A Tribute to Victor L. Streib

The Ohio Northern Law Review proudly acknowledges and thanks former Dean and Professor Victor L. Streib for his numerous contributions to the legal profession and our law school community. We are honored to commemorate Professor Streib by dedicating Volume 38, Issue II to him.

Introduction to the Tribute to Victor L. Streib: An Ideal Role Model
Scott D. Gerber ................................................................. 407

How Many Lives Has Victor Streib Saved? A Tribute
Deborah W. Denno................................................................. 413

Victor Streib: A Man on a Mission, Mission Accomplished
Paul Marcus ........................................................................... 417

A Note from Carl Monk
Carl Monk ............................................................................. 423

A Tribute to Victor Streib
Katherine Hunt Federle............................................................. 425

Standing for the Most Vulnerable
Michael L. Radelet .................................................................. 431

A Note from Lauren Robel
Lauren K. Robel ...................................................................... 437

Women on Death Row: A Tribute to Dean Victor Streib
Lorraine Schmall ................................................................. 441

Victor L. Streib Tribute
Margery B. Koosed ............................................................... 455

A Note from Hal Pepinsky
Hal Pepinsky ........................................................................ 463

Thompson v. Oklahoma and the Judicial Search for Constitutional Tradition in Celebration of Victor Streib
Harry F. Tepker ..................................................................... 465

Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976
Richard C. Dieter .................................................................. 497
I am delighted to be writing the Introduction to this wonderful Tribute in the Ohio Northern University Law Review honoring my recently-retired colleague Victor L. Streib. I arrived at Ohio Northern University in the fall of 2001 and quickly learned that Vic was the ideal role model for what it means to excel in all phases of the law professorate: teaching, research, and service. Vic also was a wonderful colleague and family man, and our law college—our village of Ada—is not the same without him.\footnote{I am not stealing from Hillary Clinton here. See HILLARY R. CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US 19 (1996). Ada, Ohio really is a village rather than a town or a city.}

**A DEDICATED TEACHER**

Vic received his Bachelor of Science in Industrial Engineering from Auburn University and his Juris Doctorate from Indiana University at Bloomington.\footnote{Vic’s biography is drawn from his ONU faculty webpage. See Victor Streib, Faculty Profile, OHIO NORTHERN UNIVERSITY PETTIT COLLEGE OF LAW, http://www.law.onu.edu/faculty_staff/faculty_profiles/victorstreib.html (last visited Jan. 5, 2012).} He began his teaching career in the Department of Forensic Studies (now Criminal Justice) at Indiana University. He moved to New England School of Law in Boston in 1978 and to Cleveland-Marshall School of Law at Cleveland State University in 1980, where he also served a term as Associate Dean. Vic arrived at Ohio Northern University Pettit...
College of Law (“ONU”) in 1996 to serve as Dean and Professor of Law. After a successful deanship, Vic remained the most significant member of our law faculty until his retirement in December of 2010.3

Vic taught a variety of courses during his distinguished career, including Criminal Law, Criminal Procedure, Death Penalty, Juvenile Homicide, Children and the Law, Legal Profession, and Women and Criminal Justice. His Capital Punishment Seminar was almost certainly the most popular course at ONU, and students would adjust their schedules well in advance to make sure they had a chance to take it. Who could blame them? As this Tribute demonstrates, Vic is probably the leading authority in the United States on the subject. But Vic excelled in all the courses he taught. Indeed, one of the urban legends at ONU is how Vic taught Legal Profession one particular semester while holding one of his student’s infants in his arms so her mother could take notes. A sweeter picture is difficult to imagine: the renowned Professor Victor L. Streib discussing the intricacies of legal ethics while a cherubic baby pulls quizzically at his beard. And Vic cared about all of his students, not simply the ones with adorable children. His door was always open and nary a day would pass without Vic talking to students—mentoring them—in his office, in the corridor, at the gym . . . name it and Vic was inspiring students there. As celebrated of a scholar as Vic undeniably is, my sense is that Vic always put his students first.

AN INFLUENTIAL SCHOLAR

Or, better still, a life saving scholar. Vic is, of course, most famous for helping to convince the Supreme Court of the United States in 2005 that it is unconstitutional to execute juveniles.4 That in itself makes Vic one of the all time greats of American legal education.5 Vic literally dedicated his professional life to saving the lives of juvenile offenders, and he succeeded. In fact, his comprehensive empirical evidence was so impressive that the majority in Roper v. Simmons6 and both dissents cited it multiple times.7

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3. Vic visited at a number of institutions during his long career, including Duke, Elon, Indiana, Michigan State, Ohio State, and San Diego.
5. Vic laid the groundwork for Roper with his work in Thompson v. Oklahoma, a decision in which he and Harry F. Tepker persuaded the Court to forbid the execution of individuals under the age of sixteen at the time of the crime. See Thompson v. Oklahoma, 487 U.S. 815 (1987). Professor Tepker contributes a marvelous essay about that case to this Tribute. See Harry F. Tepker, Thompson v. Oklahoma and the Judicial Search for Constitutional Tradition: In Celebration of Victor Streib.
7. Id. at 594-95 (O’Connor, J., dissenting); id. at 614-15 (Scalia, J., dissenting).
In light of the fact that I write in the areas of American legal history and constitutional theory, I will leave it to the other distinguished contributors to this Tribute to speak to the substance of Vic’s scholarship. Deborah W. Denno, Richard C. Dieter, Katherine Hunt Federle, Margery B. Koosed, Paul Marcus, Harold Pepinsky, Michael L. Radelet, Lauren K. Robel, Carl Monk, Lorraine Schmall, and Harry F. Tepker know far more about criminal law than I do. However, I feel compelled to mention how prolific Vic has been. When I requested a copy of Vic’s publications list prior to commencing this Introduction, I received a twenty-eight page single-spaced Word attachment in response. I knew Vic had published a lot, but I never imagined it was possible to publish that much. At my count, Vic has authored more than three hundred books, chapters, articles, and papers during his illustrious academic career. No wonder Dr. Anne Lippert, at the time ONU’s Vice President for Academic Affairs, referred to Vic as the most prolific scholar in the history of our university. Vic continues to write during his retirement, as his forthcoming book about preteen murderers illustrates.

More importantly, as the other contributors to this Tribute make clear, Vic’s scholarship is good, not simply plentiful. Not only did Vic’s voluminous writings about the death penalty lead West to commission him to write a nutshell on the subject—he is currently hard at work on the 4th edition—but he has been cited twenty-eight times by the Supreme Court of the United States, which is twenty-eight times more than most law professors can claim. Vic also has been interviewed about his work by, among other media outlets, the New York Times, London Times, Wall Street Journal, Washington Post, Chicago Tribune, Los Angeles Times, ABA Journal, U.S. News, ABC (This Week, News), BBC (News), CBC (News), CBS (60 Minutes, News), CNN (Larry King Live, News), NBC (Today Show, News), and NPR (All Things Considered, Talk of the Nation). Again, few law professors can say that. Vic’s scholarship likewise has influenced many colleagues in the law professoriate itself. The countless law review citations to his publications are a testament to this fact, as is my less scientific measure of being asked about Vic at seemingly every talk I have given at law schools across the country . . . even though my talks have

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absolutely nothing to do with criminal law or the death penalty. Moreover, the student editors in charge of this Tribute issue honoring Vic proudly informed me recently that other scholars had contacted the Law Review asking if they could submit a piece about Vic.

A TIRELESS SERVANT TO THE LEGAL ACADEMY . . . AND TO THE LAW

Many law professors view service as, at best, a necessary evil. “It is your turn to chair the curriculum committee,” we have all heard it said. Or, “Do you have time to serve on an ABA site inspection team this year? You know, as a personal favor.” Vic was never like that. He embraced professional service with the same zeal he exhibited as a teacher and a scholar. For example, for the Association of American Law Schools Vic presented papers at annual meetings in 1984, 1986, 2000, and 2008; served on the editorial board of the Journal of Legal Education from 1999-2002; chaired the Curriculum and Research Committee from 1996-1998; was a site evaluation summanarian from 1994-2000; served a full-time appointment as a visiting fellow in 1993-1994; chaired the Section on Criminal Justice from 1985-1986; and chaired the Section on Teaching Law Outside of Law Schools in 1983-1984. For the American Bar Association Vic was co-director of the Equal Justice Division, Criminal Justice Section from 2006-2008; was a member of the Innocence Committee, Criminal Justice Section from 2003-2008; won the Livingston Hall Juvenile Justice Award in 2002; was a member of the Law School Administration Committee, Legal Education Section from 1998-2000; was an Accreditation Evaluator, Legal Education Section from 1991-2001 (and served as team chair from 1998-2001); and authored the Resolution Opposing the Death Penalty for Juvenile Offenders in 1983.

Vic likewise has been active as an appellate lawyer and an expert witness. For example, he served as co-counsel for the appeals of a fifteen-year-old Florida boy sentenced to death, a nine-year-old Pennsylvania boy convicted of murder, a fifteen-year-old Indiana girl sentenced to death, and a fifteen-year-old Oklahoma boy sentenced to death, and was an expert witness in death penalty cases in Arizona, Delaware, Florida,

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11. I also received e-mails from friends at other law schools commending Vic when Roper v. Simmons was announced and I once noticed a letter from a federal judge in Vic’s office praising Vic’s efforts in convincing the Court to put a stop to killing kids. Vic is too modest to mention it, but I suspect there have been many such signs of admiration for Vic’s work sent to him over the years.
15. See Thompson, 487 U.S. 815.
Louisiana, Pennsylvania, and Texas. Closer to home, Vic was always willing to present works-in-progress talks when I was trying to reinstitute that practice as, at the time, the untenured chair of the law college’s faculty development committee. He likewise could be counted on to tap into his vast network of connections to bring in outside speakers for our Dean’s Lecture Series when I chaired that committee as an assistant professor.

A WONDERFUL COLLEAGUE AND FAMILY MAN

Indeed, Vic was particularly helpful to junior colleagues. He went out of his way to make certain that their personnel files included his own experienced opinion about the quality of their teaching—invariably expressed in extremely supportive terms—and he also attended the research presentations we made at faculty workshops. Trust me when I say that I was not the only junior colleague who very much appreciated how supportive Vic was to those of us navigating the sometimes stormy waters of the tenure track. Academic politics can be a nasty business, but Vic refused to play that game.

Vic’s collegiality likewise was expressed in more personal ways: he and his wonderful wife Lynn Sametz would frequently invite colleagues to dinner at their lovely home, especially if they were new to the area and did not know how to cook. Lynn certainly knows how to cook . . . thank you, Lynn!

Of course Vic’s greatest legacy is his family: Lynn and their daughter Jessi and son Noah. Vic is justifiably proud of Lynn, a successful academician in her own right, and of Jessi and Noah, both of whom are

16. See Victor Streib, Faculty Profile, supra note 2.
17. Vic is supportive even during his retirement, and even after junior colleagues have received tenure. I, for one, received an e-mail from Vic in the spring of 2011—an e-mail that Vic shared with the present ONU Law College Dean and our faculty colleagues—commending the publication of my Oxford University Press book on the origins of judicial independence in America. Vic wrote:

Scott,

Congratulations on FINALLY(!) getting your extraordinary research into print! It is, in my view, the most impressive work thus far in your career, and it is a wonderful feather in the cap of ONU law. Hopefully this will continue to send the message to legal education and the legal profession that ONU law faculty members include serious scholars who are publishing seminal works in their fields. Rightly or wrongly, this scholarly reputation of the law faculty is the MOST IMPORTANT factor in determining the national reputation of a law school. Your work, Scott, has established you as a serious legal scholar and has helped ONU law in its never ending quest for reputation, ranking, applications, etc. …

Vic

E-mail from Victor L. Streib to Scott D. Gerber (Mar. 10, 2011) (on file with author). Needless to say, I have saved a copy of this particular e-mail.
currently completing Ph.D. programs at elite universities. And Lynn, Jessi, and Noah are very proud of Vic, obviously.\textsuperscript{18} The last time I saw Vic was one of those precious moments in life that helps to explain why because it goes to the heart of the kind of person Vic is: after I downloaded a lovely wedding picture of Noah and his new bride that Vic had happily shared with the faculty and staff at the law college, I mentioned to Vic that it was clear to me that Noah had learned the greatest lesson that a father can teach a son. Vic paused and asked, “What’s that?” I answered, “To marry well above your head.” Vic beamed and said, “He certainly did that.” He then headed to the exit knowing how lucky he was to be able to spend even more time with his family during retirement.

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I would like to close this Introduction to this wonderful Tribute honoring Victor L. Streib by simply saying that my biggest personal regret about Vic retiring is that I never got to serve under him when he was Dean.\textsuperscript{19} As any good dean knows, law professors are supposed to be scholars, not simply classroom teachers or members of campus committees that seemingly never meet. It might enable a law dean to remain in office virtually in perpetuity if he or she does not require his faculty to publish, but it is a disservice to the students we are charged with educating and to the profession that we should be trying to inspire. Vic knew that, and his long and illustrious career is a blueprint for any law professor trying to do the job the right way. Thank you for being such a wonderful role model, Vic. You are a credit to both the law professoriate and the law itself.

\textsuperscript{18} I enjoyed many a playful give and take with Jessi and Noah about their famous father. My running joke when I saw Jessi at the gym without Vic was to ask whether Vic was at home sitting on the couch munching on potato chips. Vic is health conscious, so I knew the answer was no, but Jessi would always laugh too hard to rise to her dad’s defense. When I saw Noah at the gym lifting weights with Vic I would remind the two-sport varsity athlete to make sure his dad did not lift too much weight because he might hurt himself being as old as he was. Noah, like Jessi, would laugh like it was the first time I had ever told the joke. They clearly adore both Vic and Lynn.

\textsuperscript{19} That, and I do not get to eat anymore of Lynn’s fabulous cooking. North Carolina, where Vic and Lynn presently reside, is a long way from Ada.
How Many Lives Has Victor Streib Saved? A Tribute

DEBORAH W. DENNO*

This tribute to Victor Streib focuses on just a few of his standout achievements. Particularly noteworthy are Professor Streib’s landmark contributions to litigation and scholarship in two distinct areas of the death penalty involving two distinct categories of defendants: juveniles and women. For any lawyer to have accomplished so much in either of these realms would be extraordinary, but Professor Streib centered on both with definitive, life-saving, results. During it all, he has worn an unusual variety of professional hats—professor, scholar, litigator, and law school dean, each hat requiring its own particular skills and expertise.

With respect to juveniles, Streib is a large part of a litigation story that has finally ended, at least as far as the death penalty is concerned, and Streib can take much credit for that outcome. Of course I’m talking about Roper v. Simmons,1 where the Supreme Court of the United States held that the Eighth and Fourteenth Amendments prohibit the execution of persons younger than age eighteen at the time their crimes were committed.2 According to Roper, there are three “general” differences between adults and juveniles under age eighteen that explain why juveniles “cannot with reliability be classified among the worst offenders.”3 Juveniles are relatively more (1) immature and irresponsible, (2) vulnerable to negative pressures from their peers and environment, and (3) fragile and unstable in their identities.4 These disparities not only heighten the likelihood that juveniles will engage in impulsive thinking and conduct, but they also strengthen arguments explaining why juveniles may be less culpable. In the Roper Court’s eyes, the crimes of juveniles, however heinous, are less likely to be indicative of their character or intent.5

Streib’s work was critical to the Court’s decision in Roper and his research was cited throughout the various opinions.6 Just as importantly, Streib served as appellate counsel in some of the key death penalty cases

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* Arthur A. McGivney Professor of Law, Fordham University School of Law. I am grateful to Julie Salwen for comments.
2. Id. at 578.
3. Id. at 569.
4. Id. at 569-70.
5. Id. at 570.
upon which *Roper* was built. Those cases include *Thompson v. Oklahoma*, a groundbreaking 1988 decision in which the Court prohibited the execution of individuals under age sixteen at the time of the crime. After *Thompson*, *Roper*’s age extension seemed like the Court’s next logical step. Through Streib’s analyses of statistical information on states’ changes in and uses of the death penalty for juveniles, the *Roper* Court’s majority was able to effectively portray the national consensus against the death penalty for those under eighteen and thereby justify abolishment of the penalty for that age group. By navigating the real-world of lawyering with an academic focus, Streib could compare the legal and interdisciplinary nuances of juvenile culpability with the ways this country has punished young people.

This successful bridging of academics and litigation is also evidenced by the hugely prolific and influential body of scholarship that Streib produced throughout the modern Supreme Court’s examination of the death penalty in the context of juveniles. In Streib’s groundbreaking book, *DEATH PENALTY FOR JUVENILES*, for instance, strategically published a year before *Thompson*, Streib intertwinesthe wide-array of research on the history, philosophy, and warped legitimacy of the death penalty for juveniles over three centuries, from the late 1600s to the late 1900s. The book also includes a statistical study of the 281 juveniles who were executed over those centuries, documenting the overwhelming preponderance of minorities. Such compelling content enables Streib to raise forceful arguments suggesting that the constitutional limit for juveniles should be age eighteen, thus opening the door for the Court’s decision in *Roper* years later. Particularly effective is Streib’s investigation of statistics and case studies to demonstrate the random nature of juvenile executions. While this finding coincides with the arbitrariness of the punishment as applied to adults, the results are even more egregious when the spotlight is on juveniles, whose lesser levels of culpability and maturity make for striking biographies of disparity. The story of George Stinney provides a potent illustration. Stinney was a black male of fourteen years who stood at five-feet-one-inches and weighed ninety-five pounds. On the day he was executed he was so small he could barely fill South Carolina’s electric chair, which was built for adults. In sum, *DEATH PENALTY FOR JUVENILES* is so impeccable in its research, case studies, and arguments, that the outcomes in *Thompson* and *Roper* appear to follow neatly from Streib’s work.

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8. *Id.* at 838.
11. *Id.* at 107-09.
Streib’s take on female offenders is comparably impressive, a result all the more notable because the questions raised about females differ from those directed toward juveniles. Females constitute less than two percent of all inmates on death row and only one percent of all inmates executed since 1973. Streib asks why there are so few of them when females constitute approximately thirteen percent of the arrests for murder. While criminologists have long studied the differences between male and female offenders, Streib’s approach is especially powerful because he puts these investigations in the context of the death penalty along with a lawyer’s understanding of that penalty’s particular demands and requirements. What’s more, for over twenty-five years Streib has documented every female sentenced to death and executed in the United States, thereby offering insightful data about state and national trends as well as individual demographics and the lives of the inmates themselves.

In Streib’s book, The Fairer Death: Executing Women in Ohio, for example, Streib gives an overview of the extent of sex bias in the death penalty nationally and the numerical differences between men and women executed over time before narrowing in on the personal stories of the women executed and sentenced to death in Ohio. While Streib recognizes that the numbers of women are not sufficiently large to make a statistical point, the vividness of their personal vignettes makes a different kind of statement—one that stresses the incredible arbitrariness of the penalty when it is applied to so few who hardly seem the worst of their sex. These women’s stories illustrate the differential impact of such factors as race (a continual theme in Streib’s work), mental deficiency, confessions, and physical demeanor at trial, among others. In all, Streib probes the legal reasons why these women were selected over the hundreds who were not, lamenting that their numbers are so small they could be forgotten. Of course, with Streib’s account, their stories will be preserved.

Victor Streib may be retiring from academia, but his academic work will stay put, guiding generations to come as it has impacted on current and past generations. Consider this question, for example: How many juvenile lives have already been saved by Thompson and Roper alone? While statistical projections are speculative, we know the numbers would have

been substantial. They would also have included a disproportionate number
of poor minority youths with inadequate legal representation residing in
southern states. Clearly, some percentage of those juveniles would have
been innocent. Preventing these youths’ executions is an amazing legacy
for Streib to leave. In addition, Streib’s work exposes the injustices of sex
differences in the death penalty, both between males and females and within
the female population itself. Altogether, these findings fuel more general
doubts about the death penalty’s persistence.

This tribute to Professor Streib is modest compared to what he has
accomplished. Additional triumphs will be celebrated by, among many
others, the faculty and students of the Claude W. Pettit College of Law. For
them, Streib leaves the imprint of professor, mentor, colleague, dean, and
galvanizer. For all of us in the legal profession, Victor Streib sets the
highest, most inspirational, standard we could possibly hold.
Victor Streib: A Man on a Mission, Mission Accomplished

PAUL MARCUS

For most of the history of our nation, courts in a number of states have allowed the execution of minors. To many people outside of the United States, the notion of executing a sixteen-year-old or a fifteen-year-old, or even a fourteen-year-old, is shocking, and indeed the vast majority of countries throughout the world long ago concluded that such a practice could not be tolerated. Today, very few nations allow for the executions of individuals under the age of eighteen.

Less than ten years ago, the Supreme Court of the United States abolished the death penalty for minors, even in connection with homicide offenses. It was the second of a two-step process in its jurisprudence, as I shall explain below. Few American lawyers are more directly responsible for achieving this abolition than Professor Victor Streib. Before paying tribute to this extraordinary man, I begin with the story of the process of elimination of this awful procedure.

In *Thompson v. Oklahoma*, the Supreme Court decided that the execution of a defendant who was fifteen years old at the time of his offense for a heinous crime (a brutal murder) violated the constitutional prohibition against the infliction against cruel and unusual punishment found in the Eighth Amendment. The Justices did not speak to the question of those who were above the age of sixteen. Instead, they looked solely at the few states that still allowed for the execution of those under sixteen. The language of Justice Stevens for the plurality opinion is striking:

"It is generally agreed that “punishment should be directly related to the personal culpability of the criminal defendant.” There is also broad agreement on the proposition that adolescents as a class, are less mature and responsible than adults. . . . “But youth is

* Haynes Professor of Law, College of William and Mary, Paul Marcus 2012.
2. Iran, Saudi Arabia, Sudan, Pakistan, and Yemen are on that short list. See Human Rights Watch, *The Last Holdouts: Ending the Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, and Yemen* 2 (Sept. 2008), www.hrw.org/sites/default/files/reports/crd0908webwcover_0.pdf.
4. *Id.* at 818, 838.
more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly ‘during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment’ expected of adults.”

The case which forced the Justices to face the issue of minors over the age of sixteen being executed is *Roper v. Simmons*, decided in 2005. There, the majority of the Court continued the analysis from the *Thompson* case:

> When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

....

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows . . . “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” . . . “[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.”

....

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. (“[Y]outh is more than a chronicle fact. It is a time and condition of life when a person is most susceptible to influence and to psychological damage”).

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5. *Id.* at 834 (citations omitted).


7. In reaching its result, the Court overturned its earlier opinion in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had allowed the death penalty for offenders above or at the age of sixteen. *Id.* at 380.
The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.\(^8\)

Victor Streib has taught several generations of law students, principally at Ohio Northern University Pettit College of Law but also at the New England School of Law and the Cleveland-Marshall College of Law. He talks with his students of the evils of the death penalty generally, but also particularly in connection with juvenile offenders. He is extremely effective in this context and has influenced many students throughout the country. Indeed, I saw him recently speak to a captivated group of law students at the College of William and Mary, laying out the U.S. experience of the death penalty with respect to minors and why that chapter in our history is so shameful.

Professor Streib’s contribution to the elimination of this “utterly barbaric”\(^9\) practice is broader than simply educating law students. He is a scholar of the first rank, who has focused his attention on capital punishment issues. To cite but one of many examples, his influential 1998 article, Moratorium on The Death Penalty for Juveniles,\(^{10}\) is a careful and detailed view of the rules throughout the United States regarding the problem, as well as actions taken by the American Bar Association to eliminate the problem. His conclusion is a forceful assertion to readers that we should simply get out of the business of executing minors:

[I]t is clear that the Court does not clearly and strongly endorse the death penalty for juvenile offenders.

