; the sentencing state; the timing of the habeas petition and its adjudication at the various stages; the outcome at the various stages; information about the petitioner, lawyers, judges, courts, victim, and offense; the aggravating and mitigating cireumstances found at trial; procedures used during the habeas review process; and the asserted and the judicially accepted bases for and defenses to habeas relief.

The first database that was generated by others—referred to herein as "DRCen" (for *Death Row U.S.A.* Census)—is a compilation of the information used to produce the NAACP Legal Defense Fund's quarterly death row census *Death Row U.S.A.* See NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW U.S.A. REPORTER CURRENT SERVICE [hereinafter DEATH ROW U.S.A.]. This database has the name of all individuals who were on a state death row between 1973 and 1995, the state where their death sentence was imposed, and the sentencing year. *Death Row U.S.A.* is also our source of information about when and where executions occurred and whether they were consensual or nonconsensual, as defined *infra* note 27.

Three additional databases used in this Article contain information collected by the United States Government. The database referred to herein as "USCen" (for U.S. Census) is a compilation of information collected by the United States Census Bureau. *See* U.S. Census Bureau, *American Factfinder*, (visited May 20, 2000) <http://factfinder.census.gov/java_prod/dads.ui.homePage.HomePage> (providing a searchable database of census information). "UCRDB" (for Uniform Crime Reports Database) is a compilation of information collected by the United States Department of Justice's Bureau of Justice Statistics in its annual Uniform Crime Reports. *See* National Archive of Criminal Justice Data (NACJD), *Uniform Crime Reporting Data*, (visited May 20, 2000) <http://www.icpsr.umich.edu/NACJD/ucr.html#ucr> (providing access to the UCR database); *see also* Federal Bureau of Investigation, *Uniform Crime Reports*, (visited May 20, 2000) <http://www.fbi.gov/ucr.htm> (providing abstracts and summaries of data). "PrisCen" (for Prison Census) is a compilation of information collected annually by the Bureau of Justice Statistics. *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (various years).

A final data set relied upon here is reported in full in James S. Liebman, Jeffrey Fagan, and Valerie West, *A Broken System: Error Rates in Capital Cases 1973-1995* <www.thejusticeproject.org> [hereinafter *A Broken System*], and contains an *incomplete* list of the capital cases in which state post-conviction relief was granted between 1973 and the present. The list is incomplete because many state post-conviction decisions (whether or not relief was granted) are not reported, and information on them is not available except by a seareh of the records of each of the thousands of local, intermediate, and statewide courts in the United States with jurisdiction over capital post-conviction cases. The list is also incomplete in that it only reports state post-conviction reversals. It thus does

II. Summary of Central Findings

In *Furman v. Georgia*[24] in 1972, the Supreme Court reversed all existing capital statutes and death sentences.[25] The modern death-sentencing era began the next year with the implementation of new capital statutes designed to satisfy *Furman*. In order to collect information about capital sentences imposed and reviewed after 1973 (no central repository exists), we conducted a painstaking search, beginning in 1995, of all published state and federal judicial opinions in the United States conducting direct and habeas review of capital judgments, and many of the available opinions conducting state post-conviction review of those judgments. We then (1) checked and catalogued all cases the opinions revealed, (2) collected hundreds of items of information about each case from the published decisions and the NAACP Legal Defense Fund's quarterly death row census,[26] (3) tabulated the results, and (4) (still in progress) conducted multivariate statistical analyses to identify factors that may contribute to those results.

Six years in the making, our central findings thus far are these:

- Between 1973 and 1995, approximately 5,760 death sentences were imposed in the United States. Only 313 (5.4%; one in 19) of those resulted in an execution during the period.[27]

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not contain the information needed to produce an accurate count of (1) the number and percentage of capital judgments that "cleared" state direct review and were finally decided by state post-conviction courts during the study period (a large but unknown uumber of cases that "cleared" direct appeal during the study period were pending in front of, but had not yet been finally decided by, state post-conviction courts as of the end of 1995), and (2) the number and percentage of capital judgments that were finally reviewed on state post-conviction that were either affirmed or overturned. The data in this final data set were collected during April, 2000 in the following manner: Capital attorneys in each of the 28 states on which this study focuses (states in which at least one capital judgment was reviewed on federal habeas corpus between 1973 and 1995) were contacted and asked to report and provide any available information about all known cases in which capital judgments were overturned during state post-conviction proceedings since 1973. The names of individuals granted capital state post-conviction relief and some additional identifying information was received from 26 of the 28 states (all but Delaware and Washington). In all cases, the reporting attorney said that he or she was not sure that the list of reversals provided was complete. Where possible through the use of cases reported in the national reporter system or on Westlaw, the information provided was verified and supplemented. Also verified were all unpublished cases from Nevada (as to which the actual unpublished opinions were provided); most unpublished cases from Arizona and Texas (using newspaper accouuts available on Westlaw and cited in *A Broken System*), and a few additioual unpublished cases where the secondary sources cited in *A Broken System* were readily at hand, such as the John Henry Knapp case in Arizona. *See* Anthony Sommer, *Knapp Sentenced to Time Served, Goes Free after Pleading No Contest*, PHOENIX GAZETTE, Nov. 20, 1992, at B1, *available in* 1992 WL 8297955. Other unreported information has not been verified, although information has been provided that permits verification using local court records—a task for future research.

24. 408 U.S. 238 (1972).

25. *See id.* at 239-40.

26. DEATH ROW U.S.A., *supra* note 23.

27. DRCen, *supra* note 23; DEATH ROW U.S.A., *supra* note 23, at 907. The figure in the text

- Of the 5,760 death sentences imposed in the study period, 4,578 (79%) were finally reviewed on "direct appeal" by a state high court.[28] Of those, 1,885 (41%) were thrown out on the basis of "serious error" (error that substantially undermines the reliability of the outcome).[29]

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refers to *all* executions during the study period. For the reasons discussed below, *see infra* note 29, when calculating error rates it often is sensible to consider only the executions that were nonconsensual in the sense that the prisoner insisted that his capital judgment be subjected to the full review process before he was executed. The number of nonconsensual executions between 1973 and 1995 was 263, or 4.6% of the total number of death sentences. *See* DEATH ROW U.S.A., *supra* note 23, at 8-23; BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1998 12 (1999) <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp98.pdf>.

28. DRCen, *supra* note 23; DADB, *supra* note 23. The state direct appellate process is described *infra* note 29.

29. DADB, *supra* note 23. In calculating error rates, we count only errors that result in the reversal of a capital conviction or sentence. To do so, the error must be "serious" in three respects. First, to be reversible, error must be *prejudicial*, either because the defendant shows it potentially affected the outcome of her case or because it is the kind of error that almost always has that effect. *See* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE §§ 32.1, 32.3, 32.4 (3rd ed. 1998) (discussing the harmless error doctrine). The vast majority of error that state appellate courts discover is deemed harmless and does *not* result in reversal. In Illinois, for example, in addition to reversing half of the capital judgments it has reviewed, "the Illinois Supreme Court has upheld scores of death sentences while forgiving trial errors that benefited prosecutors, dismissing the errors as harmless." Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, at 1, *available in* 1999 WL 2932178. One such case was Anthony Porter's, in which the Illinois Supreme Court based its harmlessness findings on the "'overwhelming'" evidence of Porter's guilt; Porter was later released as innocent when another man confessed to his crime. *Id.* Another article notes:

> Between 1993 and 1997, there were 167 published opinions in which the Illinois Appellate Court or Illinois Supreme Court found that prosecutors committed some form of misconduct that could be considered harmless. In 122 of those cases—or nearly three out of four times—the reviewing court affirmed the conviction, holding that the misconduct was "harmless."

Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at 1, *available in* 1999 WL 2834609. And in Oklahoma, "[a]t least four men convicted of murder have received new trials based upon an appellate finding that [Oklahoma City's District Attorney] broke the rules of a fair trial"; that same office has been criticized by courts for similar misconduct in "at least 17 other" cases in which the errors were found harmless. Ken Armstrong, *'Cowboy Bob' Ropes Wins—But at Considerable Cost*, CHI. TRIB., Jan. 10, 1999, at N13, *available in* 1999 WL 2833491.