The international community is also on the side of opposing the death penalty for juveniles. The continuing involvement of the United States in this practice aligns us with the criminal justice and human rights practices of such countries as Iran and Iraq, odd company indeed for the leading democratic nation of the western world. If the United States wishes to continue to take the high road

\(^8\) Roper, 543 U.S. at 569-70 (citations omitted).
\(^9\) Outside the United States, I have heard this term on numerous occasions. It was most recently spoken to me, in light of the Court’s decision in Roper, by an Australian judge praising the Court’s actions, but she wondered why it had taken so long.
in pushing other nations to improve their human rights records, our leadership in the practice of the death penalty for juvenile offenders is a strong counterweight to our efforts.\textsuperscript{11}

Professor Streib’s scholarship has influenced many, and certainly in that group would be Justices of the Supreme Court of the United States. This remarkable individual’s research has been cited more than two dozen times in opinions of the Court. In the \textit{Thompson} case discussed above, the Court struggled to find exact figures for executions of minors:

> While it is not known precisely how many persons have been executed during the 20th century for crimes committed under the age 16, a scholar has recently compiled a table revealing this number to be between 18 and 20. All of these occurred during the first half of the century, with the last such execution taking place apparently in 1948.\textsuperscript{12}

The scholar to whom the Court was referring is, of course, Victor Streib.\textsuperscript{13}

The involvement of Professor Steib in the abolition of the death penalty for minors has been even more active than as a scholar and teacher. He has served as an expert witness in a number of states including Florida, Texas, Arizona, Louisiana, and Pennsylvania.\textsuperscript{14} Moreover, he has been counsel or co-counsel in several important cases in which the issue has been raised.\textsuperscript{15} Foremost of these, of course, is \textit{Thompson v. Oklahoma}, where he represented the fifteen-year-old boy who was sentenced at trial to be executed.\textsuperscript{16} Less widely known, but just as significant, was his role as lawyer for Paula R. Cooper, who was convicted—at fifteen years old—of murder and felony murder and was sentenced to death.\textsuperscript{17} Cooper was the youngest person ever to be placed on Indiana’s death row. In a series of cases going up and back through the Indiana state court system, Professor Streib vigorously represented the interests of his client and argued

\textsuperscript{11} \textit{Id.} at 73.
\textsuperscript{12} \textit{Thompson}, 487 U.S. at 832.
\textsuperscript{13} The opinion here was citing Professor Streib’s highly influential work \textit{Death Penalty for Juveniles}, \textsc{Victor L. Streib, Death Penalty for Juveniles} 190-287 (1987).
\textsuperscript{14} Victor L. Streib, Biography, \textsc{Ohio Northern University}, http://www.law.onu.edu/faculty_staff/faculty_profiles/victorstreib.html (last visited Feb. 20, 2012).
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Thompson}, 487 U.S. 815. The 5-4 decision removed seventy-two juvenile offenders in twelve states from death row, and ended more than 360 years of the death penalty for juvenile offenders in the United States.
\textsuperscript{17} Cooper v. Indiana, 540 N.E.2d 1216 (Ind. 1989).
strenuously for a lesser penalty. He was ultimately successful, and the death penalty judgment against Cooper was invalidated.18

It is truly a great pleasure for me to participate in this limited way with others in the issue of the Ohio Northern Law Review dedicated to the life and career of Victor Streib. He is a man I admire very much for being willing to spend a good deal of his time taking what—for a considerable period—was an unpopular and often highly-controversial position. He, of course, ultimately prevailed in the courts of law in the United States as well as in the courts of public opinion in our country. Albert Einstein once wrote, “[t]ry not to become a man of success but rather try to become a man of value.”19 Victor Streib is both a man who is of great success and a man of clear and important value.

18. Id. at 1221.
A Note from Carl Monk

Carl Monk

I am honored to have the opportunity to write this brief note commending Victor Streib. While others writing about Vic and his many contributions to legal education and the legal profession undoubtedly know Vic more closely than I do, I have the unique perspective of having worked with Vic on the national level when he served as “Visiting Faculty in Residence” at the Association of American Law Schools (“AALS”), where I then served as Executive Director.

While at AALS, Vic demonstrated his many talents, including a great sense of humor and an ability to work with the many diverse people and constituencies of AALS. Vic could always be counted on to defuse a tense situation with his wry sense of humor while simultaneously advancing the objectives of the AALS through the many committee members with whom he worked.

Vic also represented AALS to its many external constituencies, often representing AALS at Consortium of Social Science Associations meetings, American Council of Learned Societies, and American Bar Association meetings in this capacity.

Vic did all of this for AALS while maintaining his abiding commitment to advocating the end of the death penalty and helping others through his representation of their interests in court, including, often, the Supreme Court of the United States.

Vic was also fun to go to a baseball game with and just “hang out.” The number of excellent scholars and teachers who also know how to have fun and relax is far too small. Vic is one of those people. I thank him for enriching my life, the life of legal education and the legal profession and, most importantly, our democratic society through his many contributions.

Good luck in your future endeavors, Vic, and keep in touch with all of us!

* Carl Monk, AALS Executive Director, 1992-2008; Founding President, International Association of Law Schools; Dean and Distinguished Professor of Law Emeritus, Washburn University School of Law
A Tribute to Victor Streib

KATHERINE HUNT FEDERLE*

Recently, law schools have come under attack for being too theoretical, emphasizing scholarship over teaching and theory over practice.1 Law faculties, it is claimed, have little or no real practice experience, and offer esoteric courses that cannot possibly inform future lawyers.2 Moreover, law professors are rewarded for deeply theoretical scholarship but less for teaching or community service.3 From within this critique, it is claimed that law schools are divorced from the realities of law practice, churning out graduates lacking basic lawyering skills.4 Although new lawyers often receive on-the-job training (the costs of which could be passed on to clients), economic pressures have made this approach seem less feasible.5

The divide between theory and practice is an old one. Many attribute the split to Christopher Langdell, who was appointed Dean of the Harvard Law School in 1870.6 Responding to criticisms that law was a mere trade and not a graduate-school worthy area of study, Langdell sought to establish the underlying theoretical approaches to the study of law.7 Legal reasoning, case analysis, and logic became central to law teaching, with little to no emphasis on the other skills necessary to good lawyering. Those skills, such as client counseling or trial practice, were deemed too practical by the legal academy to warrant inclusion. Although law schools more recently have added new courses designed to teach these important “practical” skills, they remain isolated from the traditional curriculum in important ways—taught by adjuncts or faculty without tenure, and not part of the required curriculum, for example.8

* Professor of Law and Director, Center for Interdisciplinary Law and Policy Studies, The Ohio State University Michael E. Moritz College of Law. She is the former Director of the Justice for Children Project at the Moritz College of Law and has written extensively about children and their rights.

   2. See id.
   3. See id.
   4. See id.
   5. See id.
   6. See David Segal, supra note 1.
   7. See id.
   8. See id.
The notion that theory can do without practice—or the converse—is deeply flawed. Despite the academy’s claims to intellectual bona fides, the reality is that most law graduates will practice, not teach, law. Moreover, the distinction between legal reasoning, logic, and case analysis on the one hand and “practical skills” on the other is largely specious, for the former is a set of skills essential to the practice of law, as is the latter. On the other hand, the disdain for the academy is—at its worst—anti-intellectual. The best attorneys know that the practice of law is not simply a matter of screwing pipes together to make liquid flow; one must know certain fundamental principles governing gravity and mechanics to make the water flow in the direction and manner desired.

The reality is that theory informs practice and practice informs theory. The best lawyers and academics know this and find ways to learn from one another to accomplish change, innovation, reform. Nevertheless there are certain institutional disincentives: woe to the untenured professor who writes a “merely descriptive” article or a treatise for the bar. And the practitioner who wants to delve into the theory of the law finds little time, encouragement, or financial incentive to do so, for what client wants to pay for time spent reading academic work?

But as I have said, I believe excellent practitioners and academics understand the value of thinking deeply about the law in order to implement or effectuate change. From an academic perspective, using law as a tool for social reform is not only appealing but possible; the security of tenure enables one to take positions that may be unpopular or politically infeasible. There nevertheless is a certain exhilaration in articulating a new theory or arguing for societal change while simultaneously exploring these ideas with young (and often quite insightful) law students. Such an approach provides purpose to a career, can rescue one from becoming an intellectual dilettante, and exposes young lawyers to the value of intellectual exploration. In short, intellectual pursuits could—and do—change the way the world is understood.

Professor Victor Streib in many ways is the epitome of the academic who understands this important connection between theory and practice. Although a prolific scholar, his intellectual pursuits had a deeper purpose: to reform the law. The work that most influenced me (and with which I am most familiar) is his work on the juvenile death penalty. His scholarship, including his book, Death Penalty for Juveniles, showed us the realities—and injustices—of executing juveniles, and educated all of us on the need to see beyond stereotypes.9 He also challenged the way the law was

constructed around the death penalty and children, and argued that the constitutional framework should—and must—accommodate juveniles.10

Professor Streib, however, also walked the walk of the practitioner. He served as co-counsel in a number of cases involving juveniles sentenced to death,11 including that of Wayne Thompson, a fifteen-year-old Oklahoma youth sentenced to death for his crimes.12 In Thompson v. Oklahoma,13 Justice Stevens, writing for a plurality of the Supreme Court of the United States, held the imposition of a death sentence on a juvenile who was fifteen at the time of his crimes violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.14 Noting that evolving standards of decency determined the boundaries of the Cruel and Unusual Punishment Clause, the Court looked to statutes and jury determinations as reflections of those evolving and contemporary standards.15 The plurality cited Professor Streib’s book, Death Penalty for Juveniles, as evidence that the execution of juveniles was both rare and now “abhorrent to the conscience of the community.”16 Even the dissent cited Professor Streib’s work.17

In retrospect, the Thompson case was the breach in the dike, although it did not seem so at the time. Less than a year later, the Supreme Court upheld the imposition of the death penalty on sixteen- and seventeen-year-old offenders in Stanford v. Kentucky.18 Justice Scalia, who had written the dissenting opinion in Thompson,19 now authored the Court’s plurality opinion.20 The plurality concluded that the “majority of . . . [s]tates that permit capital punishment authorize it” against minors who are at least sixteen at the time of the offense.21 Petitioners’ arguments that the death penalty violated evolving standards of decency thus were without merit because petitioners had failed to establish a national consensus against the death penalty.22 Rejecting the claim that society viewed capital punishment of juvenile offenders as inappropriate, Justice Scalia again cited Professor

10. See id.
14. Id. at 838.
15. See id. at 826-32.
16. Id. at 832.
17. Id. at 869-70 (Scalia, J., dissenting) (arguing that statistical evidence does not support claim of changing attitude toward execution of juveniles).
19. Thompson, 487 U.S. at 859.
21. Id. at 371.
22. Id. at 377.
Streib’s book, arguing evidence that such sentences were rare did not support the contention that they should never be imposed.23

Professor Streib nevertheless continued to influence the debate about the execution of juveniles. He continued to write and practice, serving as co-counsel for other juveniles sentenced to death and testifying as an expert witness on the juvenile death penalty.24 In 2005, the Supreme Court returned to the issue of the execution of juvenile offenders in Roper v. Simmons.25 This time, a majority of the Court found that the imposition of a death sentence on a criminal defendant for crimes committed as a juvenile violated the Eighth Amendment.26 The Court once again cited Professor Streib’s work as evidence of a national consensus opposing the death penalty for juveniles.27

Professor Streib’s work on the juvenile death penalty may be seen as part of a broader agenda examining the sentencing and punishment of juveniles. Some of his early scholarship raised legitimate questions about the efficacy of severe sanctioning in juvenile law.28 For example, he raised issues about the imposition of a sentence of life without the possibility of parole for juveniles convicted of criminal offenses.29 Moreover, his work on the capital punishment of juveniles reflects a broader interest in the death penalty. He has examined issues surrounding the death penalty for female offenders and written several articles and books on the subject.30 Professor Streib also has written more broadly about death penalty law as well as considered ethical issues in the representation of death row inmates.31

Professor Streib has made numerous other contributions to our understanding of law, and I do not mean to disparage those contributions by not focusing on them here. I simply want to emphasize that his work has helped to change the face of juvenile justice in the United States for the better. He has served as a model for those who see the importance of

23. Id. at 373-74.
26. Id. at 578-79.
27. See id. at 564-65; see id. at 595-96 (O’Connor, J., dissenting).
bridging the artificial gap between theory and practice and has no doubt inspired others to do the same. While I might hope that he continues to exhort all of us to do more, I also wish him the best in this, the next stage of his life. We will miss him.
Standing for the Most Vulnerable

MICHAEL L. RADELET

It takes a special sort of person to dedicate his or her professional career to fighting for those who are at the bottom of the barrel. Questions of “just desserts” aside, there are few (if any) groups in the United States today who are closer to the bottom of the barrel than those 3,500 or so who are awaiting the day when they will be strapped on a gurney and dispatched to the hereafter. 1 Professor Victor L. Streib not only dedicates his time to working with death-row inmates, but his strongest scholarly and legal contributions have been directed at the most vulnerable of those on that bottom rung: juveniles, women, and the mentally retarded. Like Mother Teresa, Streib is a man who has walked the walk.

It is almost impossible to imagine that Professor Streib is beginning his eighth decade on our planet. He continues to approach scholarly issues with the energy of a first-year associate in a New York law firm and the creativity of a student who might just have graduated at the top of her or his law school class. Today he has plenty of laurels to rest on, but he looks forward to retirement as a time to shed even more light on contemporary death penalty debates.

A native of Marion, Indiana, Streib completed his undergraduate work in Industrial Engineering at Auburn in 1966 and his law degree at Indiana University-Bloomington in 1970. He then spent two years with the Institute for Research in Public Safety at Indiana University (“IU”) before accepting a tenure-track position in what is now IU’s Department of Criminal Justice. In 1978 he began a two-year stay at New England College of Law in Boston and then, in 1980, he began a sixteen-year tenure at Cleveland-Marshall College of Law. In 1996 he was named Dean of Ohio Northern University Pettit College of Law.

Streib was a generalist before becoming a specialist. His first book, published in 1978, was a critical overview of the juvenile justice system in the United States. 2 It examined the history and philosophy of America’s

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treatment of juveniles by the criminal justice system as well as the many shortcomings of this approach.\textsuperscript{3} Indeed, in the book Streib outlined some thirty recommendations for how the juvenile justice system could be improved.\textsuperscript{4}

Shortly after moving to Cleveland, however, he began to focus his scholarship on death penalty issues, specifically on the death penalty for juveniles. His first major publication in the area was in 1983,\textsuperscript{5} and other important works on the problem soon followed.\textsuperscript{6} At the time, very little was known about the issue; undoubtedly most scholars would have thought that only a handful of children had been executed in the history of the United States. In his 1983 article, Streib told the history and summarized the debate over juvenile executions, and gave information on 287 executions in American history that took the lives of children aged seventeen or younger at the time of their crimes.\textsuperscript{7} Now almost thirty years old, that article can be seen in retrospect as the bugle call at the beginning of the horse race. It opened the modern debate on the wisdom and morality of executing youthful offenders, and has proved to be enormously important.

In 1987, Streib finished a book that remains the Bible in this field.\textsuperscript{8} It was fittingly published by Indiana University Press,\textsuperscript{9} the university where Streib received his legal training and spent the first eight years of his career. The book provides readers with an overview of the constitutional issues involved in executions of juveniles, an overview of the cases of juveniles who were executed throughout American history,\textsuperscript{10} a discussion of the arguments for and against public policies that allowed states to execute youthful offenders, and a snapshot of the procedures used in various states that were continuing to sentence juveniles to death in the 1980s.\textsuperscript{11} In the years since, no scholar or litigator can deal with the juvenile death penalty without first studying this book.

\textsuperscript{3} See generally id.
\textsuperscript{4} Id. at 51-104.
\textsuperscript{7} Streib, supra note 5, at 613-16, 618-19.
\textsuperscript{8} VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES (1987).
\textsuperscript{9} Id.
\textsuperscript{10} The book included 281 cases of juvenile executions, a figure that updated his earlier work. Id. at 55.
\textsuperscript{11} See generally id.
Streib has always been a scholar who credits others for their assistance with his projects. In particular, I have always been impressed with his willingness to share the spotlight with Watt Espy, an Alabama death penalty researcher who died in August, 2009.\footnote{See M. Watt Espy Papers (APAP-301), 1730-2008: Biographical Sketch, UNIV. AT ALBANY, http://library.albany.edu/specoll/findais/eresources/findingaids/apap301.xml (last visited Mar. 14, 2012).} Espy, who never had a college degree,\footnote{Id.} spent his life trying to document every execution in American history.\footnote{For information about Espy’s work, see, e.g., Bruce Krasnow, Chronicler Spends Life with Death, FLORIDA TIMES-UNION (Jacksonville), Dec. 1, 1986, at A1; Ronald Smothers, Historian’s Death Penalty Obsession, N.Y. TIMES, Oct. 21, 1987, at A16; Francis X. Clines, A Dismayed Historian of the Gallows, N.Y. TIMES, Nov. 18, 1992, at A16. Espy’s papers are now housed in the National Death Penalty Archives in the M.E. Grenander Department of Special Collections and Archives. See M. Watt Espy Papers, supra note 12. At the time of this writing, the University at Albany is trying to convince Professor Streib to add some of his papers to this collection.} He lived in poverty and rarely got credit for his scholarship. Streib learned of Espy’s work in the early 1980s and spent several days with him in Alabama going though the information he had gathered on executions of juveniles. Unlike some other academics, Streib always gave Espy credit and respect. He once described Espy as “an undisputed gem.”\footnote{Bruce Krasnow, supra note 14, at A5.}

As Streib noted in the preface and acknowledgements section of his 1987 book, Death Penalty for Juveniles:

Two individuals deserve special mention. One is a recognized giant in the field of death penalty research, Watt Espy.\footnote{The other, not surprisingly, is his wife, Lynn Sametz.} He generously opened his files to me originally when I sought to identify each juvenile execution and has remained a loyal and priceless contributor to this research ever since. Along with so many other death penalty researchers, I have achieved this level in my research only by standing on the shoulders of Watt Espy.\footnote{Streib, supra note 9, at x.}

Espy thought of Streib as a true hero. For the last twenty-five years of his life, Espy had a picture of Streib on the wall over his desk.\footnote{However, Espy could never remember how to pronounce “Streib,” doing so without a long “i.”}

Soon after completing his book on juveniles, Streib shifted gears and began to study executions of women. The first paper, coauthored with Lynn Sametz, built on his work on the juvenile death penalty.\footnote{Victor L. Streib & Lynn Sametz, Executing Female Juveniles, 22 CONN. L. REV. 3 (1989). This is one of five publications that Vic and Lynn coauthored. She holds an M.A. in Special Education.} Other papers about the death penalty for females soon followed,\footnote{Streib, supra note 8, at x.} as did a book in 2006.\footnote{19. Victor L. Streib & Lynn Sametz, Executing Female Juveniles, 22 CONN. L. REV. 3 (1989). This is one of five publications that Vic and Lynn coauthored. She holds an M.A. in Special Education.}
Streib has always been generous sharing the data that he gathered for his own work with others who share his interests. In January 1984, he published the first issue of “The Juvenile Death Penalty Today,” which went through seventy-six updates until execution of offenders aged seventeen or younger at the time of the crime was finally banned by the Supreme Court in 2005. Shortly after he began distributing the information on the death penalty for juveniles, he undertook a similar project summarizing data on the death penalty for women. He continues to update that document today. I cannot imagine a college class on the death penalty today that would not list these two documents as required or suggested reading.

By the early 1990s, Streib expanded his interests to include more global issues in death penalty debates. In 1993 he published one of the most important edited books on the death penalty in the modern era, with excerpts from over forty scholarly articles that discuss a wide array of death penalty issues. Ten years later, the first edition of a wonderful overview of death penalty issues, Death Penalty in a Nutshell, first appeared. There really is no other book like it on the market: in three hundred pages the monograph synthesizes all the major issues in contemporary death penalty debates. It is useful not only in law school courses, but as a supplement for undergraduate criminology courses.

With this record, it is not surprising that Streib has had a hand in virtually all of the litigation surrounding the juvenile death penalty over the past three decades. He has struggled with the (sometimes) conflicting roles

and a Ph.D. in Education, and has been a constant sounding board for Vic throughout his career. In addition to the five papers, they also collaborated twenty-eight years ago to produce twin children, Jessi and Noah. Lynn is currently the Associate Director of the Center for Youth, Family and Community Partnerships, University of North Carolina Greensboro.


22. The final issue is dated October 7, 2005. See Victor L. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – February 28, 2005, 3 (Issue # 77) (Oct. 7, 2005), available at http://www.law.onu.edu/faculty_staff/faculty_profiles/coursematerials/streib/juvdeath.pdf. By this time, Streib had documented 366 executions of juveniles in American history. Id. at 3. In the pre-Internet era, spanning the first ten years or so of this publication, Streib would photocopy several dozen copies and mail them to a growing list of subscribers.


of scholar and advocate, but just a few weeks after he finished his 1987 book he became co-counsel for Wayne Thompson, who was sentenced to death in Oklahoma for a murder committed when he was fifteen. Later, he also became co-counsel for other juveniles on death row, Paula Cooper and Jerome Allen. I am sure that he has spent literally thousands of hours in uncompensated time brainstorming about various death penalty issues with both litigators and scholars.

In 1998, Streib wrote an essay that linked death penalty issues for “second class citizens”—juveniles, women, and the mentally retarded. By any measure and for different reasons, these demographic groups are especially vulnerable in death penalty proceedings. In part, this is precisely why the Supreme Court has banned the death penalty for two of the three groups. Female defendants, too, can have special vulnerabilities: in determining punishment for women, jurors and judges need to be aware of the possibility that the defendant was acting under the domination of a male accomplice, or had a history of abuse from male partners or acquaintances that dramatically increases the probability of criminal violence.

Ohio Northern University (“ ravel Faculty with such a strong commitment to the general principles on which the university was founded. ONU is a private university affiliated with the United Methodist Church (“UMC”). In 1956 the UMC became one of the first major organized religions in the United States to take a formal (and firm) stand against the death penalty. Their 1956 statement read, in part, “[w]e stand for the application of the redemptive principle to

29. Cooper v. State, 540 N.E.2d 1216, 1217 (Ind. 1989) (a case that tested the retroactivity of Thompson and ultimately banned the death penalty in Indiana for offenders aged fifteen or older).
30. Allen v. State, 636 So.2d 494, 496 (Fla. 1994) (Allen was sentenced to death by a judge who apparently hoped the Supreme Court would ultimately reverse the Thompson decision; the result was that the Florida Supreme Court firmly banned the death penalty in Florida for offenders aged fifteen or younger).
the treatment of offenders against the law, to reform of penal and correctional methods, and to criminal court procedures. [For this reason] [w]e deplore the use of capital punishment. 35

These are stands that have guided the career of Professor Victor Streib. May his work continue to inspire the ONU law students and faculty, as it has and will continue to inspire contemporary and future students of the death penalty in America.

A Note from Lauren Robel

LAUREN K. ROBEL

“The secret of success is constancy to purpose.” - Benjamin Disraeli

Constancy to purpose defines the success that Victor Streib has achieved in his career as an academic and an advocate. He has fought passionately for the rights of children and women who have been sentenced to death, and has further fought to change society so future generations have options that lead them away from a life of violent crime. It takes a special kind of person to spend decades representing the rights of some of our most powerless and—quite often—reviled citizens in the face of ambivalence and antipathy, and Victor is that special person. He is a national authority on the death penalty, a noted scholar and educator, and an exceptional advocate for the clients he represents.

I am especially proud of the role that Indiana University has played in forming the basis of Victor’s distinguished career. A seventh-generation Hoosier, Victor became the first in his family to graduate from college. After receiving his undergraduate degree from Auburn University in industrial engineering, he returned to Indiana to attend law school in Bloomington. He began his legal studies in June 1968 and graduated just twenty-six months later in August 1970.

Victor was an older student, having served in the U.S. Air Force before starting college, and he entered law school during a period of intense social change. Like many of his generation, he experienced his own personal and political awakening during this time. He developed an abhorrence of what he calls “the American love affair with violence” and became a conscientious objector. He also discovered that law and higher education offered a unique opportunity for him to champion the cause of the underdog, which is where his heart had always been.

Victor started his career as an academic and an advocate for the powerless after graduating from law school. He was admitted to the Indiana Bar in 1970 and began teaching in Indiana University’s Department of Forensic Studies (now Criminal Justice) in 1971. Almost immediately, he

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* Interim Provost and Executive Vice President of Indiana University Bloomington, President of the Association of American Law Schools, and former Dean of the Maurer School of Law.

began focusing his work on issues of the death penalty and its application to children and women. He had a unique opportunity to see the system in action when he served as deputy prosecuting attorney in juvenile court in Bloomington in 1976, and this experience informed his later representation of juveniles and women on death row during the appellate process.

After leaving Indiana University, Victor began a distinguished career as a law professor. He first taught at the New England School of Law in Boston and then at the Cleveland-Marshall College of Law at Cleveland State University. In 1996, he became Dean of the Claude W. Pettit College of Law at Ohio Northern University, the institution from which he is now retiring. He is an incredibly prolific scholar and has published more than three hundred books, chapters, articles, and papers.

Victor’s commitment to understanding and fighting the death penalty and its application to juveniles and women has truly defined his life. Forty years ago, when he began tracking the number of juveniles on death row, the United States was the only Western country that still sentenced minors to death. Victor was among the first scholars to study this issue seriously and raise awareness about the fact that a child in this country could be executed but could not “drive, vote, marry, contract or play church bingo[.]”

Victor set out to change this situation and shift our national focus from vengeance and retribution to rehabilitation and prevention of further violence. He served as appellate counsel in a number of high profile cases, including *Thompson v. Oklahoma,* in which Wayne Thompson—who was fifteen years old at the time of his crime—was sentenced to death. The case was a victory: the Supreme Court overturned Thompson’s death sentence and held that execution of a person who was under the age of sixteen at the time of the offense was a violation of the Eighth and Fourteenth Amendments. But the victory was not complete. Victor’s ultimate goal was to persuade the Court to draw a line prohibiting executions of any person under the age of eighteen at the time of the offense.

One year after *Thompson,* it appeared the Supreme Court would not draw this line. In *Stanford v. Kentucky,* the Court sanctioned imposition of the death penalty for minors who were sixteen or seventeen at the time of

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4. *Id.* at 819.
5. *Id.* at 821-38.
their crimes. But Victor remained constant to his purpose and continued writing about the death penalty for juveniles and women, serving as appellate counsel for children and women facing the death penalty and advocating for a moratorium on the death penalty for juveniles. In 2005, the Supreme Court of the United States cited Victor’s work eight times, along with society’s “evolving standards of decency[,]” in holding that it is unconstitutional to impose the death penalty on offenders who were under the age of eighteen at the time their crimes were committed.

Fresh on the heels of this success, Victor returned to Bloomington to deliver the 2006 Ralph Fuchs Lecture, Representing Kids Who Kill. Professor Fuchs, who retired from teaching the same year Victor graduated, would have been proud to have Victor deliver this lecture in the series named for him. Like Victor, Fuchs was a champion for the underdog during times of stress and social change. He was active in the NAACP and fought for civil rights and racial equality at the state and university level. Further, at the height of the McCarthy Era, he fought for the rights of free speech, free press, free assemblage, and other civil rights in academic institutions. Victor’s lecture, and life, resonated deeply with these themes. Our faculty and students were delighted to welcome Victor back in 2007 to teach a seminar in juvenile criminal law.

As Victor embarks on the adventure of retirement, it is wonderful to reflect upon the huge impact he has had since he left Indiana University. Through his commitment to his purpose, he has achieved great success in the field of criminal law, particularly juvenile criminal law and death penalty scholarship. The Maurer School of Law is proud to claim him as one of our alumni.

7. Id. at 364-74.
Women on Death Row:  
A Tribute to Dean Victor Streib

LORRAINE SCHMALL

Over 1,100 persons—only a dozen of them female—have been executed in the United States since the death penalty’s reinstatement in 1976 in Gregg v. Georgia. As of the end of 2010, “36 states and the Federal Bureau of Prisons held 3,158 inmates under sentence of death.” Sixty-three of them are women. Rather than representing the worst among us, the condemned are a serendipitous lot: nearly all are murderers; many are former drug addicts or people with serious mental health problems. Some are serial killers, but many have a bad history with law enforcement and a life of conviction and incarceration that aggravate their crimes and make them death-eligible. Some of each gender were found to be guilty of unquestionably heinous crimes. The women on the row are overwhelmingly guilty of domestic violence. “One-quarter . . . killed their husbands or boyfriends; and another one-fifth . . . killed their children.” “One other woman killed both her husband and her children, and three other women

* Professor of Law at Northern Illinois College of Law; B.A., University of Illinois – Chicago; M.A., Columbia University; J.D., George Washington University.


[T]he Supreme Court held that the punishment of death did not invariably violate the United States Constitution; that the death penalty was not a form of punishment that could never be imposed, regardless of the circumstances of the offense, the character of the offender, and the procedure followed in reaching the decision to impose it; and that the concerns that the penalty of death not be imposed in an arbitrary or capricious manner were met by a carefully drafted statute that ensured that the sentencing authority was given adequate information and guidance.

Id. (LexisNexis Case Summary). The Court upheld the newly-written Georgia statute and re-introduced the death penalty in the United States. Id. at 207.

4. Id.
5. See Streib, supra note 1, at 18-24.
6. See id. at 10.
7. Id.
killed a young niece, nephew, or child in their care. " Forty-five percent of their victims were children or teens.  

The death penalty is rarely visited upon a criminal, even those whose deeds might make us shudder. In 2010, there were 14,748 people murdered in the United States, 112 men and two women sentenced to death, and forty-six executions. Only one of those executed, Teresa Lewis, was a woman. Dean Victor Streib, as the nation’s foremost historian of the death penalty, recorded Lewis’s punishment, and has recorded the crimes and punishments for the other 166 women and girls he lists on his annual survey of death penalties for female offenders.  

Trial lawyer, law professor, scholar, Dean Victor Streib is likely the most widely-cited and prolific death penalty scholar. He has committed to and endeavored many important things of a generous and noble nature, including his avant garde research on juvenile criminal offenders. But chief among his accomplishments, for me at least, is Victor Streib’s meticulous, dispassionate, and objective reporting of every woman sentenced to death in the United States since 1984. This has been no easy task. He has told how old they were at the time of their crimes, identified them by race, and described their victims and the crimes they were found to have committed. Disciplined and scientific, these data have a Progressive-era feel, offering measures for assessment. Victor Streib has protested, quite consistently, that he has no axe to grind. His objectivity is never in doubt. But his
research is like a vigil; it shines a light on the names and faces of women sentenced to death by the state for their crimes. Interest in the death penalty wanes and waxes, often with the notoriety of the crime, the criminal, or the prosecutor. Research about women on death row is limited; there are only a handful of legal scholars who have dedicated much of their work to informing and challenging the rest of us.18 Victor Streib has spent decades keeping track of the legal system’s every imposition of a sentence of death on a woman.19 Diligent scholars like him assist the community in remaining aware that the machine of death continues, and that women are among those on whom it is used. Victor Streib refuses to let us hide the condemned: he puts their names and stories on a list that is cited by me and likely every other person who has studied, written about, or practiced death penalty law. As Streib chronicled the population of women on death row, Michel Foucault, a contemporary French philosopher, noted that “[i]t is ugly to be punishable, but there is no glory in punishing . . . . Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the punishment itself.”20 Condemnation and execution of women in the United States continues as “governments increasingly hid[e] the death penalty behind prison walls, legislators minimize[] its use and lessen[] the reach of capital crimes, and reformers s[ee]k newer, more ‘humane’ means of death from the guillotine, the electric chair, the gas chamber, and the lethal injection,”21 Little-noted executions cause little discomfort: Ojos que no ven, corazón que no siente—Out of sight, out of mind (what the eyes cannot see, the heart cannot feel).

Supreme Court Justice Brennan, concurring, wrote in Furman v. Georgia,22 that

concern for decency and human dignity, . . . has compelled changes in the circumstances surrounding the execution itself. No longer

held by the author. Having first gotten through the topic by studying and reporting all known cases of the death penalty for female offenders, I and others should then, and only then, begin to get at what it all means.

Id. at 845 n.5.
19. Streib, supra note 1, at 2.
does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.23

But not all his colleagues agree with that notion. U.S. Supreme Court Justice Lewis F. Powell argued, not speciously, that “‘[w]hat this country needs is for public executions to be reinstated[,]’”24 A pair of scholars have recently proposed a constitutional amendment to make executions public, which

would offer a profound affirmation of democratic transparency and accountability. . . .

. . . [B]ecause the ultimate punishment occurs behind closed doors, it is all too easy for citizens to overlook the issue entirely. Returning executions to the public sphere would force Americans either to openly endorse or firmly reject a sanction that many find all too easy to ignore.25

Their point—that “[v]eil[ing] capital punishment from the general citizenry has reduced it to a mere abstraction”—bears repetition.26 The lifework of Victor Streib is a bulwark against the forgetfulness and anonymity that might otherwise perpetuate the tragedy of capital punishment.

Esteemed law professor Charles L. Black, long an abolitionist, wrote in 1971 that “I should suppose that any person favoring capital punishment owes it to his own conscience to inquire fully into the physical facts about that which is being done with his approval.”27 But secrecy is inherent in executions, and only a few people can witness the death, including the condemned and victims’ families, prison personnel, and the media.28 A judge in Georgia recently granted a teen inmate’s request that his execution for the murders of his parents and his brother be videotaped to preserve his

23. Id. at 297 (Brennan, J., concurring).
26. Id. at 862.
claim, post-mortem, that the method of killing him was cruel and unusual.\textsuperscript{29} But that decision, and the public notice of execution, is rare.\textsuperscript{30}

Justice Stevens, concurring in a decision that rejected a capital defendant’s arguments that Kentucky’s lethal injections were cruel and unusual, expressed his own frustration at how little the public examines the death penalty despite its frequent consideration by the Supreme Court of the United States:

[C]urrent decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.\textsuperscript{31}

In an October 2011 Gallup poll, 61% of respondents favored the death penalty, 41% thought it was applied unfairly, and an overwhelming number—64%—thought it neither deterred criminals nor lowered the murder rate.\textsuperscript{32} Information, of the type so painstakingly gathered by the likes of Victor Streib, might help Americans reach rational decisions that would obviate such inconsistent opinions. Justice Stevens also observed that his countrymen’s support of the death penalty weakens when they discover other alternatives to executions:

[A] recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.\textsuperscript{33}

The death penalty is rarely newsworthy. Murder trials get coverage; occasionally, sentencing hearings—and discussions of the propriety, efficacy, or morality of capital punishment—command public attention.

\begin{itemize}
\item[30.] \textit{Id.} The court agreed with defense lawyers who argued such video was essential to their claims that the method of execution used by the state—a 3-drug “cocktail”—caused unnecessary pain and suffering. \textit{See} Rhonda Cook & Bill Rankin, \textit{Metro}, \textit{THE ATLANTA JOURNAL-CONSTITUTION}, July 21, 2011, at B2, \url{available at 2011 WLNR 14422475}.
\item[33.] \textit{Baze}, 553 U.S. at 78-79.
\end{itemize}
But after the appeals are exhausted, scant newsprint or pixels are spent on the condemned. Gender, race, existence, all go unnoted. Teresa Lewis, the last woman executed in the United States in 2010, garnered a bit of attention when she was being sentenced, but died with little fanfare. Lewis was found guilty of being an accomplice to the shooting deaths of her husband and stepson. Lawyers and critics of her penalty claimed Lewis was intellectually limited, and argued that testimony from the man who actually fired the weapons that he chose her because she was not too bright, easily influenced and seduced, with a husband with money should reduce her culpability. Courts disagreed, and she died for her role in the crime.

Despite a story one would consider newsworthy and fascinating, Teresa Lewis’s execution on September 23, 2010—the first of a woman in five years—was barely and briefly noted in seventy-four very short printed news articles, almost half of which were in the foreign press. Brooke Marie Rossiers, the last woman sentenced to death on October 22, 2011, barely got a paragraph of notice or notoriety either at the time of

34. In 2005, for example, a young black woman who killed her husband and her two young children was executed with only one official notice: a few sentences in the Grand Rapids Press. Woman executed, THE GRAND RAPIDS PRESS, Sept. 15, 2005, at A3, available at 2005 WLNR 14746536. In August 2011, Jerry Jackson, who was black and found guilty of the sexual assault and murder of an elderly white woman, died after being given a lethal injection; he was briefly mentioned in a single news account in Queensland, Australia. Murderer executed in U.S., SUNSHINE COAST DAILY (Queensland), Aug. 20, 2011, at 30, available at http://www.lexisnexis.com. The above articles were found as search results of major newspapers in a two-year period, including the execution dates, using the name of the condemned as terms, dated December 19, 2011 at 2:17 pm CST. The fact that so few results appear demonstrates that executions take place with very little notice from the public.

35. See Streib, supra note 1, at 3.

36. Although in another context, Harvard Law Dean Martha Minow’s conclusion rings true here: “Today’s hot social problem is tomorrow’s old news, less worthy of public attention, public support, and social resources -- yet all the while just as common and just as harmful as it was when the public paid attention.” Martha Minow, Words and the Door to the Land of Change: Law, Language, and Family Violence, 43 VAND. L. REV. 1665, 1683 n.107 (1990).


40. Allen, supra note 38 (noting “[t]he last execution of a woman in America was in 2005 when Frances Newton, 40, died by lethal injection in Texas for the murder of her family.”)

the crime or contemporaneous with her trial or sentencing.\textsuperscript{42} There is no reported criminal case in California, where she was convicted of being the “mastermind” in a double murder and robbery.\textsuperscript{43} Rossiers, described as a sex worker in a news story, was sent to death row while her two male co-defendants were given life sentences.\textsuperscript{44} Her lawyer’s pleas for mercy, based upon Rossiers’ history of drug addiction and out of concern for her four small children, were rejected.\textsuperscript{45} The only mitigation testimony reported was that of the grandmother of one of the defendant’s four children, who said Rossiers always fed her children and was not capable of doing such a crime.\textsuperscript{46} The two victims were johns, who followed the defendant to a motel room where she lived with one of the co-defendants (a small-time drug dealer).\textsuperscript{47} The trio stripped, robbed, and beat the men to death, then dumped their bodies nearby, wrapped in sheets.\textsuperscript{48}

Foreign newspapers often carry more stories about American women condemned to death than domestic news agencies. The international community is keenly interested in America’s unique place in having more women on death row than any other nation.\textsuperscript{49} Execution also expose the United States to international criticism: it is banned by the United Nations Charter and the European Union espouses abolition.\textsuperscript{50} Sadly, in the United States, there are more news stories about the infrequent (though appalling) stories about stoning young women for committing adultery and premarital sex in Third World countries than features about battered women or prostitutes or junkies who end up killing and being condemned.

\textsuperscript{43} See id.
\textsuperscript{44} See id.
\textsuperscript{45} Id.
\textsuperscript{47} Alvarez, supra note 42.
\textsuperscript{49} See e.g., Ho, supra note 41 (referencing Streib’s book, DEATH PENALTY IN A NUTSHELL (2003)).
A WOMAN’S PLACE

Pundits allege the death penalty is itself sexist, because women commit twelve percent of the crimes eligible for death (typically, aggravated murder) and only get about 1.2% of the death sentences. A myriad of factors enter sentencing deliberations; some are statutory, others are emotional, political, or prejudicial. Consequently, numerical comparisons do not accurately capture the difference. But concerns that women get a break pervade the discussion of the death penalty. Even as strong an abolitionist as Justice Thurgood Marshall concluded “[i]t is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.” It has been argued that “Justice Marshall’s blunt observation still rings true. Nationwide, between the years 1973 and 2002 of the 859 individuals executed, only ten—or 1.2%—were women. And as of 2002, of the 3,557 total prisoners on death row around the nation, only fifty-one—or 1.4%—are women.”

This supposed gender disparity has even led some to call for equal treatment, with potentially singularly-horrific results:

“If capital jurors were asked to avoid sex bias in their deliberations, they might be more likely to treat female defendants as if they were male than to treat male defendants as if they were female.” Thus, such proposed avenues for combating the gender disparity on death row could actually lead to a harsher imposition of the death penalty on women and in-turn an increased female occupancy on death row rather than reducing the overall number of persons sentenced to death.

Like Justice Marshall, Dean Streib has been quoted as saying that gender bias influences death penalty impositions. But one could argue that both men, renowned for their fairness and their representation of those with little financial or political currency, use the statistical disparity to establish the arbitrariness of the penalty itself. Streib has noted that when

52. Furman, 408 U.S. at 365 (Marshall, J., concurring).
53. Reza, supra note 51, at 180.
55. Streib, supra note 17, at 887-88.
states and prosecutors can no longer stomach capital punishment, it may “fade away . . .”\(^{56}\) When observing how many more men than women are condemned to die for their crimes, and simultaneously recognizing our country’s commitment to gender equality, Streib has mused that our leaders may express alarm at the trend and seek means to reverse it. While this political position has the advantages of being tough on crime and of being opposed to gender bias, calling for the death of girls and women may not provide the same macho image as calling for the death of adult men.\(^{57}\)

Statistical differences between the number of men and women on death row, however and whatever their relevance, are probably appropriate. Some decry “a system-wide apparent bias based on the gender of the offender.’ Simply put, throughout the history of the American capital punishment system, there have been significantly fewer women both sentenced and executed for capital crimes than their male counterparts.\(^{58}\) But the number of women who commit death-eligible crimes, and are ultimately sentenced for them, are too small to reach any conclusion. Beyond that, and in any case, only a very small percentage of men get the death penalty.\(^{59}\) There is no data for actual numbers of crimes that make defendants eligible for death; one can only count the number of murders\(^{60}\) and number of people living on death row\(^{61}\).

The result is that a very small percentage of men and women get the death penalty—each under two percent.\(^{62}\) These may not be fair.

\(^{56}\) Id. at 880.

\(^{57}\) Id.

\(^{58}\) Reza, supra note 51, at 180 (quoting Victor Streib, \textit{Gendering the Death Penalty: Countering Sex Bias in Masculine Sanctuary}, 63 OHIO ST. L.J. 433, 433 (2002)).


\(^{62}\) I know all these comparisons are phony, and that death sentences might actually be imposed one or two years after the murder is committed, may I legitimately say something like, only 1.2% of all murderers end up on death row. For example, in 1976: with a population of 214,659,000, there were 18,780 murders and 60 death sentences. In 1991, population 252,177,000, there were 24,700 murders and 126 death sentences. In 2000, population of 281,421,906 there were 15,586 murders and 76 people put on the row. In 2010, population308,745,538, there were 14,748 murders and 69 death sentences. See \textit{The Disaster Center}, United States Crime Rates 1960-2010, http://www.disastercenter.com/crime/uscrime.htm; \textit{Death Penalty Info. Center, Death Row Inmates
generalizations (because of the panoply of complex considerations that lead juries and judges to impose capital punishment) but it is just as valid to compare the number of murderers to the number of condemned as to contrast the number of female murders who are sentenced to death with the nearly ten-times larger number of men condemned for their killings. In finding three death penalties too capricious to be fair, Justice Stewart opined, “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”63 The Supreme Court of the United States has reiterated that capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes[,]” and whose extreme culpability makes them “the most deserving of execution . . . .”64 If only that were so.

Instead, all the data should reflect that the death penalty is unusual, arbitrary, and possibly random. Dean Streib’s work is integral in reaching that conclusion. A recent empirical study of capital punishment in Connecticut illustrates and supports this position.65 “The extreme infrequency with which the death penalty is administered in Connecticut raises a serious question as to whether the state’s death penalty regime is serving any legitimate social purpose.”66

The modern jurisprudence of the death penalty began in 1972, when the Supreme Court in Furman struck down state death-penalty laws that lacked guidelines on how the penalty should be applied.67 In a per curiam opinion expressing the view of five members of the Court, it was held that the imposition and carrying out of the death sentence in the present cases involving three black men (who, separately, committed two rapes and one killing) constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.68 Some of the Justices opined that the fact that the death penalty was imposed so infrequently—only fifteen percent of


63. Furman, 408 U.S. at 309 (Stewart, J., concurring).
65. The author studied “the application of the death penalty in Connecticut from 1973 until 2007, a period during which 4686 murders were committed in the state[,]” gathering background information on the overall numbers of murders, death sentences, and executions in Connecticut. John J. Donohue, Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation From 4686 Murders to One Execution, 1 (2011), available at http://works.bepress.com/john_donohue/87 (last visited Jan. 9, 2012). “Specifically, of the 4686 murders committed during the sample period, 205 are death-eligible cases that resulted in a homicide conviction, and 138 of these were charged with a capital felony.” Id. “Of the 66 [convicted of a capital felony,] 29 then went to a death penalty sentencing hearing, resulting in 9 sustained death sentences, and one execution (in 2005).” Id.
66. Id.
67. Furman, 408 U.S. 238.
68. Id.
death-eligible murder convictions in Georgia lead to a death sentence—made it “freakishly” rare, and therefore arbitrary and unconstitutional. The Furman Court was not asked to find all death penalty laws unconstitutional. It was asked only whether, in that instant case, the imposition of the death penalty violated the prohibition against cruel and unusual punishment. But data over the past fifty years, and studies like the newest one in Connecticut, raise the alarm that capital punishment is indeed, rare, random, and likely contrary to every tenet of the U.S. Constitution.

Dean Streib has been careful to avoid the conclusion that being a woman gives a capital defendant an advantage. His data shows that for whatever reason, women are less likely than men to be sentenced to death and he does find a “gender-bias away from imposing death sentences and executions,” but he neither judges nor exhorts about the results. Instead, he has summarized his research in ways that highlight the arbitrariness of the death penalty:

The executed females tended to be very poor, uneducated, and of the lowest social class in the community. Their victims tended to be white and of particularly protected classes, either children or socially prominent adults. Perhaps most fatally for them, they committed shockingly “unladylike” behavior, allowing the sentencing judges and juries to put aside any image of them as “the gentler sex” and to treat them as “crazed monsters” deserving of nothing more than extermination.