Second, to be reversible, error generally must have been *properly preserved*. Most state direct appeal courts will not grant relief based on error—no matter how egregious and prejudicial—that the defendant did not properly preserve by way of (1) a timely objection at trial, (2) reiteration in a timely new trial motion at the end of trial, and (3) timely and proper assertion on appeal. *See* 1 LIEBMAN & HERTZ, *supra*, §§ 7.1a, at 276-77 & n.29 (discussing the need to fully litigate all federal law claims in the state court). This is true even in cases where the failure to preserve the error was the fault of counsel, not the defendant, and even in many cases where the counsel's mistake resulted from inexperience, incompetence, or sheer stupidity, and not a valid exercise of professional judgment. *See* Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 683 (1990) (discussing the low "effective assistance of counsel" standard of *Strickland v. Washington*, 466 U.S. 668 (1984)); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on*

- Most of the remainder of the death sentences were then inspected by state post-conviction courts.[30] Although incomplete, our data (reported in *A Broken System*[31]) reveal that state post-conviction review is an important source of review in some states, including Florida, Georgia, Indiana, Maryland, Mississippi, and North Carolina.[32] In Maryland, for example, at least 52% of capital judgments reviewed in state post-conviction proceedings during the study period were overturned due to serious error; the same was true for at least 25% of the capital judgments that were similarly reviewed in Indiana, and at least 20% of those reviewed in Mississippi.[33]

Executions, 4 GEO. J. ON FIGHTING POVERTY 3, 28-30 (1996) (examining the ABA Task Force discussion of procedural requirements). Numerous prisoners have been executed despite acknowledged prejudicial errors affecting their convictions and sentences because they failed to preserve their objections. Examples include the capital prisoners in *Gray v. Netherland*, 518 U.S. 152, 162-70 (1996); *Coleman v. Thompson*, 501 U.S. 722, 747-49 (1991); *Dugger v. Adams*, 489 U.S. 401, 408 (1989); and *Smith v. Murray*, 477 U.S. 527, 533-35 (1986), each of whom had an evidently meritorious constitutional claim that he was capitally convicted or sentenced in violation of the United States Constitution, but nonetheless was denied relief in state (and then, as a consequence, federal) court based on his failure to assert the claim at the time or in the manner required by state law, and was subsequently executed. *See* DEATH ROW U.S.A., *supra* note 23, at ix, xi, xvi.

Finally and most obviously, even prejudicial error only results in reversal if it is discovered. If it is not discovered because, for example, the party responsible for it fails to disclose it, *see infra* note 74 and accompanying text, reversal will not occur and the error will not be deemed "serious" by our measure.

Hundreds of examples of "serious error" found in state post-conviction proceedings, and dozens of examples of the even narrower category of "serious error" warranting federal habeas relief are reported in the appendices to *A Broken System*, *supra* note 23.

30. For a discussion of errors found at the state post-conviction stage, see *A Broken System*, *supra* note 23, app.; *see also supra* note 23.

31. *See supra* note 23.

32. *See A Broken System*, *supra* note 23.

33. *See A Broken System*, *supra* note 23, app. A (giving Maryland, Indiana and Mississippi Report Cards). We can only say "at least" for the reasons set out *infra* note 36. The category of "serious error" that leads to state post-conviction reversal is narrower than "serious error" at the direct appeal stage, because generally only properly preserved state and federal *constitutional* violations that (1) *were not*, and (2) *could not have been* raised on direct appeal can be the basis for state post-conviction reversal. *See supra* note 29, *infra* note 35. The United States Supreme Court itself occasionally grants relief in capital cases on review of state direct review proceedings. *See, e.g.*, Yates v. Evatt, 500 U.S. 391, 411 (1991) (reversing the state supreme court's finding that the incorrect jury instructions were harmless error); Johnson v. Mississippi, 486 U.S. 578, 585-90 (1988) (finding that a defendant's prior conviction which had been overturned should not have been used as an aggravating factor, and that such error was harmless); Tison v. Arizona, 481 U.S. 137 (1987) (holding that in a felony murder case, courts must find "major participation in the felony committed, combined with reckless disregard for human life," and remanding so the Arizona courts could make the latter determination); Truesdale v. Aiken, 480 U.S. 527 (1987) (reversing per curiam the decision of the South Carolina Supreme Court refusing to apply *Skipper v. South Carolina*, 476 U.S. 1 (1986) retroactively). We treat these Supreme Court cases reviewing state post-conviction decisions as findings of "serious" error and, in all these cases, federal constitutional error infecting capital sentences.

- Of the death sentences that survived state direct and post-conviction review, 599 were finally reviewed on a first habeas corpus petition during the 23-year study period.[34] Of those 599, 237 (40%) were overturned due to serious error.[35]

- The "overall success rate" of capital judgments undergoing judicial inspection, and its converse, the "overall error-rate," are crucial factors in assessing the efficiency of our capital punishment system. The "overall *success* rate" is the proportion of capital judgments that underwent, and *passed*, the three-stage judicial inspection process during the study period. The "overall *error* rate" is the frequency with which capital judgments that underwent full inspection were *overturned* at one of the three stages due to serious error.[36]

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34. *See* HCDB, *supra* note 23. "Final review" is defined *supra* note 23.

35. *See* HCDB, *supra* note 23. The definition of "serious error" that warrants reversal on habeas is even narrower than the analogous definition at the direct appeal stage. *Cf. supra* note 29 and accompanying text (setting out the definition of serious error at the direct appeal stage). This is because error is only reversible on habeas if it meets the three criteria for "seriousness" required on direct appeal—it must be (1) prejudicial, (2) properly preserved aud (3) discovered, *see* LIEBMAN & HERTZ, *supra* note 29, §§ 7.1a, 11.2b, 26.1, 32.1-32.5; *supra* note 29 (explaining each requirement—and if, *in addition*, the error (4) violates the federal Constitution, *see* 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994 and Supp. IV 1998) (providing that a federal judge may grant a writ of habeas corpus if the prisoner is in custody in violation of the Constitution); (5) is not a search and seizure claim, or some other claim based on the Fourth Amendment exclusionary rule, *see* Stone v. Powell, 428 U.S. 465, 494 (1976) (holding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial"); (6) in habeas cases litigated in 1989 and after, is not based on "new law," *see* Teague v. Lane, 489 U.S. 288, 299 (1989) (declining to address the defendant's contention that *Taylor v. Louisiana*, 419 U.S. 522 (1975), applies to petit juries because "the rule urged by petitioner should not be applied retroactively to cases on collateral review"); and (7) in habeas cases litigated in 1993 and after, meets a substantially higher standard of prejudice or "harmful error," *see* Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (determining that the standard for harmful error is error that "had substantial and injurious effect or influence in determining the jury's verdict" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))). *See generally* LIEBMAN & HERTZ, *supra* note 29, §§ 9.1, 9.2, 25.1, 32.1 (discussing constraints (4) through (7) on habeas relief). Dozens of examples of "serious error" warranting federal habeas relief from capital judgments imposed by most of the study states are collected in *A Broken System*, *supra* note 23, app. D.

36. A production-line/product-inspection analogy helps explain how these figures are calculated. The "overall error rate" is the proportion of capital judgments thrown out during the first (state direct appeal) inspection due to serious error, plus the proportion of the judgments that survive the first inspection thrown out at the second (state post-conviction) inspection, plus the proportion of judgments that survive both state inspections thrown out at the final (federal habeas) stage. The "overall success rate" is the converse. In note 37 *infra*, we use this method to calculate the national composite "overall error rate."

As we indicate by our occasional use of the phrase "at least" in our narrative, and by our use of the "≥" symbol in the national, state, and circuit Report Cards, *see A Broken System*, *supra* note 23, apps. A & B, the "overall error rates" calculated here are in fact *underestimates*. Due to incomplete data we assume that all death sentences that survived the direct appeal inspection and are not known to have been reversed during the state post-conviction inspection passed muster during that

Nationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was *68%*.[37]

- Because "serious error" is error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial,[38] each instance of that error warrants public concern. The most common errors found at the state post-conviction stage (where our data are most complete) are (1) egregiously incompetent defense lawyering (accounting for 37% of the state post-conviction reversals), and (2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty (accounting for another 16%—or 19%, when all forms of law enforcement misconduct are considered).[39] These two violations count as "serious," and thus warrant reversal, *only* when there is a "reasonable probability" that, but for the responsible lawyer's miscues, the outcome of the trial would have been different.[40]

  The result of very high rates of serious, reversible error among capital convictions and sentences, and very low rates of capital reconviction and resentencing, is the severe attrition of capital judgments. Figure 1 illustrates the sources of attrition, and the eventual disposition of cases where death sentences were reversed.