Critics of capital punishment, like Albert Camus, argue that it is the state, and not the criminal, who is the monster:

But what then is capital punishment but the most premeditated of murders, to which no criminal’s deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and

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69. Id. at 387, n.11 (Burger, J. dissenting).
70. Id. at 293.
71. Id. at 308.
72. Furman, 408 U.S. at 239.
73. See Donohue, supra note 65.
74. Streib, supra note 17, at 878.
75. Id. In 2002, a movie was made by that name, see Monster, INTERNATIONAL MOVIE DATABASE, 2003, www.imdb.com/title/tt0340855/ (fictionalizing the life of Aileen Wuornos, a prostitute who killed and robbed seven clients. Her claims of self-defense were rejected.)
who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.76

There are objective reasons for statistical differences.77 Women are less likely to be involved in capital crimes.78 Women have fewer criminal convictions, yet many of their murders are committed during the course of another violent felony,79 and a large number of convicted women have killed intimates.80 For good or ill, it is the murder of strangers that tends to elicit the hue and cry for severe punishment; we can choose our mates, but cannot escape the vagaries of random street crime.81 Ironically, most of the women on death row are there for killing their families.82

There is also the argument that women are more likely to be given an individual assessment of culpability than men.83 Dean Streib once said that it is “easier to convince a jury that women suffer emotional distress or other emotional problems more than men.”84 More likely, a woman—because of her uniqueness as a killer—might capture the focus of those who, when choosing a sentence, are commanded to consider the aggravating and mitigating factors of a person’s life and history that would make condemnation a just punishment.85 A court or jury that considers the

78. “[F]emales are not only much less criminal than males, they are so much less criminal that whereas convictions are, statistically at least, ‘normal for males’ they are very unusual for females.” FRANCES HEIDENSOHN, WOMEN AND CRIME 2 (2d ed. 1985).
79. See Richard A. Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C. L. REV. 1103, 1128, n.64 (1990). “Out of the total number of felony murders committed in any given year, only about six percent are committed by women.” Christine Nader & Trisha J. Pasdach supra note 54, at 78.
81. See Christine Nader & Trisha J. Pasdach, supra note 54, at 79 (“the seriousness of domestic homicides are generally discounted in comparison to felony murder, which men overwhelmingly commit, because the murder of a family member or sexual partner is typically read by the law to be mitigated by the stresses of domestic life. Because the victims of women killers are substantially more likely than those of men to be family members or other intimates, the tendency to exclude domestic homicides from capital murder tends to also exclude women’s homicides as compared to men’s homicides” (footnotes omitted)).
82. Streib, supra note 1, at 10.
84. Carol J. Williams, Woman’s execution could lead to more Virginia case might end reluctance to put females to death, THE STAR-LEDGER (Newark, New Jersey), Sept. 26, 2010, available at 2010 WLNR 19154318.
85. Schmall, supra note 83, at 311.
mitigation of horrific histories of personal abuse in the case of women may be moving more closely toward nondiscriminatory consideration in every defendant’s case.86

86. As I have argued before:

We need to check our impulse to find sex discrimination in capital sentencing and punishment when it is clearly not the only reason for disparity. We must applaud the inclusion— for women, at least—of personal stories as an element of just desert, and we must try to extend that inclusion to men whose lives hang in the balance.

Id. at 326.
Victor L. Streib Tribute

MARGERY B. KOOSEDB

Vic Streib was at the Cleveland Marshall School of Law at Cleveland State University when I first got to know him in the 1980s. He was living on the east side of Cleveland, as was I, though I have taught for over thirty-seven years down the road at the University of Akron School of Law. Like Vic, I teach criminal law and procedure, specializing in capital punishment litigation. It was natural that we would meet, sharing so much. But I honestly do not recall how or when we first met. It must have been at a death penalty-related meeting or through a phone conversation (no email was flowing in those olden days in the late ’80s).

ON DEATH AND KIDS AND WOMEN

Vic was already chronicling the death-sentencing practices, past and present, of juveniles and women then. I made sure to get on his mailing list, and going through my office file cabinets last month (which woefully need the attention of a paper recycler), I found twenty random 1990-1998 issues of Vic’s The Death Penalty for Female Offenders. Also known as Capital Punishment for Female Offenders, these reports came several times a year and tracked imposition of the death penalty on women from January 1, 1973 to the then present. A similar tracking paper for minors, The Juvenile Death Penalty Today—Present Death Row Inmates under Juvenile Death Sentences and Death Sentences and Executions for Juvenile Crimes, January 1, 1973 to (issue date) filled another folder in my cabinet. These—along with Death Row, USA, long-published by the NAACP Legal Defense and Education Fund—were by far the best tracking mechanisms for capital case decision-making.

* Aileen McMurray Trusler Professor of Law in Public Service; University of Akron School of Law.


Vic provided and tracked the data—state by state, with the age, race, and sex of defendants and victims, supplying information on the proportion of women or juveniles to the total death row populations in the past and as of the current issue date. But beyond the empirical data, Vic provided an analysis of the legal context in which courts, legislatures, and governors were acting. This was especially important with regard to the constitutional question of juveniles’ eligibility for death under the Eighth Amendment.

As Vic tracked each state’s practices, his data became invaluable as he and others pushed the Court to reconsider its earlier cases of Thompson v. Oklahoma, in which Vic was co-counsel for Thompson and Stanford v. Kentucky. These cases upheld the imposition of death on juveniles aged sixteen and older. In Thompson, the Court concluded that there was no consensus on the issue of imposing death on persons who were sixteen or older at the time of their crimes, and thus no evolving standard of decency within the Eighth Amendment precluded the death penalty imposed on sixteen and seventeen year olds. For children under sixteen at the time of their crimes; however, the Thompson Court agreed that imposing death on those under sixteen did violate the Eighth Amendment when a state legislature had not specifically attended to and expressed that eligibility, which in that case had simply arisen by operation of overlapping laws.

Post-Thompson and Stanford, death could permissibly be imposed for those sixteen and above, and was in a number of states (but not Ohio). It took well over a decade to shift the consensus among the states to one against the death penalty for juveniles sixteen and seventeen years of age. Vic worked hard, speaking to multitudinous groups and media, and writing articles that could bring the country’s attention to this human rights issue. Meanwhile, his chronicles of juvenile death-sentencing practices moved from the mailed print version to the World Wide Web in late 1998. These regular online bulletins continued to reflect the changing legislative and judicial perspective on death-sentencing of sixteen and seventeen year olds. Eventually, the Supreme Court granted certiorari on the issue of overruling that portion of Thompson that had upheld death sentencing. Vic’s reports mapping the national consensus against death were invaluable when the fate of juveniles on death row was finally favorably resolved in Roper v.

6. Thompson, 487 U.S. at 838; Stanford, 492 U.S. at 380.
7. Thompson, 487 U.S. at 838; id. at 849 (O’Connor, J., concurring).
8. Id. at 838.
9. The Ohio legislature made eighteen the minimum age for death in its death sentencing statute crafted in 1981. Ohio Rev. Code Ann. §2929.03 (LexisNexis 1981); see also Ohio Rev. Code Ann. §2929.03(B) (LexisNexis 1981). Thus, Vic’s work was not as critical within Ohio as it was elsewhere.
Simmons. In all, seventy-one juvenile offenders in twelve states were removed from death row due to this decision. A triumph for human rights, and a fulfilling moment in Vic’s professional life.

PROLIFIC PRODUCTIVITY

Taking us back to the ‘90s, by August 1996, Vic had moved on to Ohio Northern University Claude W. Pettit College of Law. We kept in touch mostly through occasional phone calls, chance encounters at the Association for American Law Schools Annual Meeting or bar meetings, and email. Vic visited and researched at law schools in Ohio and Michigan over this period.

 Sadly, we never brought Vic to Akron for an extended stay, and I never had the opportunity for steady day-to-day contact with Vic. I envy my peers at Cleveland Marshall, Ohio Northern and elsewhere who had that delightful opportunity. Ours was simply a ‘meet and greet with the utmost respect for one another’s work’ collegial relationship.

My respect for Vic’s work knows no bounds. I was reminded how vast his body of work is as I perused my file copy of the June 3, 1998, issue of the Death Penalty for Female Offenders, the last before it went to “the World Wide Web.” Vic’s Appendix C listed “Selected Citations to Victor Streib’s Involvement with Issues in Capital Punishment of Females.” This ‘selected’ (mind-you) list contained twenty-one articles or paper presentations, from 1984 to 1998, including law review articles and presentations at meetings devoted to interdisciplinary studies of criminology, such as the American Society of Criminology, Academy of Criminal Justice Studies, and the Institute of Criminology at the University of Cambridge.

This prolific work continued for decades. In 2005, I sent an email to Vic asking if he could assist in lobbying against proposed federal habeas corpus legislation that would have weakened this critical federal court review even further than the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) already had done in 1996. I hoped he would join with other law professors and law deans to sign on to a letter opposing these changes. When I apologized for it being so long since we had spoken and expressed my hopes that he was well, I got this message back from Vic:

11. Streib, supra note 2.
Hi Marge:

Great to hear from you again. I will see what I can do with our dean . . . .

Just wrapping up a book on the death penalty for women in Ohio—all four executions (1844-present) and all ten recent sentences (1973-present). To be published by Ohio University Press next Spring.

New edition of the Death Penalty Nutshell came out a few weeks ago. Other death penalty articles in progress. Still doing the same stuff I have been doing for 30 years!

Vic

Exchanges with Vic invariably revealed his incredible devotion to the work. Even now, in “retirement,” he is working on an update to one book and starting another. I have had the blessing of meeting the best lawyers on the planet through working in the area of capital punishment litigation, extraordinary, selfless lawyers, some essentially itinerant advocates, moving through the South living on next to nothing, there to save lives and often succeeding. I always felt humbled and wondered how it was that I could have this opportunity to converse with them when I was but a law professor and occasional appellate death penalty litigator. Happily, many of those persons are now part-time or full-time law professors themselves, working their cases in death penalty clinics with the assistance of students, who are now learning from the best. But Vic was a pioneer law professor in this field, among a small select group working on death penalty cases from the ‘80s on. He aptly describes himself as a law professor/death penalty lawyer in the DEATH PENALTY IN A NUTSHELL. He is one of a rare and wonderful breed of dedicated life-sustaining men and women.

FAIRNESS AND COURAGE

Truth-telling and fairness are the two other facets of Vic I would like to share with those who have not been as blessed as I to have interacted with him.

In 2007, Vic came to the University of Akron School of Law on our invitation to do a faculty workshop and a presentation for the Akron law

school community. He had just published *THE FAIRER DEATH—EXECUTING WOMEN IN OHIO*. He did not expect to sell many books, but as he said, “it is an intriguing topic prompting lots of discussion, much of it across disciplines.” He captivated the room full of students, drawing on the fascinating vignettes of Ohio women on death row that illuminated our past and contemporary experiences with the death penalty.

Vic was never at a loss for a true tale from the annals of the death penalty. One was particularly poignant and disturbing, though the setting itself would appear humorous at first thought. He related a conversation he had overheard years before, one occurring—of all places—in a men’s bathroom. Vic told my Akron students how he had entered the men’s room for the usual purpose while attending a Youngstown area death penalty seminar only to find two men talking about a death penalty case. One of the men said he was a prosecutor in the Donna Roberts case, and that one reason for seeking death was she was a white woman “fooling around with a nigger.”

That case actually arose in neighboring Trumbull County, not Mahoning County where the seminar was being held. Vic later feared that the students and others in attendance at his Akron talk may have gotten the wrong impression about which prosecuting office may have been so infected. He wrote me the next day asking me to make clear to my students, the Mahoning County Prosecutor (who was a former student), and those who had videotaped the lecture for airing on a local public access channel that it was the Trumbull Country office that had handled the case.

That episode confirmed a lot of my understanding of Vic. Vic Streib is “fair” in life. As he spoke about *THE FAIRER DEATH*, he wanted to be altogether certain that no one had inadvertently gotten the wrong impression about which office this noxious comment emanated from.

He is also courageous, and will call people out on race or other biases whenever circumstances permit. He wrote me:

> The men’s room was fairly crowded, and I don’t remember actually identifying the speaker one-to-one. I did assume, however, that the speaker worked for the Trumbull County prosecutor’s office (since that’s the office that prosecuted the case), and I remember vividly his use of the term “nigger.” In hindsight, I should have been more

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15. *See id.* at 112-17.
16. *Id.* at 112.
aggressive in figuring out who said it and calling him out on it, but the crowd and noise prevented that.

Fairness, in the sense of neutral examination of the issues, also drives Vic’s research and publications. In the Preface to FAIRER DEATH, Vic writes:

I have written elsewhere on the distinction between two categories of research and its publication: academic research and advocacy research. The broad goal of academic research is to generate and publish accurate information based upon research results, typically driven by the delight of discovery and regardless of whether the information advances or hinders any particular advocacy position of political agenda . . . .

. . . .

My analysis of these cases is based upon academic research, not advocacy research. As such, it is intended simply to explore an interesting topic rather than to advocate a specific agenda.17

His fairness and commitment shines through in all he does. Vic is utterly devoted to the cause of teaching and writing, joyously so. In the preface to FAIRER DEATH, Vic wrote “I have had the joy of being a law professor . . . . In this role, they actually pay me to do what I love to do, and would do, no matter what.”18 (Being one myself, I fully share his gratefulness—somehow we have both found this wonderful career.) His appreciation for those who have made it possible for him to do this work is similarly joyously pronounced. In the preface to the third edition of the DEATH PENALTY IN A NUTSHELL, Vic writes:

My family has, as always, allowed me to slave away at the office doing what I seemingly must do, instead of going on vacations and family outings like normal people. Far more important than their tolerance is their daily encouragement and support for my work, without which you would not be reading these words.19

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17. *Id.* at xi.
18. *Id.*
19. STREIB, *supra* note 13, at VIII; STREIB, *supra* note 14, at xii (noting the support of his family in his research).
Those words are so insightful; it is hard to imagine what the study of women or juveniles on death row would have been like without Vic’s research and stories. About THE FAIRER DEATH, I wrote for the jacket notes:

Professor Streib’s fascinating vignettes of Ohio women on death row illuminate our past and contemporary experiences with the death penalty. Analyzing these stories, Streib chillingly demonstrates that the concerns we have grappled with on a national level have antecedents here, that only a handful of these concerns have thus far been successfully addressed by court or legislative decisions, and that we still have much work to do.20

Vic signed my copy of FAIRER DEATH at the Akron book-signing on April 5, 2007: “To Marge—My death penalty hero!”

I said it at the time, and I will say it again: he is the hero.

20. STREIB, supra note 14.
A Note from Hal Pepinsky

HAL PEPINSKY

Victor Lee Streib was a personal inspiration when I joined the Indiana University ("IU") faculty in 1976. At that time he focused on juvenile justice. He was the first juvenile referee in Monroe County, a position that eventually turned into a judgeship. He came to the field as an Auburn-trained engineer whose first book in press was a systems analysis of the juvenile justice process. He brought real life practice to his criminal justice classes at IU and was (and remains) so charismatic that in his large lecture classes, even as a newly-tenured professor, his students spontaneously applauded him at the end of every semester.

In 1978, he began his career of academic service becoming dean of the first women’s law school in the country (founded as Portia Law School and now New England School of Law). At that time, he also distinguished himself as a scholar on the death penalty, being a trailblazer on the subject of women on death row. Vic has always been a pioneer.

Vic, on your retirement, I thank you and celebrate how your pioneering efforts have contributed so much to people caught in the criminal justice system, to students, to scholarship, and to academic administration in many places. You have given and accomplished so much. I, for one, thank you for having contributed greatly to my professional and personal life.

* Professor Emeritus, Indiana University
Thompson v. Oklahoma
and
The Judicial Search for Constitutional Tradition
in Celebration of Victor Streib

HARRY F. TEPKER*

Wayne Thompson was a fifteen-year-old boy who murdered his
threatening and abusive ex-brother-in-law. He was a “child” as a matter of
Oklahoma statutory law, but the District Attorney of Grady County,
Oklahoma sought to have him tried “as if” he was an adult.\(^1\) The
prosecutor’s petition was granted.\(^2\) The boy was tried, convicted, and
sentenced to death.\(^3\) The Oklahoma Court of Criminal Appeals affirmed the
conviction and the sentence.\(^4\)

Wayne was one of a few persons on death row for committing a crime
while still a child under state law when he was invited as a guest on “The
Oprah Winfrey Show,” along with his mother.\(^5\) As a guest of Oprah,
Professor Victor Streib of Cleveland State University spoke with Wayne
before I did. Questioned by Oprah herself, Wayne and his mother
described the facts of the murder in general terms.\(^6\) Wayne’s mother, the
late Dorothy Thompson, made a stronger and more humane plea for Wayne
than his trial attorney. She described the beatings and brutality of Wayne,
Wayne’s sister (Keene’s ex-wife), and herself.\(^7\) Ms. Winfrey listened and
concluded: “So your opinion is that it [the murder] was mostly . . . a case of
family self-defense.”\(^8\) Wayne’s mother answered, “That’s right.”\(^9\) She only
confirmed what the prosecution had proved and admitted; the facts proved
motive and guilt, but they also proved mitigating circumstances, though

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* Professor of Law, Calvert Chair of Law and Associate Dean for Scholarship and Enrichment,
University of Oklahoma.

1. Wayne had been certified to stand trial “as if he were an adult” under a separate certification
(1988) (No. 86-6169) [hereinafter Pet. Br. U.S.]. He was not certified to be an adult under processes
governing cases involving sixteen and seventeen year olds. Id.
2. Id. at 3.
4. Id.
6. Id. at 2-5.
7. Id.
8. Id. at 4.
9. Id.
defense counsel’s argument in closing was weak and did not discuss the issue of age.\textsuperscript{10}

\textbf{Getting the case.} At the time of the interview, Wayne was not represented. Al Schay, director of the Oklahoma Indigent Defender System ("OIDS") had represented Wayne before the Oklahoma Court of Criminal Appeals, which rejected all his arguments.\textsuperscript{11} At the time, Oklahoma law barred OIDS from taking the case to the Supreme Court of the United States. Despite diligent efforts by OIDS to attract one of the usual crusaders against capital punishment tradition in America, all—inexplicably—passed on the opportunity to represent Wayne, perhaps because the Court had only recently turned down a plea on behalf of a mentally-retarded juvenile.\textsuperscript{12} As a desperate last resort, they walked across the hall at the University of Oklahoma Law Center, which also houses the College of Law, and asked me to take the case. I was not their first, or second, or third choice—for good reason.

As a professor at the University of Oklahoma, I had heard of the “baby case.” I knew it posed an important constitutional law question, but I knew little of the facts and less of the proceedings below. I gave the matter very careful consideration, for all of a few seconds, and agreed on the spot. Arguing a case before the Supreme Court was a life-time (or at least career-long) dream, and I didn’t want to say no, despite some realities. It was my first criminal case, my first death penalty case, my first Supreme Court case as first chair, my first case in Oklahoma, my first case since joining the University of Oklahoma law faculty, and my first case for an indigent client. Every condemned man deserves better.

I needed help. Thankfully, Victor Streib was ready, willing, and able to help, after talking with Al Schay. He was then and now the foremost national authority on capital punishment of juveniles. He prepared the first draft of the brief on the merits, but in a more accurate, broader sense, he was a co-creator of all briefs of all parties. He had gathered all of the facts necessary to assess what American jurisdictions did and why. He developed and organized the facts essential to evaluating the general and specific traditions relevant to the case. Everyone began with his work. Everyone relied on his research. So would the Supreme Court, when it decided the case. Ms. Winfrey had chosen well when she invited Professor Streib to

\begin{enumerate}
\item \textsuperscript{10} Transcript 8646, supra note 5, at 4; Pet. Br. U.S., supra note 1, at 3-9.
\item \textsuperscript{11} See Thompson I, 724 P.2d at 786.
\item \textsuperscript{12} See Woods v. Florida, 479 U.S. 954 (1986).
\end{enumerate}
speak on her show. My client and I were extremely fortunate to have his assistance.

**The crime.** Wayne’s motive for the crime—as described by the prosecution—was to protect his family from continuing violence by Charles Keene. Keene had assaulted Wayne’s mother and sister. He had kidnapped Wayne’s nephew. He had threatened to drop Wayne’s nephew head first from a roof. He had assaulted Wayne and he had taught him paint sniffing.

On the afternoon of January 22, Anthony Mann, Danny Mann, and Vicky Keene visited Charles Keene at his former wife’s trailer in order “to talk some sense into Charles.” In Mrs. Keene’s words, they were “trying to talk him into leaving . . . [to] get out of our lives.” They had no success. According to testimony of Mrs. Keene and Danny Mann, Charles Keene was “messed up” from paint sniffing. When Vicky Keene asked Charles Keene for her car keys so that he could not take her car away, Charles said the keys were in the car.

While Mrs. Keene looked on, in Danny Mann’s words, “we said ‘Charles, you’re going to give us the keys or we’re going to get them from you.’ So we started kind of easing forward toward him . . .” Keene grabbed a knife, which Anthony Mann knocked from his hand. The two men grabbed Keene, held and searched him, took the car keys and were leaving when Keene again picked up the knife and tried to stab Danny Mann. Mrs. Keene observed her brothers running out of the trailer. She also saw Keene, butcher knife in hand, before he closed the trailer door. The Manns and Mrs. Keene then reported the incident to the local sheriff, but they were told that nothing could be done.

The trailer incident was one of many episodes in a violent and tragic matrimonial conflict between the Keenes. The two were married for seven years, but had been divorced approximately two years before Keene’s death. When called as a prosecution witness at the defendant’s trial, Mrs. Keene stated that being married to and living with Charles was a nightmare. Despite the divorce and

14. *Id.*
15. *Id.* at 4-5.
despite her wishes, he often stayed in his ex-wife’s home. When she “would call the law out there [,] they wouldn’t do nothing” about Keene’s presence. Mrs. Keene said that Keene had beaten her many times and had shot at her.16

According to the report of Dr. Helen Klein, a clinical psychologist who testified for the prosecution, the boy “described Charles Keene, his deceased brother-in-law, as an ‘unemployed glue sniffer,’ who ‘beat up on me all the time . . . when I was younger he kicked me.’” Keene also started the boy “sniffing” paint.17

In the early morning of January 23, Wayne, acting in concert with at least one other,18 killed Keene. After the crime, Thompson returned to Dorothy Thompson’s home.19 “The boy was wet from the chest down.”20 “He was visibly shaken and was crying.”21 “The boy’s mother was hugging him and trying to calm him.”22 He confessed in the arms of his mother; “Charles was dead and Vicky didn’t have to worry about him anymore.”23 “Later, apparently after the boy had changed clothes, he was still upset and crying.”24

A portrait of Wayne Thompson—an accused fifteen-year-old boy—appeared in the psychological report of Dr. Helen Klein, a prosecution witness:

During the initial stage of the interview, he attempted to portray himself as macho, tough and cavalier. This facade tended to dissipate as his anxiety abated.

Wayne is the sixth of eight children, his father is a truck driver and his mother a housewife. Wayne said he was in special education classes and had entered the 10th grade before dropping out of school in the fall of 1982. Wayne said he had sniffed paint for approximately seven months last year, but quit of his own volition.

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16. Id.
17. Id. at 5.
18. Three others were convicted of the crime. One was Anthony Mann, Wayne’s half-brother. Wayne testified he did assist the kidnapping and beating of Charles Keene, but he tried to stop the murder. One of the others was subsequently retried and acquitted.
20. Id.
21. Id.
22. Id.
23. Id.
Individuals who obtain MMPI [Minnesota Multiphasic Personality Inventory] profiles similar to Wayne’s typically are described as hyperactive, restless and indecisive, and as persons who may keep people at a distance (emotional alienation) and show poor social judgment. A profile such as that obtained by Wayne must be interpreted with caution as it suggests the possible effect of a response set which may have led to exaggeration or distortion of his current status. Such a profile reveals the possible presence of a desire to appear independent of social ties and to “fake bad,” i.e., to exaggerate symptomatology.

Rorschach test data support the MMPI data in that test results are indicative of a person whose entire focus is external. He is excitable, hostile, and is responsive to the external world to the extent he cannot organize his inner experience. He has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience beyond that. Wayne does not have enough ego to handle or to control his impulses and therefore tends to act them out.25

This was the prosecution’s evidence.