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inspection. In fact, many capital judgments affirmed on direct appeal were *pending in*, but had not yet been *finally decided by*, state post-conviction proceedings by the end of the study period. Inflating the denominator in this way—using the class of cases available for review as a proxy for the cases that actually underwent final review—leads us systematically to overestimate the success rate and underestimate the error rate. *See A Broken System*, *supra* note 23; *infra* note 49.

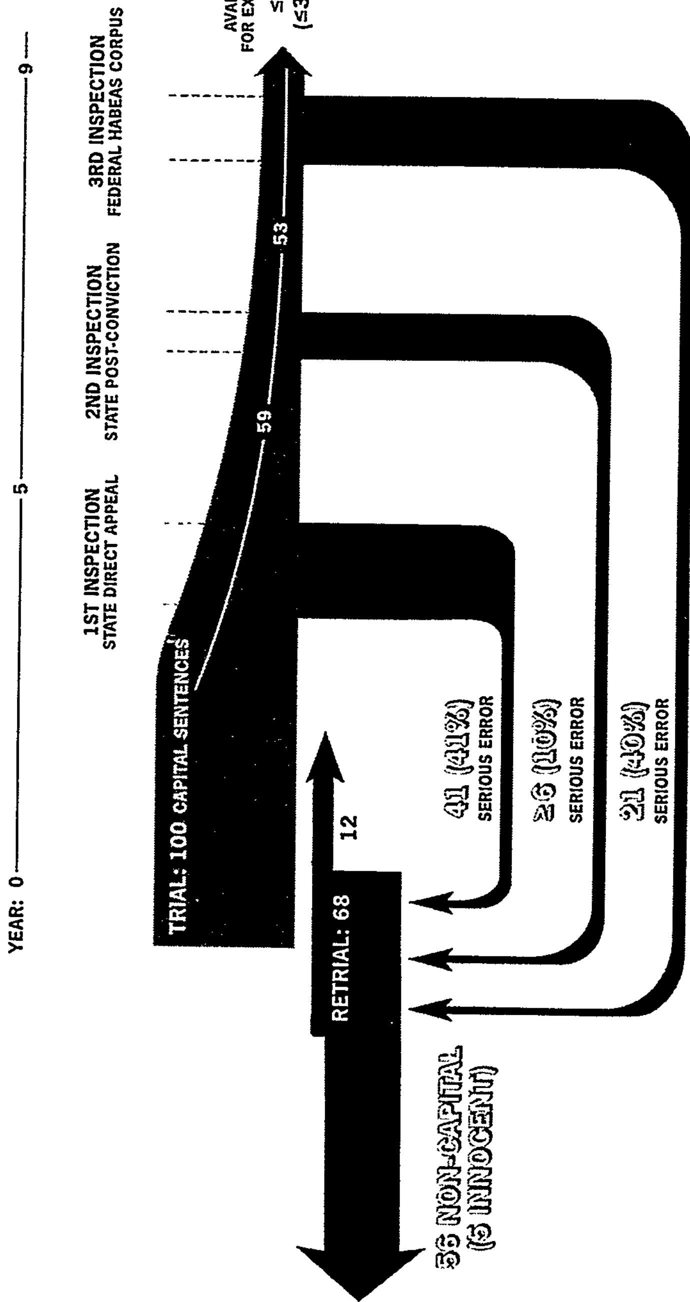
37. *See* DADB, *supra* note 23; HCDB, *supra* note 23, *A Broken System*, *supra* note 23. Because 41% of the capital judgments reviewed on state direct appeal were found to be tainted by serious error, only 59% of those judgments were available for state post-conviction review. Because at least 10% (this figure is probably higher, *see supra* note 36) of that 59%—meaning at least 5.9% of the original pool (≥.10 x .59 = ≥.059)—failed this second, state post-conviction inspection, the overall rate of error found by *state* courts is 47% (41% + 6%) of the original pool. Then, of the 53% (100%-47% = 53%) of capital judgments that were available for federal habeas review, 40%—meaning 21% of the original pool (.40 x .53)—failed the federal inspection. The "overall error rate" thus is at least 68% of the overall pool (41% + ≥6% + 21% = ≥68%). In other words, at least 68% of the capital judgments that were fully inspected were found seriously flawed at some stage.

Our "overall error rate" is *not* the rate of error in the 5,760 death sentences imposed between 1973 and 1995. That number cannot be calculated because, at the end of 1995, many of those death sentences were pending in some court awaiting review, but had not yet been finally resolved at one of the three inspection stages. This rate instead uses the outcomes of the 4,578 cases in which state direct review occurred during the study period, and the 599 of those cases in which subsequent federal habeas review occurred, together with the 248 known state post-conviction reversals (taken as a proportion of the 2,693 capital judgments that "cleared" state direct appeal) to calculate the error rate found in capital judgments that were finally reviewed.

38. *See supra* note 29.

39. *See A Broken System*, *supra* note 23.

40. *See, e.g.*, Williams v. Taylor, 120 S. Ct. 1495, 1496 (2000); Strickler v. Greene, 527 U.S. 263, 264 (1999).


THE ATTRITION OF CAPITAL JUDGEMENTS
YEAR: 0
5
9
1ST INSPECTION
STATE DIRECT APPEAL
2ND INSPECTION
STATE POST-CONVICTION
3RD INSPECTION
FEDERAL HABEAS CORPUS
AVAILABLE FOR EXECUTION
≤32
(≤32%)
TRIAL: 100 CAPITAL SENTENCES
59
53
41 (41%)
SERIOUS ERROR
≥6 (10%)
SERIOUS ERROR
21 (40%)
SERIOUS ERROR
TOTAL: ≥68 SERIOUS ERROR
12
RETRIAL: 68
56 NON-CAPITAL
(5 INNOCENT)

For every 100 death sentences imposed and reviewed during the study period, 41 were turned back at the state direct appeal phase because of serious error. Of the 59 that got through that phase to the second, state post-conviction stage, at least[41] 10%—six more of the original 100—were turned back due to serious flaws. And, of the 53 that got through that stage to the third, federal habeas checkpoint, 40%—an additional 21 of the original 100—were turned back because of serious error. Overall, at least 68 of the original 100 were thrown out because of serious flaws, compared to only 32 (or less) that were found to have passed muster—after an average of 9-10 years had passed.

And for each such 68 individuals whose death sentences were overturned for serious error, 82% (56) were found on retrial *not* to have deserved the death penalty, including 7% (5) who were *cleared of the capital offense.*

- The seriousness of these errors is also revealed by what happens on retrial when the errors are supposed to be cured. In our state post-conviction sub-study where the post-reversal outcome is known, over four-fifths (56 out of 68) of the capital judgments that were reversed were replaced on retrial with a sentence less than death, or no sentence at all. In the latter regard, fully 7% of the reversals for serious error resulted in a determination on retrial that the defendant was *not guilty* of the offense for which he previously was sentenced to die.[42]

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41. For an explanation of why we say "at least," see *supra* note 36.