Wayne never denied or minimized his guilt. At all times after the conviction, Wayne acknowledged his guilt. Indeed, after the Supreme Court of the United States took his case to resolve a constitutional issue respecting the death penalty, and shortly before oral argument in his case, Mr. Thompson testified under oath about his own guilt as a defense witness for another person who was also accused of the crime. He waived his rights against self-incrimination; he testified against the advice of counsel; he testified as to his guilt, solely because he believed it was his moral duty to accept his guilt and to verify the innocence of another; and, of course, he did so at a time when it was in his self-interest to be silent.

**The brief for petitioner.** The briefs for petitioner were the product of a team effort. I was lead counsel and made all final decisions. All blame for shortcomings was mine. Professor Streib drafted the arguments focusing on the Eighth Amendment. A colleague at Oklahoma University at the time, Kevin W. Saunders (a brilliant scholar) helped prepare arguments about the

25. *Id.* at 8-9.
prosecutor’s use of inflammatory photographs. The Legal Defense Fund, Inc., led by Professor Anthony Amsterdam of New York University and Richard Burr, orchestrated briefs amici curiae and offered a steady stream of suggestions. The final product was an attempt to provide a range of possible theories and possible judicial holdings that would save my client’s life. We also wanted to argue on behalf of a broader community that hoped for a landmark decision creating an age limit on the death penalty. It was, put simply, a compromise.

First, “the execution of a person who was a child of fifteen at the time of the crime is cruel and unusual punishment.” Government “condemnation of children makes no measurable contribution to legitimate goals of punishment.” It “violates contemporary standards of decency . . . .” The conclusion was verified by existing patterns of state law. Here, Professor Streib’s research was indispensable. Also, the objective rejection by American jurisdictions of capital punishment for crimes of childhood was mirrored in “an emerging consensus of international law and opinion . . . .”

Finally, in this case, we emphasized that Oklahoma was guilty of an impulsive and unreasoning treatment of Wayne’s case: “Execution of this person for a crime committed at age fifteen would be cruel and unusual punishment because the Oklahoma courts failed to give careful, particularized consideration to the character and background of the accused boy.” An objective of this last element of the “narrow” age issue was to offer an alternative to a defined, absolute age limit, similar to the course adopted by the court in Eddings v. Oklahoma:

The Eighth Amendment requires that a sentencing court give careful, particularized consideration to the character and background of the defendant in order to assess the fundamental justice of the death penalty. This principle mandates that no child be sentenced to die unless the sentencing court finds that the child is morally culpable to the same degree as an adult and that the child is beyond all hope of rehabilitation.

26. Id. at 14-39.
27. Id. at 16-22.
28. Id. at 25-26.
30. Id. 30-39.
The second basic argument of the brief was that “the reliability of the sentencing process in this case was undermined by the admission of highly inflammatory photographic evidence that prejudiced the defendant’s right to fair, full jury consideration of all mitigating circumstances, including age.”

Challenging evidentiary rulings of a trial court was a long shot, but the argument served a purpose: it illustrated how a prosecutor could prevent “a reasoned moral response to the defendant’s background, character and crime.”

We wanted to ensure that the Justices, particularly Justice Sandra Day O’Connor, knew that the condemnation of Wayne Thompson was one of many tragic cases in which “mere sympathy or emotion” governed the outcome of the sentencing proceeding.

Finally, we reserved our fondest hope for last. The “broad” age issue was whether the Court had power to define a minimum age limit. “To vindicate American traditions of special treatment of juvenile offenders, this court must prevent the execution of persons for crimes committed below a specified age.”

We emphasized the inadequacy of then-current judicial standards to assess age as a mitigating circumstance on a case-by-case basis.

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**The reply brief for the petitioner.** One month after our brief was filed, Lewis Powell retired. Ronald Reagan nominated Robert Bork as his successor. It was a shock. It appeared that the intellectual and ideological balance on the Court would tip sharply. Judge Bork was a well-known advocate of “originalism” as a philosophy of judging. Lewis Powell had been one of the “pragmatic men of the center” as Vincent Blasi put it in an analysis of the Burger Court’s activism: “That activism has not been inspired by a commitment to fundamental constitutional principles or noble political ideals, but rather by the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to...
some of the excesses and irrationalities of contemporary governmental
decision-making.”

[40] And

[i]n the last analysis, the distinctive hallmark of the new centrist
activism has been the powerful aversion to making fundamental
value choices. The Burger Court has been interventionist without
question . . . . But the Court’s efforts have been inspired almost
exclusively by discrete, pragmatic judgments regarding how a
moderate, sensible judicial accommodation might help to resolve a
potentially divisive public controversy.

41

Our brief on the merits had targeted that the Justices needed to form a
collection of five. As did most attorneys offering advice, we assumed
Justices Brennan, Marshall, Stevens and Blackmun would vote to set aside
the death sentence on this case, though not necessarily because of a
judicially-imposed age limit. The usual suspect for a fifth vote was that
Justice Lewis Powell might have helped to engineer a grant of certiorari.

42

Though Justice Blackmun had voted to uphold the death sentence in
Eddings, many were aware of Justice Brennan’s “assiduous courtship” of
Blackmun, and thought the Thompson case would be an occasion to
measure Brennan’s persuasion. But with Powell’s retirement, all eyes—
especially mine—turned hopefully to Sandra Day O’Connor.

I hoped Sandra Day O’Connor would prove to be a “pragmatic woman
of the center,” using and adapting Professor Blasi’s terminology. She had

41. Vincent Blasi, The Court as an Instrument of Change, in LA COUR
SUPREME DES ESTATS-
42. In the history of the term and the Thompson case, Justice Brennan’s clerks report that

[the year prior, several Justices had considered granting a cert to entertain a challenge to the
death penalty brought by a defendant who was approximately 17 and a half years old at the
time of the murder; those favoring a grant, however, had decided against taking the case on
the advice of LFP [Justice Powell], who thought a younger defendant would make a more
sympathetic petitioner.

“Thompson v. Oklahoma, No. 86-6169,” in October Term 1987, William J. Brennan Term History at 47-
48 [hereinafter WJB OT ‘87 History]. The term histories were prepared by Justice Brennan’s clerks and
remained confidential until released to Stephen Wermiel as part of preparation of the book, SETH STERN
& STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010). The clerk histories are dis-
cussed at pages 465-66, 550. Permission to quote from the term history was granted by William J.
Brennan IV and transmitted to the author by Professor Wermiel.
43. See STERN & WERMIEL, supra note 42, at 383, 495 (noting Brennan’s efforts and their
success).
44. THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T, supra note 40, at 249
(describing Justice O’Connor as having “a moderate, pragmatic approach to judging”).
been on the court for seven years when she cast her vote in Thompson.45 The most hopeful element of her writings on the issue of capital punishment was an insistence that a death sentence be “a reasoned moral response to the defendant’s background, character and crime . . . .”46 The idea was highlighted in our brief on the merits; we sought to underscore and reinforce the argument in the reply brief by linking two themes. First, the state had truncated the inquiry into youth as a mitigating circumstance in Wayne’s case. Second, the incoherent and impulsive proceedings represented why an age limit was needed to respect and reinforce an unquestioned tradition that the law ought to treat juveniles differently, decently, and with restraint. And it attempted to build this link with quotations from Justices Powell and O’Connor:

Even when horrifyingly brutal crimes are the focus for inquiry, Respondent Oklahoma assumes a burden of proof it cannot carry. While it is true that Petitioner cannot rely on clear-cut precedents to justify a minimum chronological age, Oklahoma cannot rely on any precedent to argue—as it does—that in this undefined class of particularly brutal murders, youth, chronological age and emotional immaturity are of no special relevance to the fundamental questions of moral guilt, personal responsibility and retributive justice. As Justice Powell wrote:

Where a capital defendant’s chronological immaturity is compounded by “serious emotional problems, . . . a neglectful, sometimes even violent, family background, . . . [and] mental and emotional development . . . at a level several years below his chronological age,” . . . the relevance of this information to the defendant’s culpability and thus to the sentencing body, is particularly acute. The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults.47

Yet, in some cases, the brutal nature of the crime—or perhaps the inflammatory nature of the evidence—will often be enough to

46. Brown, 479 U.S. at 545 (O’Connor, J., concurring) (emphasis omitted).
prevent “a reasoned moral response to the defendant’s background, character and crime.” In such tragic cases, “mere sympathy or emotion,” will all too frequently govern the outcome of the sentencing proceeding. When the facts respecting moral guilt of condemned children and adolescents are collected, as they have been by Amici American Society for Adolescent Psychiatry and American Orthopsychiatric Association, there is good reason to condemn the sensitivity, the objectivity, the fairness and the justice of a case-by-case assessment of youth as mitigating circumstance—particularly when the crimes are the most horrifying. When a murder is particularly brutal, the reality is that the undeniable tradition of more careful, more sensitive consideration of youthful offenders cannot be vindicated except by means of a minimum chronological age.48

**Oral Argument.** On November 8, 1987, the case came before eight sitting Justices49 for oral argument. Victor Streib appeared, received, and certainly deserved one of the quill pens given to attorneys appearing before the Supreme Court of the United States. Justice Brennan’s clerks recalled: “Oral argument, in addition to being among the most crowded and perhaps the most solemn of the year, was noteworthy for high level of participation by the Justices, all eight of whom asked questions . . .”50

Arguing for the petitioner, my introduction sought to summarize and emphasize the facts and theories upon which we placed our hopes:

In this case Oklahoma has decided that a fifteen year old boy lost his moral entitlement to live because he committed a brutal murder, the killing of the ex-husband of his sister.

According to the prosecution evidence the motive for this murder was revenge, revenge for the ex-husband’s abuse of the boy’s sister. This case comes before this Court on Certiorari to the Oklahoma Court of Criminal Appeals. Petitioner asked this Court to vacate the sentence of Death, but not the judgment that Wayne Thompson was guilty; and not the judgment that he deserves punishment.

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48. *Id.* at 11-13 (internal citations omitted).
49. The United States Senate voted against Judge Bork’s appointment. Manning, *supra* note 39. *Thompson v. Oklahoma* was argued before eight Justices. The ninth seat was vacant.
50. WJB OT ’87 History, *supra* note 42, at 48.
Two basic issues in this case relate to one fundamental principle: the principle that Youth bears on the fundamental justice of the Death Penalty and emotion and prejudice do not.

First, does this principle require a minimum chronological age, or at least standards and instructions that tell the sentencing authority that their examination of non-adulthood should not be truncated? Second, did introduction of inflammatory photographs of the murder victim’s decomposing remains undermine the reliability of this Death sentencing process?

Wayne Thompson was still a child under state law when he shot and killed the ex-husband of his sister. According to the prosecution’s most incriminating evidence, the boy on the night of the murder shortly after the crime, confessed to his mother and explained to her that his . . . sister “would not have to worry about her ex-husband any more.”

Wayne was certified to stand trial as if he were an adult. The jury was told that he was an adult. The jury was instructed that Youth is a relevant mitigating circumstance they could consider, but they were not told that Youth is a relevant mitigating circumstance of great weight. They were told that they could decide for themselves what were and were not mitigating circumstances. These were the instructions before the jury that sentenced Wayne to death.

Under these circumstances and in a very real sense, this case comes before the Court presenting this Court with the first opportunity to decide whether or not Wayne Thompson was too young to be condemned to death. We submit under the circumstances of this case, as well as under circumstances generally applicable to a class of children and adolescents, it is most inappropriate under the Eighth Amendment, under the prohibition against cruel and unusual punishment, to inflict the Death Sentence.

. . .

. . . We submit that these factors, these reasons for treating Youth in a special way are compelling in this particular circumstance: first children and adolescents are simply too inexperienced to be judged by the same standards applicable to
adults. They have not been around long enough to formulate the understanding, the capacity for self-control, to be judged by standards according to adults. The question is not merely whether they know the difference between right or wrong, but whether they have the experience to apply those standards, to resist the stress, the trauma, the difficulties—of particularly difficult occasions.

We submit that, in addition to that, it is quite plain that children, adolescents, are far more vulnerable to volatile, impulsive, self-destructive behavior, and this, recognized by this Court in the past, is grounds for treating Youth, youths, in a different manner, particularly when the punishment is Death.\textsuperscript{51}

There were three moments of great significance in the oral arguments, all related to inquiries by Justice Scalia, who had—in a few years of service—developed a reputation as the Court’s most aggressive interrogator.

First, Justice Scalia revealed his odd way of counting statutes to determine whether there was a tradition or an objective rejection of capital punishment for crimes of childhood. He ignored states that had abolished the death penalty. Their views did not count.

Repeating an argument first advanced in the reply brief, I pointed out that “60 percent of the jurisdictions in this country, encompassing 70 percent of the population, would not tolerate this execution.”\textsuperscript{52} One would think that this fact would be relevant and probative on whether the boy’s death sentence was rare and, therefore, “unusual,” the term used in the Eighth Amendment’s text. Chief Justice Rehnquist interjected: “That is, 60 percent of the jurisdictions which provide for capital punishment?”\textsuperscript{53} The answer was “[n]o. That is 60 percent of the states total. It is approximately half of the states that retain the Death Penalty, establish minimum lines that would not allow this execution.”\textsuperscript{54}

The Chief pressed further to establish that half of the states retaining the death penalty would permit the execution. I offered a correction:

Half of them allow the potential for it, although I might add, if one takes into account the more general question of whether Youth bears upon the fundamental justice of the Death Penalty, Oklahoma

\textsuperscript{51} Transcript of Record at 3-5, Thompson, 487 U.S. 815 (No. 86-6169, Nov. 9, 1987) [hereinafter Official Transcript].
\textsuperscript{52} Id. at 7.
\textsuperscript{53} Id. at 7-8.
\textsuperscript{54} Id. at 8.
is one of only three states that has neither a minimum line nor any special legislative declaration that Youth is a mitigating circumstance. And it is—the only one of those three states to have someone on Death Row who is a juvenile. 55

Justice Scalia took up the line of argument. He announced that “the relevant statistic” was only the percentage of states that have capital punishment but do not allow executions at a certain age. He explained: “it is, of course, irrelevant with respect to those jurisdictions that have chosen not to impose capital punishment at all.”56 I responded:

Although I must suggest that when we are considering the nature of the Death Penalty in considering the judgment of the Young, to throw out those states that have decided the Death Penalty process is uncertain enough, or illogical enough, or perhaps too cruel, out of the calculation of what are evolving standards of decency, is to not inquire into what the consensus really is. 57

Justice Scalia had the last word on the subject:

We really have no idea what they would think about Youth as a factor, had they chosen capital punishment: they simply have not chosen capital punishment . . . So it really says nothing about whether if they did have it they would consider that Youth is a factor that would render it absolutely intolerable.58

The Court heard the data and the argument but there was no persuading Justice Scalia, so I changed the subject to international law and traditions. My hope was to show this execution would be abhorred by the world. I am not certain, but I believe I was the lucky human being to be the first to try out this argument in front of Justice Scalia. The Court has used international opinion and international law in order to assess what are evolving society’s standards of decency. Justice Scalia did not appreciate the method: “We would not have capital punishment at all if we were to be bound by that, would we not.”59

55. Id.
56. Official Transcript, supra note 51, at 15.
57. Id.
58. Id. at 15-16.
59. Id. at 16.
I expressed doubt about his speculation. Foreign rejection of the death penalty per se was hardly universal or even arguably close to it. In any event, our argument was not a broad challenge to the death penalty:

What I am suggesting is that 80 nations reject this kind of executions, and 40 of those nations retain the Death Penalty. If you add to that the practice of the nations in terms of the rarity of these kinds of executions, the clear statements that appear in the International Covenant of Human Rights, and the American Convention of Human Rights, it becomes very clear that there is an objective rejection of execution of children, and Wayne Thompson was a child under the laws of Oklahoma.

I did not know then that the Soviet Union had sent a representative accompanied by a State Department official to observe the oral argument. The Soviets were trying to use the juvenile capital punishment issue as a talking point to resist United States criticisms about Soviet human rights abuses.

Justice Scalia would amplify his views in his Thompson dissenting opinion and in his majority opinion a year later in Stanford v. Kentucky. The issue would arise again in Roper v. Simmons, and it would generate a wave of conservative criticism of using “foreign law” to decide American cases.

The most significant moment of the oral arguments came when I was sitting down. Arguing for Oklahoma, David Lee, Deputy Attorney General, made a candid, humane and pragmatic admission. Specifically, in the words of Justice Brennan’s clerks, he conceded

the Eighth Amendment authorized the Court to establish a minimum age below which persons convicted of capital crimes could never be executed . . . . This concession infuriated [Justice

60. Id. at 16-17.
62. Thompson, 487 U.S. at 859 (Scalia, J., dissenting).
64. 543 U.S. 551 (2005).
Scalia, who first asked counsel if he really meant what he had said and then challenged him to defend such a line.66

Mr. Lee had argued *Eddings v. Oklahoma* years before.67 Under questioning, he had conceded that execution of a boy for a crime committed at age ten was cruel and unusual punishment in violation of the Eighth Amendment.68 He remembered that concession. He thought he would be asked again. He was ready, and for the record, I think his answers were right.

Justice Blackmun asked, “[S]uppose Thompson had been ten years old?”69 Mr. Lee responded:

Justice Stevens asked that question of me in the *Eddings* case in 1981 and I told him at that time in my view it would be a violation of the Eighth Amendment to impose the Death penalty on an individual that is ten years of age.70 

Lee reaffirmed his view: “That would obviously be too young.”71 And now, he was on a slippery slope. Next question: “What about 12? . . . . Then you see, what I am going to do is I am going up the ladder—where would you draw the line?”72

Lee attempted escape: “We do not think that this Court should decide in advance what that minimum age should be.”73 The Court should look at the issue case by case.74 The Justices, skeptical of the *Thompson* death sentence, would not give up. A Justice asked, “But you would say that any ten-year-old, no matter where he is, may not be executed?”75 Mr. Lee was candid: “I think that there would be common and unanimous agreement among all people that that would be too young for an individual to receive the Death penalty. However, we think the country is divided with regard to the minimum age with imposing of the Death sentence.”76

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
75. *Id.*
76. *Id.* at 25.
After a brief digression about how many young persons were on death row and after making his argument that Wayne’s past had been violent, the Justices dragged Mr. Lee back to his concession.\textsuperscript{77} Another Justice, William Brennan, I believe, pressed:

Mr. Lee, may I ask you, when you conceded that the execution of a ten-year-old for murder would be unconstitutional, are you resting that on a violation of the “cruel and unusual punishment” clause of the Eighth Amendment?

[Mr. Lee]: Yes, Your Honor, I think that would violate anybody’s sense of decency under the Eighth Amendment.\textsuperscript{78}

Lee conceded “this Court is going to be the arbiter as . . . what does constitute a situation that would violate the consensus of the public in this country that an execution of a person of a particularly young age would be unconstitutional.”\textsuperscript{79} Here Mr. Lee went a step too far for Justice Scalia.

Justice Scalia began to throw roadblocks in Mr. Lee’s effort to preserve a broad discretion. He showed his dismay that Lee had “accepted” that the Court could define an age limit derived from the Eighth Amendment.\textsuperscript{80} All that remained for decision, Justice Scalia complained, was the appropriate age limit.\textsuperscript{81} Justice Scalia then pushed Lee into a corner: “[D]o not argue to us why a rule of constitutional law establishing a chronological age is bad, because you have accepted a rule of constitutional law that uses a chronological age, have you not?”\textsuperscript{82} Justice Thurgood Marshall asked what line Mr. Lee would draw.\textsuperscript{83} Mr. Lee responded:

If there was any bright line, and I have thought about this for six years since \textit{Eddings}, and of course I thought about it before \textit{Eddings}, if I had to pick a particular bright line, if there was a case directly before this Court, if there is any bright line, Age 14 is the age of common law age incapacity, and this Court in two previous cases, the \textit{Gault} case and the \textit{Ford} case, which you yourself wrote, Justice Marshall, you used the common law as the guideline for, in that particular case, for the imposition of the Death Penalty on somebody who was insane.

\textsuperscript{77} \textit{Id.} at 25-26.
\textsuperscript{78} \textit{Id.} at 26.
\textsuperscript{79} Transcript of Oral Argument, \textit{Thompson}, supra note 69, at 28.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 32.
Also, Blackstone, in his Commentaries on page 23, which we have cited in our brief, pointed out that from seven to 14 is the common law age of presumed incapacity. 84

Justice Marshall, who usually was silent during oral argument, responded: “I would say that our educational system and our government and everything else has sure progressed from Blackstone. Has it not?” 85 Mr. Lee admitted: “Well, yes, Your Honor.” 86

Still later, Justice Scalia gave Mr. Lee a very hard time when he tried to argue for a broad state discretion: “You are really—it seems to me that you are arguing two different lines: your argument you are now supporting says that there cannot be any minimum age.” 87 Lee attempted to return to his view that “the states should—are the proper entity to decide, what the minimum age should be, is all I am saying.” 88 Justice Scalia offered one more sarcastic sign of his fury: “Above ten, anyway?” 89

One point underscores the unfairness of Justice Scalia’s treatment of Mr. Lee. When Justice Scalia announced his own considered view in his dissenting opinion, he made the exact same concession as did Lee. 90 There was a bottom somewhere. In Scalia’s words, after he also referred to Blackstone’s treatment of the age of responsibility at common law: “Doubtless, at some age, a line does exist—as it has always existed in the common law . . . below which a juvenile can never be considered fully responsible for murder.” 91

Justice Brennan’s clerks reported, “[s]pirits ran high in chambers following oral argument . . . .” 92 First among the reasons for good cheer was the concession. 93 They also perceived “the apparent receptivity of the Justices to various petitioner’s arguments . . . .” 94 Still, eyes were focusing on Sandra Day O’Connor. Of course, her clerk was “under a ‘gag rule’ . . . .” 95 Still, “there was considerable optimism that the Court might even set the minimum age at 18.” 96

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84. Transcript of Oral Argument, Thompson, supra note 69, at 32; see In re Gault, 387 U.S. 1, 16 (1967); see also Ford v. Wainwright, 477 U.S. 399, 406 (1986).
85. Transcript of Oral Argument, Thompson, supra note 69, at 32.
86. Id.
87. Id. at 34-35.
88. Id. at 35.
89. Id.
91. Id.
92. WJB OT ’87 History, supra note 42, at 48.
93. Id. at 48-49.
94. Id. at 49.
95. Id.
96. Id.
Our team was also satisfied, though worried. Justice O’Connor had offered little sign of her inclinations to us. Still, we had said what we hoped. There was little of the after-the-fact, “Oh, I wish I had said . . .” second-guessing. We would not know what was happening for a long time. Elapsed time between oral argument on November 9 and the decision’s announcement was the longest for any case of the term; the Court decided the case on the last scheduled day of the October 1987 Term, June 29, 1988.97

The conference of the Justices. At the conference on Friday after the oral argument, the Chief Justice, Justices White, and Scalia announced their intent to affirm Oklahoma’s judgment.98 The Chief noted that the state had “conceded” a line existed, but he thought it “[h]ard to lay down a definite rule.”99 Justice Brennan noted his usual views opposing all death sentences, and his preference for drawing a line at age eighteen.100 He said he could “go lower,” presumably to decide this case.101 Justices White, Marshall, and Blackmun announced their votes, but none of Blackmun’s notes record anything said.102

Justice Stevens voted to set aside Oklahoma’s death penalty on age-related issues, but he was not persuaded by the argument that the inflammatory photographs undermined the reliability of Oklahoma’s sentencing.103 He followed the classic view that the Court should decide only what it needed to.104 Executions for crimes at this age had already all but disappeared. The sanction served no deterrent purpose. It was not necessary to address an age limit of eighteen, because Wayne was fifteen at the time of the crime: “That is all we need to decide. The Court should hold 15 is too young.”105 Because Justice Stevens would not reach the

97. Thompson, 487 U.S. 815 (the case was decided on June 29, 1988).
99. Id.
100. Id.
101. Id.
102. Id.
103. Blackmun Conference Notes, supra note 98.
104. Id.
105. Id. Justice Stevens’s notes read:

alm no 15 yr old elec
no need as a deterrent
no go to 18 in this case
this one is 15
that is all we need to decide
hold 15 is too young.
photos issue, he, not Justice Brennan, was the senior Justice for the eventual coalition of four Justices, and he reserved the writing of the opinion for himself.\footnote{106}

The case turned on the votes of the two junior Justices: Sandra Day O’Connor and Antonin Scalia.\footnote{107} Blackmun’s notes are revealing about the Justices’ thinking—and their debt to Victor Streib.\footnote{108}

Justice O’Connor said she was personally opposed to the death penalty.\footnote{109} But though Blackmun’s notes in this case don’t say, the implication was that she would not vote her personal views. She continued, relying on the information that Victor Streib had gathered and disseminated: execution of persons for crimes committed at age fifteen or younger had all but disappeared. She took note that the United States had ratified the Geneva Convention.\footnote{110} She came to the conclusion that the Eighth Amendment barred execution of persons under age sixteen.\footnote{111}

O’Connor’s vote would decide the case, if she did not change her mind.\footnote{112} Justice Scalia had only an opportunity to dissent.\footnote{113} Interestingly, he began as did Justice O’Connor, discussing his personal views: that he “would place at 18 or 21 if I had to on my personal views.”\footnote{114} He interpreted the rarity of juvenile executions only as proof that juries were doing their jobs.\footnote{115}

[Justice Brennan] returned from Conference that Friday morning elated: the Court had voted 5-3 to reverse the conviction on the ground that the execution of anyone who committed a capital crime while under the age of 16 was unconstitutional.\footnote{116}

106. WJB OT ’87 History, supra note 42, at 49.
107. See id. at 49-50.
108. See Blackmun Conference Notes, supra note 98.
109. Id.
110. Id. Justice O’Connor’s notes read:

Only 12 < 15 exec since 1900
none since 1940
3 on death row.