42. *See A Broken System, supra* note 23. If a capital conviction is overturned on appeal or post-conviction review, the defendant may be (1) released for lack of evidence of guilt (as, for example, in the *Bowen, Brown, Jent, Miller, Nelson* and *Williamson* cases summarized in *A Broken System, supra* note 23); (2) permitted to accept a plea to a lesser offense, *see, e.g.*, Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1133 (1998); Miller and Jent v. Wainwright, Nos. 86-98-Vic.-T-13 and 85-1910-Civ.-T-13 (M.D. Fla. Nov. 13, 1987)) or to the same offense but a lesser penalty, *see, e.g.*, Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); Ross v. Kemp, 393 S.E.2d 244 (Ga. 1990)); (3) retried and (a) acquitted (as in the *Wallace* and *Munson/Oklahoma* cases summarized in *A Broken System, supra* note 23), (b) released upon the jury's failure to agree on a verdict (as in the *Kyles* case summarized in *A Broken System, supra* note 23), (c) reconvicted of a noncapital offense, *see, e.g.*, People v. Salazar, 643 N.E.2d 698 (Ill. 1994); State v. Butler, 951 S.W.2d 600 (Mo. 1997)), (d) reconvicted of a capital offense but awarded a lesser sentence, or (e) reconvicted and resentenced to die. If only the death sentence was overturned, the defendant may be (1) offered, and accept, a plea or other arrangement resulting in a lesser sentence; or (2) subjected to a new sentencing hearing at which the outcome is (a) a lesser sentence or (b) a death sentence. Several of these potential results are illustrated by the outcomes in recent North Carolina cases:

> Last May, a Superior Court judge overturned the murder conviction and death sentence of Charles Munsey . . . because it was clear that he was innocent of murder, and that the district attorney who prosecuted him . . . as well as other law officials withheld exculpatory evidence. Tragically, Munsey died . . . awaiting a new trial.

- High error rates pervade American capital-sentencing jurisdictions, and are geographically dispersed. Among the twenty-six death-sentencing jurisdictions in which at least one case has been reviewed in both the state and federal courts and in which information about all three judicial inspection stages is available:
  1. 24 (92%) have overall error rates of 52% or higher;
  2. 22 (85%) have overall errors rates of 60% or higher;
  3. 15 (61%) have overall error rates of 70% or higher.
  4. Among other states, Georgia, Alabama, Mississippi, Indiana, Oklahoma, Wyoming, Montana, Arizona, and California have overall error rates of 75% or higher.[43]

> Last summer, a Guilford County prosecutor told a hearing judge that he "just plain forgot" about a credible independent witness who could have provided a solid alibi for [death row inmate] Stephen Mark Bishop. Bishop is awaiting a second trial.
>
> In November, Alfred Rivera had been on North Carolina's death row for two years for a double murder . . . when, in a second trial, a jury acquitted him. The N.C. Supreme Court had ordered the new trial, ruling that the trial judge should have allowed jurors to hear testimony that Rivera had been framed by his co-defendants.
>
> [Governor] Hunt commuted the death sentence of Wendell Flowers . . . in December over doubts about his guilt . . . .

Stephen Dear, *A Death Penalty Cease-Fire for N.C.*, NEWS & OBSERVER (Raleigh), Apr. 16, 2000, at A31, *available in* 2000 WL 3924050

43. *See* DADB, *supra* note 23; HCDB, *supra* note 23; *A Broken System*, *supra* note 23. *See also infra* Figures 2 and 3. For some time, the regional press has suspected the patterns that our study demonstrates. For instance, in Illinois it was reported:

> An Illinois Supreme Court ruling on Friday pushed the number of death-penalty cases in Illinois that have been reversed for a new trial or sentencing hearing to 130—exactly half the total of those capital cases that have completed at least one round of [state] appeals, according to a Tribune analysis.

Ken Armstrong & Christi Parsons, *Half of State's Death-Penalty Cases Reversed: A Variety of Errors Found in 130 Trials*, CHI. TRIB., Jan. 22, 2000, at 1, *available in* 2000 WL 3629108. In the state of Washington, seven state capital sentences were overturned in eight years. Mike Carter, *Court Orders Retrial in 1986 Murder Case*, SEATTLE TIMES, July 15, 1999, at B1, *available in* 1999 WL 6282738. There were a total of only fourteen men on Washington's death row at that time. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 6 <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp98.pdf>. The press has also shown suspicion in Utah, California, Florida, Nevada, and Tennessee. *See* Lee Davidson, *Death Row the End?: Most Get Out Alive*, DESERET NEWS (Salt Lake City), Dec. 13, 1999, at B1, *available in* 1999 WL 26543645 (noting that since Utah reinstated the death penalty in 1973, sixteen prisoners have left the state's death row, of which six were executed and ten (63%) had their convictions or sentences overturned); Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, A.P. NEWSWIRES, Mar. 26, 2000, *available in* Westlaw, News Library, APWIRES file ("Tennessee, with 97 people on Death Row" who have accumulated over the past 22 years since the first post-*Furman* death sentence was imposed in April 1978, *see* Houston v. State, 593 SW2d 267 (Tenn. 1980), "is [still awaiting] its first execution since 1960."); Howard Mintz, *Slow Death: The Capital Punishment Gridlock in California*, SAN JOSE MERCURY NEWS, Mar. 12, 2000, at A1, *available in* Westlaw, News Library, SJMERCURY file (reporting that between 1992 and 2000, California's death row grew from 350 to over 550 inmates, but it only executed seven men; in approximately the same period, state courts overturned approximately 10 death sentences, and federal courts overturned at least

It is sometimes suggested that Illinois, whose governor declared a moratorium on executions in January 2000 because of the spate of death row exonerations there,[44] generates less reliable death sentences than other states.[45] Our data do not support this hypothesis: The overall rate of error found to infect Illinois capital sentences (66%) is slightly *lower* than the rate in capital-sentencing states as a whole (68%).[46]

- High error rates have persisted for decades. More than 50% of all cases reviewed were found seriously flawed in 20 of the 23 study years, including in 17 of the last 19 years. In half of the years studied, the error rate was over 60%. Although error rates detected on state direct appeal and federal habeas corpus dropped modestly in the early 1990s, they went back up in 1995.[47] The amount of error detected on state post-conviction has risen sharply throughout the 1990s.[48]

- The 68% rate of *capital* error found by the three stage inspection process is much higher than the <15% rate of error those same three inspections evidently discover in *noncapital* criminal cases.[49]

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13); Rene Stutzman, *High Court Puts Death Cases Back into Play: Errors Were Found in 10 of 12 Capital-Punishment Cases Reviewed This Year*, ORLANDO SENTINEL, Aug. 24, 1999, at D1, *available in* 1999 WL 2829798 (stating that in the first eight months of 1999, the Florida Supreme Court found trial errors requiring retrial, resentencing, or conversion of the sentence to life in prison in 83% of the first-time death penalty appeals it reviewed; the figure for all of 1998 was 77%); Sean Whaley, *Nevada's Death Row History Criticized*, LAS VEGAS REV.-J., Feb. 7, 2000, at 1B, *available in* Westlaw, News Library, LV-RJ-C file (reporting that since 1993 state and federal courts have reversed the convictions of eight of the state's death row inmates, including three (as of this writing, four, *see* Brendan Riley, *Emotional Mazzan Released*, LAS VEGAS REV.-J., May 7, 2000, at 1) who were released from prison; and that since 1979 eight men have been executed in Nevada, but that all but one of them gave up their appeals and volunteered to be executed).

44. *See supra* note 8.

45. *See, e.g.*, *Governor Says He Will Not Impose Moratorium on Executions*, A.P. NEWSWIRES, Feb. 15, 2000 *available in* Westlaw, News Library, APWIRES file (quoting Florida Governor Jeb Bush as stating, "Illinois appears to have a unique problem with the administration of capital punishment. Here in Florida, there is no competent evidence that suggests an innocent person has been wrongly executed.").

46. *See* DADB, *supra* note 23; HADB, *supra* note 23; *A Broken System*, *supra* note 23. *See also* National Composite and Illinois Report Cards, *A Broken System*, *supra* note 23; Figure 2, *infra* (all offering state comparisons).

47. *See infra* Figure 2.

48. *Id.*

49. Data on direct appeal and post-conviction outcomes in noncapital cases is sketchy, but suggests the following conclusions: (1) At the direct appeal stage, serious or reversible error is detected in about 12 to 20% of appealed noncapital criminal judgments. (2) Noncapital criminal judgments that are *appealed* compose only a small subset of the criminal convictions that are *obtained*. The vast majority of criminal convictions result from bargained guilty pleas, and most pleas are not appealed. (By

- Appointed federal judges are sometimes thought to be more likely to overturn capital sentences than elected state judges.[50] In fact, state judges are the first and most important line of defense against erroneous death sentences. Elected state judges found serious error in and reversed 90% (2,133 of 2,370) of the capital sentences that were overturned during the study period.[51]

- Under current state and federal law, capital prisoners have a legal right to one round of direct appellate, state post-conviction, and federal habeas corpus review.[52] The high rates of error found at

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contrast, virtually every capital conviction and sentence is appealed. *See* Whitmore v. Arkansas, 495 U.S. 149, 174-75 & n.1 (1990).) (3) The best available evidence is that serious error is detected in about 3% of the noncapital federal habeas corpus petitions that are filed, and that such petitions are filed by about three or four out of every *1000* state prisoners each year. (4) Although there is no similar data for noncapital state post-conviction proceedings, most criminal lawyers believe noncapital error is detected less often there than on federal habeas corpus, and that prisoners are no more likely to seek state post-conviction than federal habeas corpus review. These conclusions are based on evidence presented in James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. (forthcoming 2000); Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 SO. CAL. L. REV. 2057, 2524 (1993) (estimating "that of every thousand persons convicted in state prosecutions and committed to custody in any given year, only three to four actually file habeas corpus petitions challenging their custody"); Brief Amicus Curiae of Benjamin Civiletti, et al., in Support of Respondent Frank R. West in Wright v. West, No. 91-542, 505 U.S. 277 (1992) (filed Mar. 4, 1992) App. A, Table I, n.1 (providing data on the rate of relief granted to state prisoners from 1963-1981).

Assume, very conservatively, that (1) 70% of all criminal judgments are reviewed on direct appeal, among which 20% (14% of the original pool) are found to contain serious error; (2) 10% of the cases that were affirmed on direct appeal (*i.e.*, 6% of the original pool) go on to state post-conviction review, at which stage 5% (.3% of the original pool) are found to contain serious error; and (3) 10% of the cases that were affirmed on direct appeal and were not overturned on state post-conviction (another 6% of the original pool) go on to federal habeas review, at which stage another 5% (.3% of the original pool) are found to contain serious error. Even vastly overestimating both the appeal and reversal rates in this way generates only a 15% (14% + .3% + .3% = 14.6%) overall error rate.

50. *See, e.g.*, 142 Cong. Rec. S3362 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch) ("[O]ne of the biggest [federal habeas corpus] problems [is] looney judges in the Federal courts who basically will grant a habeas corpus petition for any reason at all.").

51. *See* DADB, *supra* note 23; HCDB, *supra* note 23; *A Broken System*, *supra* note 23. *See also* National Composite Report Card, *A Broken System*, *supra* note 23. Because some post-conviction reversals are unknown, *see supra* note 36 and *A Broken System*, *supra* note 23, while all federal court reversals are known, the ratio of state to federal reversals is actually higher. On the other hand, we count a handful of United States Supreme Court reversals on certiorari following direct appeal and state post-conviction as, respectively, direct appeal and state post-conviction findings of error. *See supra* note 36.

52. *See* Slack v. McDaniel, 120 S. Ct. 1595, 1605 (2000) (explaining the relationship between the exhaustion of state remedies and the availability of habeas review); Williams v. Taylor, 120 S. Ct. 1495, 1500-03 (2000) (recounting the prisoner's journey through the state direct appeal, state post-conviction, and federal habeas corpus systems); Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998) ("It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for

each stage, and at the *last* stage, and the persistence of high error rates over time and across the nation, confirm the need for multiple judicial inspections. Without compensating changes at the front-end of the process, the contrary policy of cutting back on judicial inspection would seem to make no more sense than responding to the impending insolvency of the Social Security System by forbidding it to be audited.

- Finding this much error takes time. Calculating the amount of time using information in published decisions is difficult. Only a small percentage of direct appeals decisions report the sentence date. By the end of the habeas stage, however, a much larger proportion of sentencing dates is reported in some decision in the case. It accordingly is possible to get an accurate sense of timing for the 599 cases that were finally reviewed on habeas corpus. Among those cases:

  1. It took an average of 7.6 years after the defendant was sentenced to die to complete federal habeas corpus consideration in the 40% of habeas cases in which reversible error was found.
  2. In the cases in which no error was detected at the third inspection stage and an execution occurred, the average time between sentence and execution was nine years.[53]

As Figure 2 reveals, high rates of error frustrate the goals of the death penalty system. Figure 2 compares the overall rates of error detected during the state direct appeal and federal inspection process in the 28 states with at least one capital judgment that has completed that process, to the percentage of death sentences imposed by each state that it has carried out by execution. In general, where the overall error rate reaches 55% or above (as is true for the vast majority of the states), the percentage of death sentences carried out drops below 7%.

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habeas corpus." (quoting Picard v. Connor, 4040 U.S. 270, 275 (1971))).

53. *See* HCDB, *supra* note 23; *A Broken System*, *supra* note 23. A Justice Department study concludes that the time from death sentence to execution has increased over time to about 11 years for 1998 executions. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 1.

Figure 2. Overall Error Rate and Percent of Death Sentences Carried Out, 1973-95

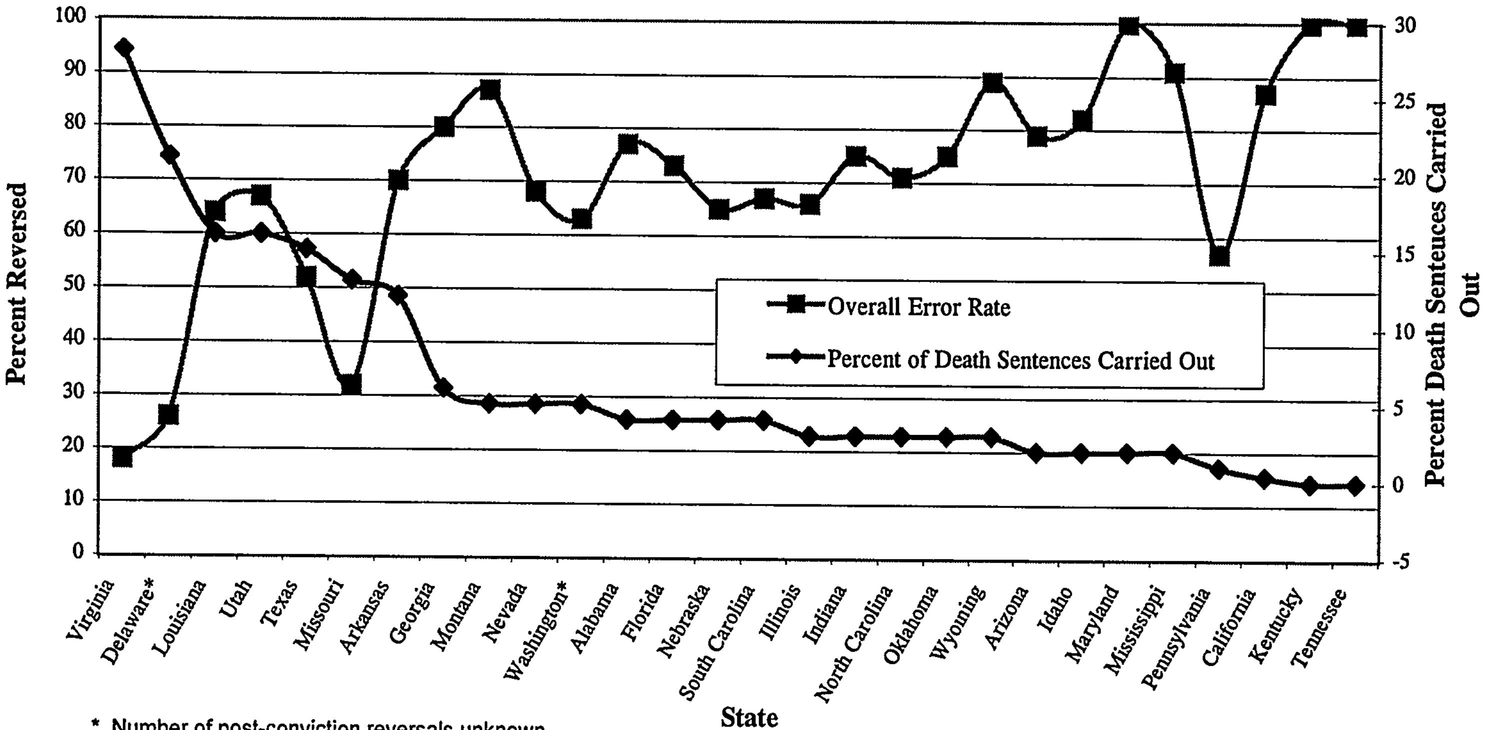

Figure 2 illustrates another finding of interest: The pattern of capital outcomes for the State of Virginia is clearly an outlier—the State's high execution rate is nearly *double* that of the next nearest state and *five times* the national average, and its low rate of capital reversals is nearly *half* that of the next nearest state and less than *one-fourth* the national average. A sharp discrepancy between Virginia and other capital-sentencing jurisdictions characterizes most of our analyses.[54] That discrepancy presents an important question for further study: Are Virginia capital judgments in fact half as prone to serious error as the next lowest state and four times less than the national average?[55] Or, on the other hand, are its courts more tolerant of serious error?[56] Or, have Virginia's legislature and courts censored opportunities to inspect verdicts and detect error by procedurally constraining the definition of error and the time within which errors can be identified?[57] We will address this issue below and in a subsequent report.