112. WJB OT ’87 History, supra note 42, at 49-50.
113. See Blackmun Conference Notes, supra note 98 (drawing the conclusion that only three of the Justices were voting with Scalia).
114. Id.
115. Id.
116. WJB OT ’87 History, supra note 42, at 49. The conviction was not at issue; only the death sentence.
But the consensus and result were fragile. After Justice Stevens circulated his draft opinion, Justice O’Connor wrote a memorandum, which the Brennan clerks characterized as “cryptic.” It was brief: “This is a difficult case for me. I am still not at rest on it and will not make a final decision until I see the dissenting opinion.” Ten days prior to the scheduled end of Term, she declined to announce her vote, even when pressed by fellow Justices.

The decision of the Court: The opinion of Justice Stevens. Justices Brennan, Marshall, and Blackmun joined Justice Stevens to conclude that execution of Wayne Thompson for murder would violate the constitutional prohibition against the infliction of “cruel and unusual punishments” because he was only fifteen years old at the time of his offense. It was the first time any American court had struck down a death sentence on constitutional grounds because the accused was too young at the time of the crime.

The Court noted that the Eighth Amendment, though “a categorical prohibition against the infliction of cruel and unusual punishments,” offered no definition or rules to “define the contours of that category. [The authors of the Eighth Amendment] delegated that task to future generations of judges, who have been guided by the ‘evolving standards of decency that mark the progress of a maturing society.’” The Justices honored and cited Justice Powell’s arguments to define the general traditions at stake in the case, stating:

Justice Powell has repeatedly reminded us of the importance of “the experience of mankind, as well as the long history of our law, recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in

117. Id.
118. Id.
119. Id. at 50.
120. See Thompson, 487 U.S. at 818, 838 (plurality opinion).
122. See Thompson, 487 U.S. at 821 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
criminal sanctions and rehabilitation, and in the right to vote and to hold office."

Despite considerable diversity in state law, there was “complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor for several important purposes.” The Justices took advantage of the Mr. Lee’s concession—and Justice Scalia’s. They noted that state statutes offered an arguably ambiguous pattern, so that “our current standards of decency would still tolerate the execution of 10-year-old children. We think it self-evident that such an argument is unacceptable; indeed, no such argument has been advanced in this case.”

From this point of judicial consensus, the Court turned to more contested ways of discovering the relevant legal traditions. But one specific statistic seemed to weigh heavily as a rejoinder to the view of the dissent:

When we confine our attention to the 18 States that have expressly established a minimum age in their death penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.

In short, a specific point of near unanimity among those jurisdictions making a conscious choice was reinforced by relevant, albeit general, traditions.

The Court relied heavily on the “second societal factor”—the behavior of juries—and the academic work of Professor Streib. Their conclusion, despite the ambiguity of the “statistics,” was that Wayne Thompson was one of a handful of unfortunate boys that “received sentences that are ‘cruel

123. *Id.* at 823 (quoting *Goss v. Lopez*, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting)).
124. *Id.* at 824.
125. *Id.* at 828 n.28.
126. *Id.* at 828.
128. *Id.* at 832 nn. 36-37.
and unusual in the same way that being struck by lightning is cruel and unusual.”

In a final section of the Stevens opinion, the Justices rendered their own judgment about the justice of a death sentence for a boy’s crime committed at age fifteen:

[W]e are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, “nothing more than the purposeless and needless imposition of pain and suffering,” and thus an unconstitutional punishment.

The Justices declined to “draw a line’ that would prohibit the execution of any person who was under the age of 18 at the time of the offense.”

They decided only the case before them: “[W]e do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.”

The concurring opinion of Justice O’Connor. Justice Blackmun has been quoted as saying: “Sandra’s tough. She’s conservative. She’s a state’s righter. She wants to let states decide things like this. . . . but here was a 15-year old, and the soft spots in her armor . . . are children and women.” She had changed her mind since she announced agreement with a line at age sixteen at the conference, but she also could not tolerate remanding the case for Oklahoma’s justice. In the account of Thompson in unpublished Clerk’s History, Justice Brennan’s clerks thought her concurrence was strange. In the published dissenting opinion, Justice Scalia—injudiciously—labeled her opinion a “loose cannon.”

Justice O’Connor began by noting that

[the plurality and dissent agree on two fundamental propositions: that there is some age below which a juvenile’s crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in light of the “evolving

129. Id. at 833 (quoting Furman v. Georgia, 408 U.S. 238, 309 (Stewart, J., concurring)).
130. Id. at 838 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
131. Id.
132. Thompson, 487 U.S. at 838.
133. See Thompson, 487 U.S. at 877 (Scalia, J., dissenting).
standards of decency that mark the progress of a maturing society."\textsuperscript{136}

She had noticed that Justice Scalia had accepted Mr. Lee’s candid and humane concession as a starting point for analysis.\textsuperscript{137} She thought the evidence “about the relevant social consensus” was persuasive.\textsuperscript{138} “[A] national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist . . . ,”\textsuperscript{139} But she was not certain and was “reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess.”\textsuperscript{140} She wanted to define a rule only “when better evidence is available . . . .”\textsuperscript{141} She explicitly refused to count statutes as Justice Scalia thought logic required:

The most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above. See ante at 829, and n. 30. When one adds these 18 States to the 14 that have rejected capital punishment completely, see ante at 826, and n. 25, it appears that almost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution. See also ante at 829, n. 29 (pointing out that an additional two States with death penalty statutes on their books seem to have abandoned capital punishment in practice). Where such a large majority of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist.\textsuperscript{142}

Professor Streib’s evidence and the approach to counting statutes in petitioner’s reply brief had effect.\textsuperscript{143} Almost all of Justice O’Connor’s opinion seemed to target Justice Scalia’s dissent as wrong and wrong-headed; she said much less about the opinion of Justice Stevens:

\textsuperscript{136} \textit{Id. at} 848 (O’Connor, J., concurring) (quoting \textit{Trop}, 356 U.S. at 101).
\textsuperscript{137} \textit{Id. at} 848-49.
\textsuperscript{138} \textit{Id. at} 848.
\textsuperscript{139} \textit{Id. at} 848-49.
\textsuperscript{140} \textit{Thompson}, 487 U.S. at 849 (O’Connor, J., concurring).
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
If we could be sure that each of these 19 state legislatures had deliberately chosen to authorize capital punishment for crimes committed at the age of 15, one could hardly suppose that there is a settled national consensus opposing such a practice. In fact, however, the statistics relied on by the dissent may be quite misleading. When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. This is how petitioner was rendered death eligible, and the same possibility appears to exist in 18 other States. . . . As the plurality points out, however, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate to impose capital punishment on 15-year-olds (or on even younger defendants who may be tried as adults in some jurisdictions).  

In short, Justice O’Connor thought that, at a minimum, the execution of a boy for a crime of childhood ought to be the result of a conscious legislative choice. Oklahoma, like many states, had extended adult or “as if he were an adult” jurisdiction, without drawing a minimum line for eligibility for a death sentence. It was impossible to know if such states had even considered the impact and justice of capital punishment for crimes of childhood. In Justice O’Connor’s words, “there is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense.”

Still, Justice O’Connor “would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation’s legislatures.” To do so might “conceivably reflect an error similar to the one we were urged to make in Furman.”

The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a policy authorizing

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144. Thompson, 487 U.S. at 850 (O’Connor, J., concurring) (citations omitted).
145. Id. at 849-50.
146. Id. at 818-21, 826-29 (plurality opinion).
147. Id. at 852 (O’Connor, J., concurring).
148. Id. at 854 (citing Enmund v. Florida, 458 U.S. 782, 826 n.42 (1982) (O’Connor, J., dissenting)).
149. Thompson, 487 U.S. at 855 (O’Connor, J., concurring).
2012] A TRIBUTE TO VICTOR L. STREIB 489

capital punishment for crimes committed at the age of 15. In that event, we shall have to decide the *Eighth Amendment* issue that divides the plurality and the dissent in this case, and we shall have to evaluate the evidence of societal standards of decency that is available to us at that time. In my view, however, we need not and should not decide the question today.\(^{150}\)

Justice O’Connor understood the issues, the evidence, the injustice of executions for crimes of childhood, and the irrationalities of the criminal justice system.\(^{151}\) Her restraint was a reflection of her judicial philosophy shared by the pragmatic Justices of the center, as was her narrowly-crafted holding:

> In the peculiar circumstances we face today . . . the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender’s execution.\(^{152}\)

Justice O’Connor admitted her conclusion was “itself unusual.”\(^{153}\) Perhaps because Justice Scalia had spent time and energy to attract her to his opinion, perhaps because he saw her principle as “new,” he defamed her analysis as a “loose cannon.”\(^{154}\) Actually, she crafted a rationale so narrow

\(^{150}\) *Id.*

\(^{151}\) *Id.*

\(^{152}\) *Id.* at 857-58.

\(^{153}\) *Id.* at 858.

\(^{154}\) *Thompson*, 487 U.S. at 877 (Scalia, J., dissenting). Specifically, he thought Justice O’Connor’s concurrence did not fulfill its promise of arriving at a more ‘narrow conclusion’ than the plurality, and avoiding an “unnecessarily broad” constitutional holding . . . . To the contrary, I think it hoists on to the deck of our *Eighth Amendment* jurisprudence the loose cannon of a brand new principle. If the concurrence’s view were adopted, henceforth a finding of national consensus would no longer be required to invalidate state action in the area of capital punishment. All that would be needed is uncertainty regarding the existence of a national consensus, whereupon various protective requirements could be imposed, even to the point of specifying the process of legislation.

*Id.* (citations omitted).
it was not likely to “misfire”—or fire at all in subsequent cases. She sought only to “avoid unnecessary, or unnecessarily broad, constitutional adjudication” while still ensuring that Wayne Thompson would live.\textsuperscript{155}

\textbf{Tradition, Justice Scalia’s dissent, and Professor Streib’s scholarship.} Thompson v. Oklahoma was once a landmark decision on capital punishment, but its significance has been limited by Stanford v. Kentucky and eclipsed by Roper v. Simmons.\textsuperscript{156} Thompson still remains an important, illustrative chapter in a longer, more complicated debate about whether national tradition is a legitimate basis for interpreting ambiguous constitutional text.

“Level of generality is destiny in interpretive disputes . . . .”\textsuperscript{157} This is especially so in contests over American constitutional traditions. Even in cases focusing on explicit textual restrictions on majority power, Justice Scalia consistently urges that abstract judicial tests “ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”\textsuperscript{158} And so: “‘[W]hen a practice not expressly prohibited by the text . . . bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.’”\textsuperscript{159} Of course, there are few specific government policies that are “expressly prohibited.” The debate is about open-ended phrases and general prohibitions that are explicit—and ambiguous.\textsuperscript{160}

When litigants point to a tradition in support of unenumerated rights, such as privacy or parental autonomy, Scalia opposes generalizing.\textsuperscript{161} Judges must focus analysis on “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”\textsuperscript{162}

Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views.

\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 858 (O’Connor, J., concurring).
\item \textsuperscript{156} \textit{See Roper}, 543 U.S. at 561-62, 568 (discussing the Court’s past interpretation of cruel and unusual punishment and use of “evolving standards of decency” in Thompson v. Oklahoma and Stanford v. Kentucky).
\item \textsuperscript{157} Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring).
\item \textsuperscript{158} United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (emphasis omitted).
\item \textsuperscript{159} \textit{Id.} (quoting Rutan v. Republican Party of Ill, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion). Only Chief Justice Rehnquist joined Justice Scalia’s footnote 6, which proposed a “specific tradition” test. \textit{Id.} at 113.
\end{itemize}
Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best ... a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all. 163

The issue of the juvenile death penalty and the Eighth Amendment cases is, therefore, one of many examples of controversy over judicial searches for cultural presuppositions, customs, mores and verifiable legal traditions. One might think that less proof of tradition, or at least less specific proof, might suffice when interpreting text that seems to be an explicit mandate for using tradition. After all, the phrase “cruel and unusual” seems plainly to require an assessment—by someone—of whether a particular punishment is harsh and inhumane (based on someone’s moral judgment). 164 The word “unusual” is, if anything, clearer: it seems to refer to punishments that are “rare,” “freakishly rare,” “unheard of,” or—at least—not common or ordinary. 165 “[W]hat is ‘unusual’ refers to infrequency at a point in time—and times change.” 166

The Framers and ratifiers knew all this and hesitated before ratification. 167 Noah Webster, an advocate of a national constitution and author of America’s first great dictionary, complained: “‘Unless you can, in every possible instance, previously define the words excessive and unusual —... any restriction of... power by a general indefinite expression, is a nullity—mere formal nonsense.” 168 The legislative history of the words negates any idea that the framers intended a fixed meaning. The Congress

163. Id. at 127.
164. See, e.g., WEBSTER’S NEW COLLEGIATE DICTIONARY (1976) (defining “cruel” as “disposed to inflict pain or suffering” or “devoid of humane feelings” or “causing or conducive to injury, grief, or pain” or “unrelieved by leniency”); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 321 (Laurence Urdang & Stuart Berg Flexner eds., College ed. 1968) (defining “cruel” as “willfully or knowingly causing pain or distress to others,” or “enjoying the pain or distress of others,” or “rigid; stern; unrelentingly severe”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 437 (4th ed. 2000) (defining “cruel” as “[d]isposed to inflict pain or suffering” or “causing suffering; painful.”); POCKET OXFORD DICTIONARY OF CURRENT ENGLISH (8th ed. 1992) (defining “cruel” as “causing pain or suffering, esp., deliberately” or “harsh, severe”).
165. See, e.g., WEBSTER’S NEW COLLEGIATE DICTIONARY, supra note 164 (defining “unusual” as “uncommon” or “rare”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, supra note 164, at 1888 (defining “unusual” as “[n]ot...common, or ordinary”); POCKET OXFORD DICTIONARY OF CURRENT ENGLISH, supra note 164 (defining “unusual” as “remarkable”); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, supra note 164, at 1442 (defining “unusual” as “not...common, or ordinary;...exceptional”).
166. See Tepker, supra note 65, at 815.
167. See id.
168. Id. at 814 (quoting Noah Webster, Reply to the Pennsylvania Minority: “America,” DAILY ADVERTISER (N.Y.), Dec. 31, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 553, 559 (Bernard Bailyn ed., 1993)).
proposing the Eighth Amendment as part of the Bill of Rights heard objections to the words on grounds that ‘“the import of them is too indefinite.”’ All seem to have understood that the clause’s objective was ‘‘to express a great deal of humanity,’” but specifics were lacking. It is not surprising to see courts embracing the view that the original understanding was that the amendment would require an evolving and tradition-based judicial analysis. Justice O’Connor’s words in Roper are representative of original understandings, original fears, and a dominant interpretation on the Supreme Court:

It is by now beyond serious dispute that the Eighth Amendment’s prohibition of “cruel and unusual punishments” is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791.

Additionally, there is no genuine alternative to assessing national tradition: “[B]ecause ‘[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,’ the Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”

Justice Scalia has admitted that perhaps the Eighth Amendment’s text has “evolutionary content.” But he does not allow a different approach for an explicit textual restriction, as opposed to the more controversial and problematic “substantive due process” line of cases. Even when the text embraces an evolving moral standard, Justice Scalia cannot endorse the long, well-established judicial consensus to “the ‘evolving standards of decency that mark the progress of a maturing society.’”

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169. Tepker, supra note 65, at 815 (quoting 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834) (statement of Rep. Smith)). This phrase is also quoted in Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 CALIF. L. REV. 839, 842 (1969); Weems v. United States, 217 U.S. 349, 368-69 (1910); Furman, 408 U.S. at 243-45 (Douglas, J., concurring); Id. at 262-63 (Brennan, J., concurring).

170. Tepker, supra note 65, at 815 (quoting 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834) (statement of Rep. Livermore)).

171. Roper, 543 U.S. at 589 (O’Connor, J., dissenting).

172. Id. (quoting Trop, 356 U.S. at 100-01 (plurality opinion)).


174. See Thompson, 487 U.S. at 874-77 (Scalia, J., dissenting).

175. Id. at 821 (plurality opinion) (quoting Trop, 356 U.S. at 101).
The risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one’s own views. To avoid this danger, we have, when making such an assessment in prior cases, looked for objective signs of how today’s society views a particular punishment.\textsuperscript{176}

In short, Justice Scalia wants specific evidence of a specific tradition approach, and only one type of evidence will do: statute counts. Justice Scalia relies almost exclusively on a count of state statutes.\textsuperscript{177}

The most reliable objective signs consist of the legislation that the society has enacted. It will rarely, if ever, be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.\textsuperscript{178}

In Scalia’s analysis, what states permit—and what they theoretically might do—is all that matters.\textsuperscript{179} To bolster the impression that executing children is not to be compared with discarded punishments like flogging and branding, he ignores whether the states have made an explicit decision (demonstrating conscious legislative choice) or an implicit one (when the legislative motive was ambiguous).\textsuperscript{180} It does not even matter whether the states actually use the power they theoretically preserve. And of course, states that ban capital punishment altogether must be ignored, because we do not know what they would do if they were to adopt a death penalty.\textsuperscript{181} Evidently law, logic, constitutional text, original understanding, precedent—and facts, thanks to Victor Streib—do not command Justice Scalia’s view of history or tradition.

Victor Streib did more than any other scholar to uncover the facts to reveal the realities and resonance of the nation’s tradition of decent restraint in criminal judgments of children. We have, as Justice Marshall said in oral argument in \textit{Thompson}, come a long way since Blackstone.\textsuperscript{182} We have also

\begin{itemize}
  \item[I.\textsuperscript{176}] Id. at 865 (Scalia, J., dissenting) (citations omitted).
  \item[I.\textsuperscript{177}] Id. at 867-70.
  \item[I.\textsuperscript{178}] Id. at 865.
  \item[I.\textsuperscript{179}] See Thompson, 487 U.S. at 867-70 (Scalia, J., dissenting).
  \item[I.\textsuperscript{180}] Compare, e.g., id. at 826 (plurality opinion) (rejecting the contention there is no chronological age at which the imposition of capital punishment is unconstitutional ), and id. at 829 n.24 (rejecting focusing upon the minimum age required before a juvenile is waived from juvenile court to criminal court), with id. at 850-53 (O’Connor, J., concurring) (implying that if a state legislature were to conclude, explicitly, that execution of juveniles under sixteen were appropriate, the result would be different).
  \item[I.\textsuperscript{181}] Roper, 543 U.S. at 610-11 (Scalia, J., dissenting).
  \item[I.\textsuperscript{182}] Transcript of Oral Argument, Thompson, supra note 69, at 32.
\end{itemize}
progressed: flogging and branding were not historically considered “cruel” and “unusual.”\textsuperscript{183} It is the judicial assessment of tradition—a realistic, well-informed and humane assessment—that is possible because Victor Streib made so significant a difference. As the saying goes, everyone, particularly Supreme Court Justices, are entitled to their own opinions; no one is entitled to their own facts. And Victor Streib supplied the facts. His data helped define the battleground. The patterns, their ambiguities, and significance left the parties free to assess the national tradition on both a specific and a general level. The opponents of the juvenile death penalty were able to show broader traditions, as well as patterns in the statute counts that persuaded Justices Blackmun, Stevens, Powell, and—most influentially—Sandra Day O’Connor that there was a real, reliable tradition to be weighed. As in other contexts, these Justices “of the center” did not insist on universality, incontrovertibility, or a principle developed so comprehensively by democratic processes that judicial rulings were beside the point.

Justice Scalia has lost his quest for specificity, at least for now. \textit{Planned Parenthood v. Casey}\textsuperscript{184} explicitly rejects his “specific tradition” test for substantive due process cases.\textsuperscript{185} The Court’s most recent analyses of the cruel and unusual punishment clause, especially \textit{Roper v. Simmons}, also adopt an approach that rejects his method. In \textit{Roper}, the Court cites both specific evidence and general traditions to assess America’s “evolving standards of decency.”\textsuperscript{186} The opinion notes and reflects a general tradition that juveniles, like the mentally retarded, are “categorically less culpable than the average criminal.”\textsuperscript{187} The opinion of Justice Kennedy left a lot to be desired. It is easily caricatured and mocked.\textsuperscript{188} But it underscores the significance of \textit{Thompson} and subsequent cases. For quite some time and in a variety of contexts, the Justices have thought it essential to

\begin{itemize}
\item \textsuperscript{183} \textit{See Furman}, 408 U.S. at 287; \textit{id.} at 384 (Burger, C.J., dissenting).
\item \textsuperscript{184} 505 U.S. 833 (1992).
\item \textsuperscript{185} \textit{id.} at 847.
\item \textsuperscript{186} \textit{Roper}, 543 U.S. at 561-69; see also Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).
\item \textsuperscript{187} \textit{Roper}, 543 U.S. at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
\item \textsuperscript{188} \textit{See Tepker, supra note} 65, at 809, 814-15.
\end{itemize}

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. [\textit{See} Michael H. v. Gerald D., 491 U.S. 110, 127-128, n.6 (1989) (opinion of [Scalia, J.]). But such a view would be inconsistent with our law.

\textit{Id.}
immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract “fundamental presuppositions” from their deepest selves, but in fact from the evolving morality of our tradition. 189

Victor Strieb’s work on capital punishment of juveniles marked the emotional, intellectual and moral progress of a nation. His research helped attorneys, judges, and justices resist the passions of those would resurrect a nineteenth- or eighteenth-century version of justice, morality, and constitutional law. His scholarship helped show that consulting tradition—humanely and wisely—can recognize our nation’s real constitutional progress and verify our nation’s honest claim to be in the vanguard of the fight for human rights.

Introduction to “Struck by Lightning”

RICHARD C. DIETER*

It has been thirty-five years since the Supreme Court of the United States allowed the death penalty to resume under state statutes that promised to protect against the arbitrary application which had been a hallmark of the punishment’s past. This is a fitting time to evaluate whether the death penalty experiment has met those expectations. The Article that follows this introduction, Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976, was written for the Death Penalty Information Center in July 2011. This Article examined two streams of evidence: the dramatic decline in the use of the death penalty, especially in the past decade, and the ongoing influence of irrelevant factors in determining who is sentenced to death and executed in this country.

Professor Victor Streib of Ohio Northern University Pettit College of Law, whose years of work are being honored in this tribute issue of the Law Review, has played a critical role in developing both these strands of analysis. His research on juveniles and the death penalty was pivotal in the eventual ruling by the Supreme Court in 2005 to bar capital punishment for young offenders, pointing the way to a narrowing of the death penalty’s use. Similarly, his research on gender disparities in the application of the death penalty has raised awareness of the role that arbitrary factors continue to play in this system. If the death penalty is someday struck down because of its rare but capricious application, the insights and empirical research of Professor Streib and many others will surely be noted.

* Executive Director, Death Penalty Information Center.
These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.
-Justice Potter Stewart (1972)

Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated to concede that the death penalty experiment has failed.
-Justice Harry Blackmun (1994)

Two decades after Gregg, it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed. Today, administration of the death penalty, far from being fair and consistent, is instead a hapazard maze of unfair practices with no internal consistency.
-American Bar Association (1997)

We now have decades of experience with death-penalty systems modeled on [the Model Penal Code]. . . . Unless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.
-American Law Institute (The motion to withdraw this section of the Code was passed in 2009.)

I have concluded that our system of imposing the death penalty is inherently flawed. The evidence presented to me by former prosecutors and judges with decades of experience in the criminal justice system has convinced me that it is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right.
-Gov. Pat Quinn of Illinois (signing bill abolishing the death penalty, 2011)
Executive Summary

The United States Supreme Court approved the re-instatement of the death penalty 35 years ago on July 2, 1976. Although the death penalty had earlier been held unconstitutional because of its arbitrary and unpredictable application, the Court was willing to sanction new systems that states had proposed to make capital punishment less like “being struck by lightning” and more like retribution for only the “worst of the worst” offenders. The Court also deferred to the states’ judgment that the death penalty served the goals of retribution and deterrence.

After three and a half decades of experience under these revised statutes, the randomness of the system continues. Many of the country’s constitutional experts and prominent legal organizations have concluded that effective reform is impossible and the practice should be halted. In polls, jury verdicts and state legislative action, there is evidence of the American people’s growing frustration with the death penalty. A majority of the nine Justices who served on the Supreme Court in 1976 when the death penalty was approved eventually concluded the experiment had failed.

Four states have abolished the death penalty in the past four years, and nationwide executions and death sentences have been cut in half since 2000. A review of state death penalty practices exposes a system in which an unpredictable few cases result in executions from among thousands of eligible cases. Race, geography and the size of a county’s budget play a major role in who receives the ultimate punishment. Many cases thought to embody the worst crimes and defendants are overturned on appeal and then assessed very differently the second time around at retrial. Even these reversals depend significantly on the quality of the lawyers assigned and on who appointed the appellate judges reviewing the cases. In such a haphazard process, the rationales of deterrence and retribution make little sense.

In 1976, the newly reformed death penalty was allowed to resume. However, it has proved unworkable in practice. Keeping it in place, or attempting still more reform, would be enormously expensive, with little chance of improvement. The constitution requires fairness not just in lofty words, but also in daily practice. On that score, the death penalty has missed the mark.
I. Introduction: History of the Modern Death Penalty

The only lengthy, nationwide suspension of the death penalty in U.S. history officially began in 1972 when the U.S. Supreme Court held in *Furman v. Georgia* that the death penalty was being administered in an arbitrary and capricious manner that amounted to cruel and unusual punishment. As in Georgia, the statutes of other states and the federal government provided no guidance to the jury empaneled to decide between sentences of life and death. The death penalty ground to a halt as states formulated revised laws they hoped would win the Court's approval.

Executions had stopped in 1967 as lower courts anticipated a High Court ruling on the constitutionality of capital punishment. Insights from the civil rights movement of the 1960s led many to believe the death penalty was so linked to the practice of racial discrimination that it would no longer be constitutionally acceptable. When the Supreme Court reviewed the practice of capital punishment, it focused primarily on arbitrariness in its application rather than on racial discrimination. Nevertheless, as Justice William O. Douglas warned in his concurring opinion in *Furman*, the questions of arbitrariness and discrimination are closely linked.

For a pivotal set of Justices, the death penalty was unconstitutional because it was "so wantonly and so freakishly imposed." Justice Potter Stewart said the death penalty was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Justice Byron White echoed that sentiment when he said he could not uphold a punishment where "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." The Justices left for another day the question of whether the death penalty itself was constitutional, leaving the door open to the enactment of more limited death penalty statutes that provided detailed guidance for juries. *After Furman*, many states re-wrote their death penalty laws and began sentencing people to death—although no executions would be carried out until the Court again addressed the issue.

It did so in 1976, approving the new laws of Georgia, Florida and Texas, while rejecting the approach taken by North Carolina and Louisiana, which required all those convicted of certain murders to be sentenced to death, without regard to individual sentencing considerations. The death penalty itself was declared constitutional under the assumption that it fit the rationales of retribution and deterrence. The Court said that being sentenced to death would no longer be random because the new statutes sufficiently restricted and guided the decision-making of prosecutors, judges, and juries—at least in theory. Whether these new laws would be less arbitrary in practice remained to be seen.

Decades of Experiment

By now thirty-five years have passed, providing ample experience to assess whether this system reliably selects the worst offenders and the most heinous crimes to merit the most severe punishment. This experience also provides an opportunity to judge whether the death penalty's twin rationales—retribution and deterrence—sufficiently justify its continued use, or whether it has devolved into the "pointless and needless extinction of life," forbidden by the Eighth Amendment.
Concerns about the death penalty before the Court's approval of new laws in 1976 stemmed not only from the lack of guidance for jurors making crucial choices between life and death sentences. The death penalty was also rarely carried out, giving rise to doubts about its consistent application. In a country with only a handful of executions each year, it was not at all clear that the few executed were the "worst of the worst." Justice Brennan, concurring with the majority in Furman, wrote, "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." The death penalty is again in decline across the country. The number of death sentences and executions has decreased sharply in the past decade. Since 2007 four states have abandoned the death penalty. Even in the 34 states that retain it, an execution is a rare event in all but a handful of states. Less than one in a hundred murders results in a death sentence, and far fewer defendants are executed. Does the one murderer in a hundred who receives a death sentence clearly merit execution more than all, or even most, of the 99 other offenders who remain in prison for life? Or do arbitrary factors continue to determine who lives and who dies under our death penalty laws?
II. Thirty-five Years Later: The Unfairness of the Death Penalty in Practice

The death penalty system in this country is demonstrably highly selective in meting out sentences and executions, and becoming more so. There are approximately 15,000 murders a year; in 2010, there were 46 executions, a ratio of 1 execution for every 326 murders. The number of murders in the U.S. barely changed from 1999 to 2009, but the number of death sentences declined by 60% during that period. Studies of the death penalty in several states since 1976 reveal a system that sweeps broadly through thousands of eligible cases but ends up condemning to death only a small number, with little rational explanation for the disparity.

- In New Mexico, during a 28-year span, 211 capital cases were filed. About half the cases resulted in a plea bargain for a sentence less than death. Another half went to trial, and 15 people were sentenced to death. In the end, only one person was executed (after dropping his appeals), and two people were left on death row when the state abolished the death penalty in 2009.

- In Maryland, over a 21-year period from 1978 to 1999, 1,227 homicides were identified as death-eligible cases. Prosecutors filed a death
notice in 162 cases. Fifty-six cases resulted in a death judgment, although it has become clear the vast majority of those will never be carried out. As of 2011, five defendants have been executed, and only five remain on death row. There have been no executions since 2005.5

- In Washington, from 1981 to 2006, 254 cases were identified as death-eligible. Death notices were filed in 79, and death sentences were imposed in 30. Of the cases that completed the appeals process, 83% were reversed. Four executions took place, with three of the four defendants having waived their remaining appeals.12

- In Kentucky, from 1979 to 2009, there were 92 death sentences. Of the 50 cases that completed their appeals, 42 sentences (84%) were reversed. Three inmates were executed, including 2 who waived their appeals.13

Patterns in other states are similar. In Oregon, 795 cases were deemed eligible for the death penalty after its reinstatement in 1984; two people have been executed—both “volunteers.”14 Nationally, only about 15% of those sentenced to death since 1976 have been executed. Under the federal death penalty, from a pool of over 2,500 cases submitted by U.S. Attorneys, the Attorney General has authorized seeking the death penalty in 472 cases; 270 defendants went to trial, resulting in 68 death sentences and 3 executions to date.15

The theory behind winnowing from the many defendants who are eligible for the death penalty down to the few who are executed is that the system is selecting the “worst of the worst” for execution. The Supreme Court recently underscored this theory in a 2008 decision restricting the death penalty: “[C]apital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.””16

However, the notion that tens of thousands of eligible cases are carefully narrowed down to the worst ones does not withstand scrutiny. Many factors determine who is ultimately executed in the U.S.; often the severity of the crime and the culpability of the defendant fade from consideration as other arbitrary factors determine who lives and who dies.

The System of Selection

The system is too fraught with variables to survive. Whether or not one receives the death penalty depends upon the discretion of the prosecutor who initiates the proceeding, the competence of counsel who represents the defendant, the race of the victim, the race of the defendant, the make-up of the jury, the attitude of the judge, and the attitude and make-up of the appellate courts that review the verdict.

-Judge H. Lee Sarokin, U.S. Court of Appeals, Third Circuit (ret.)

Does the framework of guided discretion approved by the Supreme Court in 1976 achieve the goal of making the death penalty predictable and limited to the most heinous cases? On a national level, the answer clearly is “No.” The system was never designed to punish the worst offenders across the country. Some states have the death penalty and others do not.
Many states that have the death penalty hardly ever use it, even for their worst offenders. Excluding Texas, Virginia and Oklahoma, the rest of the country has averaged far less than one execution per state per year since the death penalty was reinstated, even when only states with a death penalty are counted.

Local Choices

Although disparities among the states in using the death penalty are allowable under the constitution, the overall justifications of retribution and deterrence become far less credible when the punishment is applied so rarely and so unevenly. However, wide disparities in the use of the death penalty within a single state also raise serious questions about equality under law. Jurisdictions like Harris County (Houston), Maricopa County (Phoenix), and Philadelphia have produced hundreds of death sentences, while other counties within the same state have few or no death sentences. In almost all states, the decision to seek the death penalty is not made by a central state entity that evaluates the relative severity of committed homicides; rather, the charging decision is left to the discretion of the district attorney of each county. Prosecutors differ widely on what they consider to be the worst cases, and even on whether the death penalty should be sought at all. A defendant’s chances of being sentenced to death may vary greatly depending on which side of the county line he committed a murder.

Jury Discretion and Understanding

Following the decision to seek death by the local prosecutor, the next critical stage for choosing between life and death occurs at the sentencing phase of the trial, where typically a jury decides a convicted defendant’s fate. An individual juror, however, has no way of comparing the case under consideration with other cases in the state. For most jurors, this will be the only capital case they will ever decide. Strong emotions can easily take over as they inspect 8-by-10 glossies of the victims at the crime scene or hear heart-breaking testimony from the victim’s family. Some defendants will be spared and others condemned, but in the absence of evidence of more egregious cases, most murders can be made to look like one of the worst.

Another difficulty jurors face is that to make their sentencing decision they are given vague instructions with legal terms they do not fully understand. (See, e.g., an excerpt from an Ohio jury instruction in a capital case in the endnote below.) Although the language may be clear to lawyers and judges, numerous studies have documented the misunderstandings that jurors have about their instructions in death penalty cases.

Uneven Appellate Review

At the third key stage of the judicial process—appellate review by the state’s highest court—there could be an opportunity, called “proportionality review,” to compare a death sentence with sentences given for similar crimes in the state. However, the practice has largely been abandoned, even where it was attempted.

In 1976 the U.S. Supreme Court in Gregg v. Georgia approved Georgia’s statute, referring favorably to the provision on proportionality review. However, in
1984, in *Pulley v. Harris*, the U.S. Supreme Court rejected the principle that every state was required to systematically review whether a given death sentence was justified when compared to similar offenses in the state. Proportionality review in almost all states is now, if it occurs at all, a perfunctory process, allowing a death sentence if death sentences were given in one or more similar cases, but ignoring the vast majority of similar cases which resulted in life sentences. Once a death sentence has been upheld for a particular factual scenario, a death sentence in a subsequent similar crime will not be deemed disproportionate. This process results only in a lowest common denominator for a death sentence, not a search for the worst of the worst. Thus, in our death penalty system thousands of cases go through the initial stages of prosecution and sentencing with the public assuming that the relative few that emerge are the ones most deserving of death. Appellate review, however, in both state and federal courts, then finds that prejudicial mistakes were made in two-thirds of these cases, resulting in the death sentences being overturned. The stated reasons for these reversals often have nothing directly to do with the proportionality of the sentence to the crime. Cases are overturned because defense lawyers failed to perform their professional duties at trial, prosecutors withheld exculpatory evidence, or the jury was improperly selected, among many reasons. When these cases are retried (or reconsidered by the prosecution), the judgment most often changes to a life sentence, or less. No longer are these defendants deemed the worst of the worst, even though the facts of the crimes remain the same.

There are many people who commit heinous crimes, and I’d be the first to stand up with emotion and say they should lose their lives. But when I look at the unfairness of it, the fact that the poor and people of color are most often the victims when it comes to the death penalty, and how many cases we’ve gotten wrong now that we have DNA evidence to back us up, I mean, it just tells me life imprisonment is penalty enough.

-Sen. Dick Durbin (IL)

These reversals challenge the death-penalty selection process in two ways: first, prosecutors, juries, and judges are often making critical decisions on the basis of incomplete or incorrect information. Some of the errors, but by no means all, are caught. A defendant can have a bad lawyer at trial and another bad lawyer on appeal, so there is no one to remedy the deficiencies of the first lawyer. Evidence withheld at trial by the prosecution is not always uncovered during appeals. So, even when a defendant is near execution, critical facts bearing on the appropriateness of the sentence may remain unrevealed.

The second way in which the appeals process contributes to the arbitrariness of the death penalty is that reversals are very uneven from state to state. Virginia, for example, is the second leading state in terms of executions. Between 1973 and 1995, the Virginia Supreme Court overturned only 10% of the death sentences reviewed, compared to a national reversal rate of 41%. At the next level, Virginia’s cases are reviewed by federal courts of the Fourth Circuit, which had the lowest record of reversals in capital cases in the entire country during the same period. As a result, about 70% of Virginia’s death...
sentences have resulted in executions, compared to 15% nationally. In California from 1997 to 2010, close to 90% of the Supreme Court's capital cases were affirmed, a rate higher than any other state's.\(^7\)

Compare this to Mississippi, where from 1973 to 1995, 61% of the capital cases reviewed were reversed by the state Supreme Court; or North Carolina, where also 61% were reversed; or South Carolina, where 54% were reversed.\(^2\) Such wide disparities in reversal rates raise the specter of uneven application of the law.

Examining what happens to death-sentenced defendants the second time through the system demonstrates the critical importance of a reversal in a death penalty case:

- In North Carolina, about 2/3 of the death penalty cases that completed the review process were reversed. About 65% of the defendants in those cases were given life sentences or less as the final disposition of their cases; another 9% died in prison of natural causes.\(^3\)

- As of 2009, Pennsylvania, with the fourth largest death row in the country, has had 124 death sentences reversed on appeal. When these cases were retried or otherwise resolved, 95% resulted in a life sentence, or less. The state has had 3 executions in 30 years, all involving defendants who abandoned their appeals.\(^4\)

- In Washington, 18 death sentences have been reversed; none resulted in death sentences the second time around.\(^5\)

- In New York and New Jersey, no case made it through the entire appeals process to execution, and both states have now abandoned the death penalty.

Nationally, the most comprehensive study of death penalty appeals found that two-thirds of death sentences were overturned, and upon reconsideration over 80% received an outcome of less than death.\(^6\) In all of these re-sentencings, the judgment went from "worst of the worst" to something less severe—the difference between life and death.

In sum, this is a broken and unreliable system, compounded by wide disparities between states. In some states most death sentences are overturned and almost no one is executed, but in others, like Texas and Virginia, where reversals are rare, over 575 people have been executed since 1976, almost half of the national total.
III. The Great Divide

I have been a judge on this Court for more than twenty-five years... After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.

-Judge Boyce Martin, U.S. Court of Appeals, Sixth Circuit

When Gary Ridgway, the worst mass murderer in this state’s history, escapes the death penalty, serious flaws become apparent. The Ridgway case does not ‘stand alone,’ as characterized by the majority, but instead is symptomatic of a system where all mass murderers have, to date, escaped the death penalty... The death penalty is like lightning, randomly striking some defendants and not others.

-Justice Charles Johnson, Washington Supreme Court

Both our general prison population and death row contain dangerous individuals convicted of serious crimes. But it would be hard to predict whether an inmate ended up on death row or in the general prison population if you were to examine only the facts of the crime. It would be even harder to foresee who would eventually be executed. The fact that a condemned inmate was in Texas or Virginia would be a far better predictor of execution than the facts of the crime.

There are many reasons why a particular defendant does not receive the death penalty. He could be in a state that does not have capital punishment, such as Wisconsin’s Jeffrey Dahmer, a serial killer and sex offender who received a life sentence. He may have information to offer the prosecution in exchange for a plea bargain, such as former FBI Agent Robert Hanssen, who was charged with espionage and faced a federal death sentence before cooperating with the government. Those involved in organized-crime killings may also receive leniency because of the information they can offer. Often the most notorious cases receive the best legal defense, making a death sentence less likely, even for horrific crimes.

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<th>Who is executed?</th>
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<td><strong>Clarence Carter</strong> was executed in Ohio on April 12, 2011, for the murder of another inmate. The former Director of Ohio Prisons, Terry Collins, urged the governor to spare Carter because “It is much more likely that this was an</td>
<td><strong>Eric Rudolph</strong> admitted killing two people and injuring 150 others by carrying out a series of bombings at a gay nightclub, abortion clinics, and the 1996 Olympics in Atlanta. He finally was</td>
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Inmate fight that got tragically out of hand. Inmate-on-inmate violence in lockups is often pursued to establish oneself as fearsome and to deter others from threatening or attacking the inmate. There was no evidence that Carter planned to kill the inmate during the fight.

Captured in 2003. In separate plea agreements with the federal government and Georgia prosecutors, he avoided the death penalty and is serving four consecutive life sentences without the possibility of parole. Prosecutors spared Rudolph from execution in exchange for his guilty pleas and his information about the location of 250 pounds of dynamite he had hidden in the mountains of North Carolina.

Teresa Lewis was executed in Virginia in 2010. Requests for a commutation of her death sentence had come from mental health groups, the European Union, and novelist John Grisham. Many pointed to the fact that while Lewis was a conspirator in the crime, the two co-defendants who actually carried out the killings received life sentences. Information that became available after Lewis’s trial showed she had an IQ of 72, one of the key components of intellectual disability that could have rendered her death sentence unconstitutional. A letter from one of the co-defendants in prison indicated he had manipulated Lewis into going along with the murder of her husband. While on death row, she reportedly was a great help to other prisoners.

James Sullivan, a millionaire and former fugitive on the FBI’s most-wanted list, was captured in Thailand in 2002, four years after he was indicted on murder charges and 15 years after he paid a truck driver $25,000 to kill his wife in Georgia. A jury sentenced him to life without parole.

Michael Richard needed the help of his sisters to dress himself until age 14. He cut his meat with a spoon because he could not use a knife. He was diagnosed as mentally retarded by Dr. George Denkowski, but Denkowski reversed himself after the District Attorney’s Office intervened. Dr. Denkowski has since been barred from rendering further diagnoses of intellectual disabilities in Texas. Richard was the last person executed in the U.S. in 2007. After the U.S. Supreme Court agreed to hear a challenge to lethal injection, every other defendant was granted a stay of execution. However, Richard’s attempt to file a similar appeal was blocked because a Texas appellate judge refused to keep the courthouse open after 5 pm so his lawyers could file legal papers due that day.

In Washington in 2003, Gary Ridgway pleaded guilty to killing 48 people and received a life-without-parole sentence. He was called the “Green River Killer” because of the area in which his victims were found. He was spared the death penalty in exchange for a detailed confession about all of the young women he had murdered.
| **Kelsey Patterson** was executed in Texas in 2004 despite a highly unusual 5-1 recommendation for clemency from the Board of Pardons and Paroles. He had spent much of his life in and out of state mental hospitals, suffered from paranoid schizophrenia, and rambled unintelligibly at his execution. He had killed 2 people without warning or apparent motive.  

| **Charles Cullen** received 11 consecutive life sentences for killing as many as 29 intensive-care patients with fatal injections. In 2004 Cullen made a plea agreement with New Jersey and Pennsylvania prosecutors in which he offered to provide information about his crimes and the names of his victims in exchange for the states’ agreement not to seek the death penalty. |

| **Wanda Jean Allen** was executed in Oklahoma in 2001. She was sentenced to death for killing her lover, Gloria Leathers, in Oklahoma City in 1988. The two women, who met in prison, had a turbulent relationship. Leathers' death followed a protracted argument between the couple that began at a local shop, continued at their home, and culminated outside a police station. Allen maintained she acted in self-defense. In 1995, a psychologist conducted a comprehensive evaluation of Allen and found "clear and convincing evidence of cognitive and sensori-motor deficits and brain dysfunction," possibly linked to an adolescent head injury.  

| **Thomas Capano**, a former state prosecutor and prominent Delaware lawyer, was convicted of murdering his mistress and dumping her body in the ocean. He was sentenced to death, but a state court overturned his sentence. In 2006, the state decided not to pursue the death penalty at retrial, with the original prosecutor stating, "The death penalty was always a secondary issue." |

| **Manny Babbitt** lived with his brother in California after being released from a mental institution. He had been suffering from post-traumatic symptoms ever since he returned from Vietnam in 1969. During the 77-day siege at Khe Sanh, Manny picked up pieces of the bodies of his fellow G.I.s. When he was wounded, he was evacuated in a helicopter on a pile of dead bodies. He later broke into the home of an elderly woman and beat her. She died of a heart attack. His brother turned him over to authorities, expecting his war-hero brother would receive the medical attention he needed. However, Babbitt was tried, sentenced to death and executed in 1999, shortly after receiving the Purple Heart in prison.  

| **In 2003, Stephen "The Rifleman" Flemmi was allowed to plead guilty to 10 murders, drug trafficking, racketeering and extortion, as federal prosecutors agreed not to seek the death penalty against him in exchange for his cooperation with ongoing crime investigations. Under the terms of the agreement, Flemmi—who also admitted to murders in Florida and Oklahoma—will serve a life-without-parole sentence in a secure unit reserved for cooperating inmates. Among the murders committed by Flemmi were the murder of one girlfriend and the daughter of another." |

| **Dwayne Allen Wright** was executed in Virginia in 1998. Wright was 17 at the time of his arrest and trial.  

| **Brian Nichols** was in custody in a crowded Atlanta courthouse on a rape charge at the time of his death. |
crime, the product of a failed system of juvenile care in the District of Columbia. Wright had been admitted to St. Elizabeth’s mental hospital and sent to two of the city’s most notorious juvenile centers. He suffered from a number of mental problems and grew up with an incarcerated father, a mentally ill mother, and an older brother serving as his father until he was murdered when Wright was ten. At trial his lawyers played down these issues. Two jurors later said they would not have voted for death if they had known of his mental illness and intellectual shortcomings. Although Wright’s case captured the attention of noted civil rights, religious and political leaders, he was shown no mercy. Wright was one of three juvenile offenders executed in Virginia after the death penalty was reinstated. The Supreme Court did not bar such executions of juvenile offenders until 2005.48

<table>
<thead>
<tr>
<th>Harold McQueen</th>
<th>Oscar Veal</th>
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<tbody>
<tr>
<td>was the first person executed in Kentucky in 35 years. McQueen was tried with his half-brother, Keith Burnell, for a robbery and murder. While Burnell’s father paid for a private attorney, McQueen had a court-appointed lawyer who, at the time of trial, could be paid a maximum of only $1,000 for handling the case. McQueen was electrocuted in 1997; Burnell was sentenced to prison and paroled shortly thereafter.49</td>
<td>was a contract killer for a large drug and murder-for-hire operation. Convicted of seven counts of murder and eight counts of racketeering conspiracy, in 2011 federal prosecutors agreed not to seek the death penalty against him in exchange for his testimony about a drug organization in Washington, D.C. Although prosecutors said, “[Veal] willingly and purposely killed seven men, motivated by both greed and the desire to please the other members of this violent gang,” they called his cooperation “extraordinary by any measure” and recommended a prison sentence of 25 years.50</td>
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<table>
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<tr>
<th>Jesse Dewayne Jacobs</th>
<th>Juan Quintero</th>
</tr>
</thead>
<tbody>
<tr>
<td>was executed in 1995 in Texas. After Jacobs’s trial, at which he was accused of firing the murder weapon, the prosecution, in an unsuccessful attempt to get another death sentence against the co-defendant, reversed itself and claimed Jacobs did not do the shooting and did not even know that his co-defendant had a gun. Despite this blatant inconsistency about who committed the murder, Jacobs’s death sentence was upheld. The Vatican, the European Parliament, and</td>
<td>was a Mexican immigrant with no identification papers, killed a Houston police officer after being stopped for speeding in Texas in 2006. Unlike many other foreign nationals, the Mexican government learned of his case and was able to provide assistance, bringing in a mitigation specialist and an expert capital defender from Colorado. In 2008, a jury convicted Quintero of the murder, but at least 10 of the 12 jurors</td>
</tr>
</tbody>
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some members of the U.S. Supreme Court objected to the state’s misconduct. Justice Stevens wrote: “I find this course of events deeply troubling.”