The rising number of executions nationally[58] does not render these

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54. *See* Figure 3, *infra*; *A Broken System*, *supra* note 23.

55. For this view, see Brooke A. Masters, *A Rush on Va.'s Death Row*, WASH. POST, Apr. 28, 2000, at A1, *available in* 2000 WL 19606141, presenting the arguments of Virginia officials who attribute the discrepancy to prosecutorial restraint and narrow sentencing statutes.

56. For a report taking this position, see American Civil Liberties Union of Virginia, *Unequal, Unfair and Irreversible: The Death Penalty in Virginia* 5 (Apr. 2000) (visited Apr. 28, 2000) <http://www.aclu.org/news/2000/n040700a.html> [hereinafter *Unequal, Unfair, and Irreversible*].

57. In considering whether Virginia capital judgments are substantially less error prone than all others in the nation or, on the other hand, whether laxer error detection takes place there, the death-sentencing states that surround Virginia and lie within its same federal judicial circuit—Maryland, North Carolina, and South Carolina—may be treated as "natural controls." Insofar as philosophical, cultural, or historical factors—which probably do not vary much between Virginia and its neighbors—are thought to be the main influences on the amount of expected error in capital judgments, the fact that high capital error rates are consistently found in states bordering Virginia casts doubt on the hypothesis that Virginia capital sentences are starkly less error-prone. For this analysis to show convincingly that Virginia courts are laxer detectors of serious capital error than courts in the surrounding states, however, there would have to be an explanation for *that* difference among presumably similar states.

The explanation may lie in the unusual extent to which Virginia courts limit review of capital judgments by, for example: (1) enforcing the region's (and nation's) strictest procedural default doctrine (the rule permitting even egregious error to be ignored on appeal if it was not objected to at trial); (2) often appointing substandard trial attorneys to represent the indigents who make up 97% of the state's death row, thus increasing the probability that necessary objections will *not* be made at trial, and thus that appellate review will be cut off; (3) applying an overly strict test for reversing capital judgments based on incompetent lawyering (until the Supreme Court overturned Virginia's test earlier this year, *see* Williams v. Taylor, 120 S. Ct. 1495 (2000)); (4) limiting defendants' ability to petition for a new trial based on innocence to a 21-day period following conviction, the shortest such time frame in the region (and nation); and (5) failing throughout most of the study period to provide lawyers or to fund them at the state post-conviction stage, further undermining the quality of error detection at that stage. *See* Masters, *supra* note 55; *Unequal, Unfair, and Irreversible*, *supra* note 56, at 11-37, 53 & n.71.

58. Between 1984 and 1991, there were an average of 15 nonconsensual executions each year. That number rose to 27 between 1992 and 1994, to 53 in the succeeding four-year period and then to 88 in 1999. *See* DEATH ROW U.S.A., *supra* note 2, at 1465. For our reasons for focusing on

patterns obsolete. Instead of indicating improvement in the *quality* of death sentences under review, the rising number of executions may simply reflect how many *more* sentences have piled up awaiting review. If the error-induced pile-up of cases on death row is the *cause* of rising executions, their rise provides no proof that a cure has been found for disturbingly high and persistent error rates. The rising execution rate and the persistent error rate increase the likelihood of an increase in the incidence of wrongful executions.[59] To see why this is true, consider a factory that produced 100 toasters in a year, only 32 of which worked. The factory's production problem would not be deemed fixed if the company simply raised its production run to 200 the next year in order to double the number of working toasters to 66. Thus, the real question isn't the *number* of death sentences carried out each year, but the *proportion*.

Figure 3[60] below shows that in contrast to the annual *number* of executions (the middle line in the chart), the *proportion* of death row inmates executed each year (the bottom line in the chart) has remained remarkably stable— and extremely low. Since post-*Furman* executions began in earnest in 1984, the nation has executed only an average of about 1.3% of its death row inmates each year; in no year has it carried out more than 2.6%—or one in thirty-nine—of death sentences exposed to full review.

Figure 3 suggests that the rising number of executions (the middle line) is *not* caused by any improvement in the quality of capital judgments, but instead by the inexorable pile-up of people on death row (the top line in the chart) as judges struggle to exercise a degree of quality control over decade upon decade of error-prone capital judgments.

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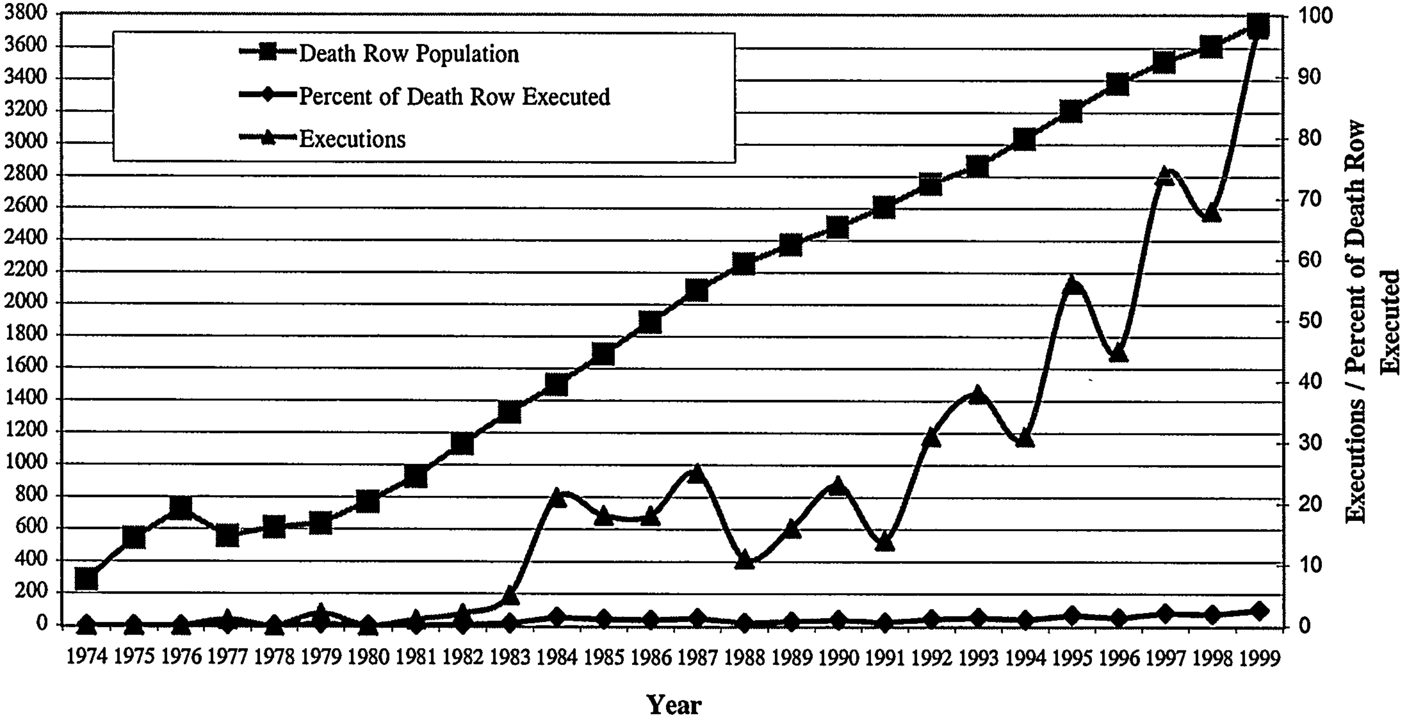
nonconsensual executions, see *supra* note 27.

59. *See infra* note 78.

60. For the data in Figure 3 in tabular form, see *A Broken System*, *supra* note 23.

Figure 3. Persons on Death Row and Percent and Number Execnted, 1976-99



III. Confirmation from a Parallel Study

Results from a parallel study by the U.S. Department of Justice suggest that our 32% figure for valid death sentences actually overstates the chance of execution. The 1998 Justice Department study includes a report showing the outcome of the 263 death sentences imposed in 1989.[61] A final disposition of only 103 of the 263 death sentences had been reached nine years later.[62] Of those 103, 78 (76%) had been overturned by a state or federal court. Only thirteen death sentences had been carried out.[63] So, for every one member of the death row class of 1989 whose case was finally reviewed and who was executed as of 1998, six members of the class had their cases overturned in the courts. Because of the intensive review needed to catch so much error, 160 (61%) of the 263 death sentences imposed in 1989 were still under scrutiny nine years later.[64]

The approximately 3500 people on death row today have been waiting an average of 7.4 years for a final declaration that their capital verdict is error-free—or, far more probably, that it is the product of serious error.[65] Of the 6700 people sentenced to die between 1973 and 1999, only 598—less than one in eleven—were executed.[66] About three times as many had their capital judgments overturned or gained clemency.[67]

IV. Implications of Central Findings

To help appreciate these findings, consider a scenario that might unfold any of the nearly 300 times a year that a death sentence is imposed in the United States. Suppose the defendant, or a relative of the victim, asks a lawyer or the judge, "What now?" Based on almost a quarter century of experience in thousands of cases in 28 death-sentencing states in the United States between 1973 and 1995, a responsible answer would be:

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61. For this purpose, 1989 was an average year. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 13, app. tbl. 1.

62. *See id.* (listing the number of prisoners removed from their sentence by execution, death from other causes, overturning of their sentence or conviction, or commuting of their sentence).

63. *See id.*

64. *See id.*

65. *See id.* at 1, 14 app. tbl. 2 (totalling 3,452 prisoners in 38 states as of Dec. 31, 1998); DEATH ROW U.S.A., *supra* note 2, at 1457.

66. DEATH ROW U.S.A., *supra* note 2, at 1457. We estimated 6,700 death sentences by extrapolating from the growth rate from 1997 to 1998. Using the December 31, 1998 figure of 6,432, *see* BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 16, we estimated that an additional 270 persons were sentenced to death during 1999. Returning to our 1989 example, the 13 executions by 1998 of individuals sentenced to die in 1989 represent only one in twenty of the 263 people condemned in 1989. *See supra* notes 61-62 and accompanying text.

67. DEATH ROW U.S.A., *supra* note 2, at 1457.

"The capital conviction or sentence will probably be overturned due to serious error.[68] It'll take about nine years to find out,[69] given how many other capital cases being reviewed for likely error are lined up ahead of this one. If the judgment is overturned, a lesser conviction or sentence will probably be imposed."[70]

As any person hearing this statement would likely conclude as a matter of common sense, these reversals due to serious error, and the time it takes to expose them, are costly. Capital trials and sentences cost more than noncapital ones.[71] Each time they have to be done over—as happens 68%

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68. *See supra* note 37 and accompanying text (reporting an error rate of 68%). In a recent study, the Bureau of Justice Statistics (BJS) reported that 35.3% of the persons sentenced to death in this country have had their capital judgements overturned. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 15 app. tbl. 3. Two factors explain the difference between the BJS figure and the 68% error rate calculated here and in *A Broken System*:

(1) The BJS figure is calculated by taking all persons removed from death sentence as of December 31, 1998, as a proportion of all death sentences imposed through that date. This means that prisoners sentenced to death whose cases had not made it through all (or any) stages of appeal are still included in the denominator in the BJS study. Both the BJS study and *A Broken System* suggest that about five years elapse between sentence and the *first* direct appeal. Because these pending cases also take an average of over nine years to receive *full* review including the maximum three inspections (and nearly 11 years for death sentences imposed after 1988), there were literally thousands of prisoners on death row in 1998 for whom no final judicial action had been taken. These cases are excluded from the denominator in this report and in *A Broken System*, but appear in the denominator in the BJS report. Put another way, the BJS figure is simply an *inventory* of death row inmates, which reports the proportion of persons sentenced to die—regardless of whether their death sentences have been fully reviewed by the courts—whose death sentences have been judicially overturned as of that moment. In contrast, the figure reported here is the *error* rate, which reveals the proportion of capital judgements that were *finally reviewed* by the courts that were overturned at one or another of the three inspection stages due to serious error.

(2) The BJS error rate is computed on the basis of individual men and women, not judgments. In the BJS study, therefore, if individual's death sentence is overturned and that individual is then re-sentenced to death, this reversal is not counted in the BJS figure, even though there was error in the original sentence. Many individuals' death sentences are overturned multiple times—some as many as four—and the BJS inventory of prisoners, as opposed to death sentences, misses these reversals.

69. *See supra* note 53 and accompanying text (calculating a nine-year average time lapse between sentencing and execution); BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 12 tbl. 12.

70. *See supra* note 42.

71. The trial, incarceration, and execution of sentence in capital cases cost from $2.5 to $5 million dollars per inmate (in current dollars), compared to less than $1 million for each killer sentenced to life without parole. *See, e.g.*, Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1268-70 (1985) (estimating the cost of trying a capital case at $600,000 and the annual cost of housing a prisoner on death row at $15,000); Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUD. IN L., POL. & SOC'Y 71, 78 (1993) (reporting a $3.2 million cost per execution in Florida, and Kansas's rejection of the death penalty because of the cost); Paul W. Keve, *The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty*, FED. PROBATION, Mar. 1992, at 11, 12-13 (collecting estimates of the cost of an execution from several states); Aaron Chambers, *Resources a Concern in Death Penalty Reform*, CHI. DAILY L. BULL., Apr. 24, 1999, at 19, *available in* Westlaw, News Library, CHIDLB file (giving an estimate of $5.2 million from pretrial to execution); Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, A.P. NEWSWIRES, Mar. 26, 2000, *available in* Westlaw, News

of the time—some or all of that difference is doubled. The error-detection system all this capital error requires is itself a huge expense—evidently *millions of dollars* per case.[72]

When retrial demonstrates that nearly four-fifths of the capital judgments in which serious error is found are more appropriately handled as non-capital cases (and in a sizeable number of instances, as non-murder or even *non-criminal* cases),[73] it is hard to escape the conclusion that most of the resources the capital system currently consumes are not buying the public, or victims,[74] the valid death sentences for egregious offenses that a maj-ority support. Rather, those resources are being wasted on the trial and review of cases that for the most part are not capital and are seriously flawed.

Public faith in the courts and the criminal justice system is another casualty of high capital error rates.[75] When the vast majority of capital sentencing jurisdictions carry out fewer than 6% of the death sentences

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Library, APWIRES file (quoting a Tennessee lawyer's estimate of a $1 to $2 million cost per execution); David Noonan, *Death Row Cost is a Killer*, N.Y. DAILY NEWS, Oct. 17, 1999, at 27, *available in* 1999 WL 23488045 (reporting the cost of prosecuting and defending New York capital cases from 1994 to 1999, a period during which only five capital sentences were imposed and none carried out, as $68 million); A. Wallace Tashima, *A Costly Ultimate Sanction*, THE LOS ANGELES DAILY J., June 20, 1991, at 6 (writing that the cost of an execution to California taxpayers is $4 to $5 million).

72. When post-trial review costs are factored in, the cost comparison between capital and noncapital cases is something like $24 million dollars per executed prisoner, compared to $1 million for each inmate serving a life senteuce without parole. *See* S.V. Date, *The High Price of Killing Killers*, PALM BEACH POST, Jan. 4, 2000, at 1A, *available in* 2000 WL 7592885. *See also* Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts, With Their Lives at Stake*, CHI. TRIB., Nov. 15, 1999, at N1, *available in* 1999 WL 2932352 ("In Illinois, the resources rallied on appeal often dwarf those summoned to keep a defendant off Death Row in the first place"); Armstrong & Mills, *Justice Derailed*, *supra* note 29, at N1 (discussing the "staggering" costs of capital case reversals and exonerations in Illinois). As Armstrong and Mills note:

> "Taxpayers have not only had to finance multimillion-dollar settlements to wrongly convicted Death Row inmates—[Dennis] Williams alone received $13 million from Cook County—but also have had to pay for new trials, sentencing hearings and appeals in more than 100 cases where a condemned inmate's original trial was undermined by some fundamental error.").

Id.

73. *See supra* note 42.

74. *Cf.* Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial: Trial and Error—How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 11, 1999, at N1, *available in 1999 WL 2873462* (studying the effects of prosecutorial misconduct in Illinois homicide and capital cases, and concluding that "the reversals exact a toll on victims and their families who are forced to come back to court, reopening sometimes barely healed emotional wounds").

75. For an example, see Armstrong & Mills, *Justice Derailed*, *supra* note 29:

> Capital punishment in Illinois is a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken, a *Tribune* investigation has found. . . .
>
> The findings reveal a system so plagued by unprofessionalism, imprecision and bias that they have rendered the state's ultimate form of punisbment its least credible.

they impose,[76] and when the nation as a whole never executes more than 3% of its death population in a year,[77] the retributive and deterrent credibility of the death penalty is low.

When condemned inmates turn out to be *innocent*,[78] the error is different in its consequences, but *not* evidently different in its causes, from the other serious error discussed here.[79] There is no accounting for this cost: to the wrongly convicted;[80] to the family of the victim, whose search for justice and closure has been in vain; to later victims whose lives are threatened—and even taken—because the real killers remain at large;[81] and to the wrongly *executed*, should justice miscarry at trial, and should reviewing judges, harried by the amount of capital error they are asked to catch, miss one.[82]

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76. *See* Figure 2, *supra*.

77. *See* Figure 3, *supra*.

78. *See* Dan Rather, *Dead Wrong*, CBS 60 Minutes II, Apr. 12, 2000 <http://cbsnews.cbs.com/now/story/0,1597,182812-412.shtml> (visited May 17, 2000) (contending there is strong evidence that Jerry Lee Hogue, whom Texas executed in 1998, was innocent). Between 1972 and the beginning of 1998, 68 people were released from death row because faulty convictions were overturned and too little evidence remained to retry the prisoner. *See* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. & CONTEMP. PROBS., Autumn 1998, at 125, 130-32 (1998); Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 916 (1996). As of this writing (June 2000), the number of inmates released from death row as factually or legally innocent apparently has risen to 87. Nine were released in 1999 alone. *See* Frank Greeu, *Question of Life or Death: Illinois Exonerations Spark Capital Punishment Debate*, RICHMOND TIMES-DISPATCH, Apr. 2, 2000, at A1, *available in* 2000 WL 503442.

79. *Compare* SCHECK, NEUFELD & DWYER, *supra* note 17, at 172-92 (attributing the conviction of the innocent in large part to incompetent lawyers and prosecutorial suppression of evidence, the two most common errors detected in the reversals discussed in this study).

80. *Cf.* Ken Armstrong & Steve Mills, *Flawed Murder Cases Prompt Calls for Probe*, CHI. TRIB., Jan. 24, 2000, at N1, *available in* 2000 WL 3629579 (reporting that $36 million was paid to settle lawsuits by four men who were wrongly convicted, two of murder and two of capital murder); Laurie Goering, *Florida Lets Speed Govern Executions*, CHI. TRIB., Feb. 28, 2000, at N1, *available in* 2000 WL 3640614 (noting that Florida paid $1 million in damages for falsely incarcerating two inmates on death row for 12 years); Paul W. Valentine, *Md. to Give Cleared Man $300,000*, WASH. POST, June 23, 1994, at B1, *available in* 1994 WL 2426459 (reporting that Kirk Bloodworth was given $300,000 compensation for the nine years he served for a wrongful rape and murder conviction).

81. *See* Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice*, CHI. TRIB., Jan. 13, 1999, at N1, *available in* 1999 WL 2834238 (detailing how twelve years after the "Ford Heights 4" were falsely couvicted in Chicago of two rape-murders, and five years before the four were exonerated following several judicial reversals, one of the actual perpetrators still at large suffocated a third woman to death in a vacant apartment near the scene of the earlier crimes); Brooke A. Masters, *Lucky Release From a Life Behind Bars*, WASH. POST, April 28, 2000, at A23, *available in* 2000 WL 19606130 (discussing David Vasquez's incarceration in Virginia for a capital murder he did not commit, and the murder spree on which the real killer embarked in the meantime).

82. *See supra* note 17 (discussing George Will's conviction that innocent men and women have been executed); *supra* note 29 (discussing how close the Illinois Supreme Court came to missing the miscarriage of justice in Anthony Porter's case). All of the points made in this section are made much more poignantly in a recent article in the *Seattle Times* about Seattle murder victim Esther Vinikow. After prosecutors said they would consider the views of the victims' family before deciding whether

If the issue was the fabrication of toasters (to return to our prior example), or the licensing of automobile drivers, or the conduct of any other private- or public-sector activity, neither the consuming public nor managers and investors would tolerate the error rates and attendant costs that dozens of states and the nation as a whole have tolerated in their capital punishment systems over the course of decades. Any system with this much error and expense would be halted immediately, examined, and either reformed or scrapped. We ask taxpayers, public managers, and policymakers whether that same response is warranted here, when the issue is not the content and quality of tomorrow's breakfast but whether society has a swift and sure response to murder and whether thousands of men and women condemned for that crime in fact deserve to die.

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to seek the death penalty against the alleged killer, Robert Wentz, a reporter interviewed Ms. Vinikow's children:

> Like most Americans, Esther Vinikow's children support the death penalty. But they say Wentz, if found guilty, should not be executed. Not because whoever killed her doesn't deserve it, but because it takes too long and costs too much.
>
> To Jerome Vinikow, 58, Esther Vinikow's only son, the death penalty seems to only protract the tragedy . . . . "As long as he's away permanently, I'm not sure . . ." he trails off. "If he does get the death penalty, and it's 10 to 12 years of waiting, I don't know what good that does."
>
> In many ways, the family's misgivings reflect a growing national impatience and unease about capital punishment. In the aftermath of a tragedy, they have become drawn into a discussion that provides no easy answers.
>
> Superior Court trials cost taxpayers an average of $388,680. State and federal appeals of death-penalty cases take an average of 11 years, according to a recent study by state Supreme Court Justice Richard Guy. That's eroded public confidence in the justice system, Guy said.
>
> But polls also suggest growing unease about capital punishment, particularly after several death-row inmates in Illinois were released when new evidence proved their innocence.
>
> The decades it takes to execute an inmate may have saved lives, notes Jerome Vinikow of Bellevue. That possibility should not be lost in the rush for justice. "I'm not against the death penalty. I used to wonder why it took 10 or 12 years, but it's obvious when you see all the mistakes in Illinois, you have to be careful," he said.
>
> . . . .
>
> At first, [the victim's daughter, Dolores] Beck-Schwartz, 62, of Putnam Valley, N.Y., wanted whomever a jury convicted to be put to death. It seemed an appropriate punishment for someone who took the life of such a defenseless, gentle person, she said.
>
> But Beck-Schwartz had second thoughts when she considered the years that pass between trial and execution—if the sentence isn't overturned along the way. "If it happened within a year, I'm fine with that. But if it dragged on year after year, it won't make it any easier," she said. "It won't bring her back. It won't make me feel better."

Alex Fryer, *Victim's Family Wrestles Death-Penalty Issue*, SEATTLE TIMES, May 14, 2000, at B3, *available in* 2000 WL 5535689.