John Spenkelink was a 24-year-old former convict and drifter. He picked up a hitchhiker, another ex-convict, in the Midwest, and together they drove to Florida. Along the way the hitchhiker, who was larger and stronger, forced Spenkelink to have sexual relations with him and bullied him into playing Russian roulette. When they reached Tallahassee, Spenkelink discovered his abuser had also stolen his money. They fought, and Spenkelink shot the man to death. He was executed in 1979, the first person put to death in Florida after the death penalty was reinstated.

Cameron Willingham was convicted of capital murder of his three children in Texas after arson investigators concluded an accelerant had been used to set three separate fires inside his home. The only other evidence presented by prosecutors during the trial included testimony from a jailhouse snitch and reports that Willingham was acting inappropriately after the fire. Before his execution in 2004, Willingham’s attorneys presented the state’s highest court and the governor with new testimony from a prominent fire expert questioning the conviction, but no stay was granted. Subsequently, four national arson experts concluded the original arson investigation was flawed and there was no evidence of a crime.

Ernest Ray Willis was sentenced to death in Texas for the 1986 deaths of two women who died in a house fire that was ruled arson. Investigators originally believed they had found an accelerant in the carpet. When officers at the scene of the blaze said Willis acted strangely, prosecutors arrested him. They used his dazed mental state at trial - the result of state-administered medication - to characterize Willis as “coldhearted” and a “satanic demon.” Seventeen years later, the Pecos County District Attorney revisited the case after a federal judge overturned Willis’ conviction. To review the original evidence, he hired an arson specialist, who concluded there was no evidence of arson. Willis was freed in 2004.

Aside from the issue of mistakes, these cases show that society has priorities that supersede the demands for the death penalty, regardless of the severity of the offense. They indicate that executions of the worst offenders are not necessary for the safety of the public; if they were, the most notorious killers almost certainly would...
be executed. In the modern death penalty era, many of the country's most infamous offenders are serving life sentences in secure state and federal prisons, while those who have fewer resources, or no valuable information to barter, or who committed their crime in the "wrong" state or county, are executed.

Even in cases evoking national fear, a death sentence is not a predictable result. From 1978 to 1995, Theodore Kaczynski, the "Unabomber," sent 16 bombs to people at universities and airlines, killing 3 and injuring 23, resulting in a national manhunt and widespread public anxiety. Although the death penalty was originally sought, the case resulted in a plea bargain and a life-without-parole sentence in federal prison. Skilled representation and Kaczynski's mental illness played a role in avoiding the death penalty, but as the cases above show, many mentally ill defendants meet a different fate.

Zacharias Moussaoui admitted his involvement in the 9/11 terrorist attacks in New York and Washington, D.C. that led to the deaths of over 3,000 people. He tried to represent himself in the sentencing phase of his federal trial in Virginia, but his abuse of the process led the judge to require experienced counsel to represent him. In 2006, a jury sentenced him to life without parole.

Even When Notorious Killers Are Executed, Arbitrariness Remains

Of course, some notorious offenders are executed. Timothy McVeigh was the first person executed under the reinstated federal death penalty for the 1995 bombing of the Oklahoma City building, in which 167 people died. However, his co-defendant, Terry Nichols, was given life sentences following convictions in both federal and Oklahoma courts, despite being found guilty of conspiracy in the same crime. Although Nichols was probably less culpable of the bombing than McVeigh, his crime was monumental compared to those of others who were executed.

Serial killer Ted Bundy was executed in Florida in 1990. Everyone knew of his crimes and smug demeanor. What many did not know was that Bundy was offered a plea bargain similar to that given other serial killers described above. His attorneys urged him to take the deal, which would have covered all of his offenses in Florida, but at the last minute he balked, perhaps attracted by the attention an execution could bring him. Bundy's crimes fit the profile of cases for which people believe the death penalty was designed, but in the end, he controlled the process. His unpredictable decision to seize the role of anti-hero, rather than a careful process of official decision-making, determined his fate.

Our criminal justice system is frequently confronted with dangerous individuals guilty of heinous crimes--yet almost all of them will remain in prison and never be executed. The few who are executed generally are not the most dangerous offenders. They may not have had information to offer the prosecution, or they may have adamantly refused a plea bargain. They are put to death many years, and sometimes decades, after their crime, and have often changed substantially from who they once were.
IV. The Judgment of Experts

Even before states tried to formulate a system that would satisfy the Supreme Court’s concerns about the arbitrariness of the death penalty, experts warned it was a futile endeavor. In 1953, the British Royal Commission studied the death penalty and concluded, “No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder.”

Ultimately, the Commission recommended that the death penalty in Great Britain be ended, and in 1973 it was.

The American Law Institute, authors of the Model Penal Code, agreed the death penalty could not easily be put into a set of rules for jurors to follow: “[T]he factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . .”

Nevertheless, in 1976 the Court approved a list of aggravating and mitigating factors when it allowed the death penalty to
resume. By a vote of 7 to 2, the Court approved Georgia’s framework of guided-discretion in Gregg v. Georgia. Justices Thurgood Marshall and William Brennan, believing the death penalty could not be saved by merely amending the old statutes, dissented.

A Majority of the 1976 Justices

It now appears that at least three of the Justices in the Gregg majority would belatedly have joined Justices Marshall and Brennan if they had had the opportunity. One of those Justices was Harry Blackmun, who famously announced his reconsideration of the death penalty in 1994, shortly before he left the bench. He concluded the theory he had upheld in 1976 had not worked in practice:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored-indeed, I have struggled-along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated to concede that the death penalty experiment has failed.64

Justice Lewis Powell came to a similar conclusion after retiring from the Court. He told his biographer, James Jeffries, that his approval of the death penalty while on the Court was the one area he had come to regret: “I have come to think that capital punishment should be abolished.”65

Finally, Justice John Paul Stevens, who remained on the Court for almost the entire 35 years of the post-Gregg era, gradually became convinced the death penalty is unconstitutional:

The imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”66

Thus if the composition of the Court at the time of Gregg in 1976 were in place today, the vote on the constitutionality of the death penalty would be at least 5-4 in favor of banning capital punishment.

Prominent Legal Organizations

The conclusion of the Justices that the death penalty should be reconsidered in light of its record since 1976 was echoed by the prestigious American Law Institute (ALI), an organization comprising the country’s leading jurists and legal scholars. Although the ALI had been skeptical about providing adequate guidance to juries on death sentencing, it nevertheless had offered as part of the Model Penal Code a framework of aggravating and mitigating factors, which many states followed. Recently, however, the ALI decided that the entire framework should be withdrawn. In 2009, while not taking a stand on the death penalty itself, the ALI voted to rescind the parts of their Model Penal Code dealing with the death penalty because the attempt to channel the death penalty toward only the worst offenders had failed. The report submitted by the ALI Council to its members stated:
Unless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.42

The ALI based its withdrawal from the death penalty arena on a research report it commissioned from law professors Carol and Jordan Steiker. Their thorough analysis of the modern death penalty concluded:

The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.46

Other leading organizations have come to similar conclusions about the state of the death penalty since the Gregg decision in 1976. The American Bar Association, after years of advocating reforms to the death penalty system, agreed in 1997 to call for a moratorium on all executions. That resolution remains in force today. The report supporting this historic step stated:

Two decades after Gregg, it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed. Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.49

The Constitution Project, a non-profit organization of legal experts focused on reforming the justice system, similarly reviewed the status of the death penalty, issuing a report in 2001 entitled “Mandatory Justice: Eighteen Reforms to the Death Penalty.” It called for a series of legislative steps to bring the death penalty into compliance with minimal constitutional requirements. On the problem of arbitrariness identified by the Supreme Court in 1972, it concluded little had changed:

We are now faced with state systems that vary vastly from one another, but most of which pose almost as great a risk of arbitrary, capricious, and discriminatory application as three decades ago, when the Court called for reform in Furman v. Georgia.50

Few of its recommendations have been adopted.

Other Jurists

Other prominent individuals have also weighed in on the continuing problem of arbitrariness in the death penalty. Retired Federal Appeals Court Judge H. Lee Sarokin recently offered a harsh critique of the system. Citing the arbitrariness at every level, Judge Sarokin concluded the death penalty should not be permitted to continue:
The system is too fraught with variables to survive. Whether or not one receives the death penalty depends upon the discretion of the prosecutor who initiates the proceeding, the competence of counsel who represents the defendant, the race of the victim, the race of the defendant, the make-up of the jury, the attitude of the judge, and the attitude and make-up of the appellate courts that review the verdict. 71

Judge Boyce F. Martin, Jr. of the U.S. Court of Appeals for the Sixth Circuit reached a similar conclusion:

I have been a judge on this Court for more than twenty-five years. In that time I have seen many death penalty cases and I have applied the law as instructed by the Supreme Court and I will continue to do so for as long as I remain on this Court. This my oath requires. After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair. 72

Finally, former Chief Justice Deborah Poritz of the New Jersey Supreme Court, reflecting on her years of trying to make the state’s death penalty fair, said, “We really can find no way to do this that will take the arbitrariness out of the system.”

Public Opinion

Legal experts are not the only ones concerned about the arbitrary nature of the death penalty. Whatever their views about the death penalty in theory, the public is very concerned about the manifest unfairness in its application. In a 2010 national survey of registered voters by Lake Research Partners, 73 respondents rated the problem of unfairness as one of the top reasons to replace the death penalty with a sentence of life in prison, ranking it high, along with their concerns about innocence and the frustration the death penalty causes victims’ families. Sixty-nine percent (69%) found the following statement convincing:

Our criminal justice system should treat all people equally, regardless of how much money they make, where they live, or the color of their skin. In reality, the death penalty is applied unevenly and unfairly, even for similar crimes. Some people are sentenced to die because they couldn’t afford a better lawyer, or because they live in a county that seeks the death penalty a lot. A system that is so arbitrary should not be allowed to choose who lives and who dies. 73

Men and women, young and old, black and white, all rated unfairness as the concern they found most convincing among the problems with the death penalty. The perception that the death penalty is not fairly administered has led many people to support repeal of capital punishment. In the same survey, when asked what the proper punishment for murder should be, 61% opted for various forms of a life sentence, and only 33% said the punishment should be the death penalty. 74

These doubts about the death penalty have contributed to the dramatic 60% decline in new death sentences in the past decade, even in states like Texas. 74 These doubts also make it difficult to select a jury in a capital case. Prospective jurors are quizzed about their views on the death penalty, and those who express serious concerns about applying it can be dismissed by the judge or prosecution. In a separate survey, almost 40% of Americans said they believe they would be eliminated from serving on a death penalty jury because of their views on capital punishment. The
percentage among some minorities was even higher. 

V. Influences on the Decision for Death

I never saw a way that you could make the death penalty consistent across jurisdictions, juries, counties, and prosecutors.
- Dee Joyce Hayes, 20-year veteran prosecutor and former St. Louis Circuit Attorney

Although the application of the death penalty remains arbitrary, the choice of who is executed and who is spared is not random. Today’s death penalty is not only determined by factors having little to do with the severity of the crime or the culpability of the criminal, but it also is unfairly applied, in that the determinative factors often are the same ones that repeatedly have marred our commitment to equal justice.

Influence of Race

One of the strongest determinants of who gets the death penalty is the race of the victim in the underlying murder. If one kills a white person, one is far more likely to get the death penalty than if one kills a member of a minority. This has been demonstrated for at least 25 years, and reinforced by careful statistical studies in almost all death penalty states and by several review commissions.

As far back as 1990, the U.S. General Accounting Office reviewed studies on race and the death penalty and concluded:

In 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.

One of the most comprehensive studies of race and the death penalty was conducted by Professor David Baldus in preparation for a case eventually reviewed by the U.S. Supreme Court. Professor Baldus and statisticians at the University of Iowa reviewed over 2,000 potential death penalty cases in Georgia and matched them with 230 variables that might influence whether a defendant would receive a death sentence. After extensive review, they concluded that the odds of receiving the death penalty in Georgia were 4.3 times greater if the defendant killed a white person than if he killed a black person.

Ultimately, the Supreme Court upheld Georgia’s death penalty system by a vote of 5-4. The Court assumed the validity of the Baldus study and recognized that inequities existed in the criminal justice system. However, the Court was unwilling to reverse McCleskey’s death sentence on the basis of this statistical study. Doing so would have, in the Court’s view, threatened the entire criminal justice system.

In his dissent in McCleskey, Justice Brennan eloquently summarized the impact of Baldus’s findings on individual defendants:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of
McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence . . . . Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.85

Subsequent studies in states around the country have revealed how pervasive this problem is. In a report prepared for the American Bar Association, Professors Baldus and Woodworth expanded on the GAO’s review of studies on race discrimination in capital cases. They found relevant data in three-quarters of the states with prisoners on death row. In 27 of those states (93% of the studies), there was evidence of race-of-victim disparities, i.e., the race of the person murdered correlated with whether a death sentence would be given in a particular case. In nearly half of those states, the race of the defendant also served as a predictor of who received a death sentence.86

In Florida, for example, a defendant’s odds of receiving a death sentence is 4.8 times higher if the victim is white than if the victim is black in similar cases. In Oklahoma the multiplier is 4.3, in North Carolina it is 4.4, and in Mississippi it is 5.5.87

Since that review new studies have reached similar results. A study conducted by Professors Glenn Pierce and Michael Radelet and published in the 2011 Louisiana Law Review showed that in parts of Louisiana the odds of a death sentence were 2.6 times higher for those charged with killing a white victim than for those charged with killing a black victim.88

A study of the death penalty in Arkansas published in 2008 showed similar racial patterns in sentencing. Professor Baldus examined 124 murder cases filed in one district from 1990 to 2005. After adjusting for factors such as the defendant’s criminal history and the circumstances of the crime, black people who killed white people were significantly more likely than others to be charged with capital murder and sentenced to death.89

A sophisticated statistical study of homicide cases in South Carolina by Professor Isaac Unah of the University of North Carolina at Chapel Hill and attorney Michael Songer found that prosecutors were more likely to seek the death penalty when the victim in the underlying murder was white or female:

South Carolina prosecutors processed 865 murder cases with white victims and sought the death penalty in 7.6% of them. By contrast, prosecutors sought the death penalty in only 1.3% of the 1614 murder cases involving black victims. . . . The data further suggest that non-Whites are far more likely than Whites to be homicide victims in the state. About 62% of homicide victims in the study were non-Whites; virtually all of these victims were African American. . . . South Carolina prosecutors were 5.8 times as likely to seek the death penalty against suspected killers of Whites.
In a comprehensive study in 2005 covering 20 years and almost two thousand capital cases in Ohio, the Associated Press found the death penalty had been applied in an uneven and arbitrary fashion. The study analyzed 1,936 indictments reported to the Ohio Supreme Court by counties with capital cases from October 1981 through 2002 and concluded that offenders facing capital charges were twice as likely to be sentenced to death if they killed a white person than if they killed a black person. Death sentences were handed down in 18% of cases where the victims were white, compared with 8.5% of cases where victims were black.

Interaction With Geography

The reasons for racial disparities in death sentencing are not hard to find. For prosecutors and juries, choosing which cases are the worst and the most deserving of death is largely a subjective judgment. If the prosecutor is white, if the media highlights the death of a prominent white victim or if the jury is predominantly or entirely white, the perception that white-victim cases are more heinous, and thus more deserving of death, is predictable.

This is not necessarily the result of racial prejudice; it also can correlate with geography. Murders are affronts to the community, but prosecutors in communities with largely black populations may believe their constituents are not as supportive of the death penalty, or that jurors in that community would be less likely to vote for the death penalty. Opinion polls appear to bear this out.

When selecting a jury, prosecutors with no racial agenda may still prefer an all-white jury because they believe such a jury would be more likely to convict the defendant and sentence him to death than a mixed-race jury. The system becomes self-reinforcing. For example, a prosecutor who knows the jury will be mainly black may choose not to seek the death penalty. The net result is a preference for white victims killed in predominantly white communities.

These race-correlated disparities in outcome may be explicable, but it does not follow that racial differences in death sentencing should be sanctioned in a criminal justice system committed to even-handed, non-arbitrary outcomes.

There’s indifference to excluding people on the basis of race, and prosecutors are doing it with impunity. Unless you’re in the courtroom, unless you’re a lawyer working on these issues, you’re not going to know whether your local prosecutor consistently bars people of color.

-Bryan Stevenson, Equal Justice Initiative

A recent study of the Equal Justice Initiative (EJI), a human rights and legal services organization in Alabama, found the practice of excluding blacks and other racial minorities from juries remains widespread and largely unchecked, especially in the South. "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy" revealed that Alabama courts have found racially discriminatory jury selection in 25 death penalty cases since 1987, and in some counties 75% of black jury pool members in capital cases were excluded.

The same study revealed that in Jefferson Parish, Louisiana, the Louisiana Capital Assistance Center found blacks were struck from juries more than three
times as often as whites between 1999 and 2007. In North Carolina, at least 26 current death row inmates were sentenced by all-white juries. According to Bryan Stevenson, Executive Director of EJI, “There’s indifference to excluding people on the basis of race, and prosecutors are doing it with impunity. Unless you’re in the courtroom, unless you’re a lawyer working on these issues, you’re not going to know whether your local prosecutor consistently bars people of color.”

**Cases Cluster Within a State**

Clearly the death penalty is applied unevenly around the country. Eighty-two percent (82%) of the country’s executions occur in the South.

However, even within states death sentences and capital prosecutions typically cluster in a few areas. An investigation by seven Indiana newspapers in 2001 found that seeking the death penalty depended on factors such as the views of individual prosecutors and the financial resources of the county in which the crime was committed. Two Indiana counties have produced almost as many death sentences as all of the other Indiana counties combined.

When New York had the death penalty, upstate counties experienced 19% of the state’s homicides but accounted for 61% of all capital prosecutions. Three counties (out of 62 in the state) were responsible for over one-third of all of the cases in which a death notice was filed.

A report by the ACLU of Northern California revealed that in 2009 three counties–Los Angeles, Orange, and Riverside–accounted for 83% of the state’s death sentences.

A recent article in *Second Class Justice*, a blog dedicated to addressing unfairness and discrimination in the criminal justice system, cited figures from the American Judicature Society revealing that only 10% of U.S. counties accounted for all of the death sentences imposed between 2004 and 2009, and only 5% of the counties accounted for all of the death sentences imposed between 2007 and 2009. Even in states that frequently impose death sentences (such as Texas, Alabama, Florida, California, and Oklahoma), only a few counties produce virtually all of the state’s death sentences. According to the study:

> The murders committed in those counties are no more heinous than murders committed in other counties, nor are the offenders in those counties more incorrigible than those who commit crimes in other counties. Examination of prosecutorial practices demonstrate that some prosecutors seek death in cases in their jurisdictions while other prosecutors in the rest of the state do not seek death for the same—or even more aggravated—murders.

In Maryland for many years almost all of the death cases came from predominantly white Baltimore County, and almost none from predominantly black Baltimore City. In 2002, Baltimore City had only one person on Maryland’s death row, but suburban Baltimore County, with one tenth as many murders as Baltimore, had nine times as many on death row.

In Ohio’s Cuyahoga County (Cleveland), a Democratic stronghold, just 8% of offenders charged with a capital crime received a death sentence. In conservative Hamilton County (Cincinnati), 43% of capital offenders ended up on death row.

Death penalty prosecutions in Missouri also illustrate the county-by-county
arbitrariness across the country. St. Louis Circuit Attorney Jennifer Joyce, whose jurisdiction covers the city, has never taken a capital case to trial since her election in 2001, but Prosecuting Attorney Robert McCulloch, whose jurisdiction is the neighboring suburban county, has won death sentences against 10 people since 2000, although the county has only one-fourth as many murders as the city. The two longtime Democrats have adjacent jurisdictions, one urban and one more rural.

The St. Louis Circuit Attorney’s predecessor, Dee Joyce Hayes, after 20 years working as a prosecutor and circuit attorney, acknowledged she found death sentences arbitrary: “I never saw a way that you could make the death penalty consistent across jurisdictions, juries, counties, and prosecutors.”

Political considerations

It’s a roll of the dice. When I look at a lineup of a panel in this kind of case, you can almost go to the bank on what the result is going to be.

-Judge Nathaniel Jones, U.S. Court of Appeals, Sixth Circuit (ret.)

The death penalty has always been plagued with political influence. Elected prosecutors and judges know the power of seeking and supporting the death penalty when a murder shocks the community. More surprising is that even federal judges with lifetime appointments can be affected by politics in the death penalty decisions.

A Cincinnati Enquirer examination of death penalty decisions of the U.S. Court of Appeals for the Sixth Circuit, which considers cases from Ohio, Kentucky and Tennessee, revealed federal judges appear to vote consistently along party lines, thereby injecting arbitrariness into their death penalty rulings. The judges work mostly on randomly selected three-judge panels. Sixteen judges are eligible to sit on those panels, including nine Republican and seven Democratic appointees. Life-and-death decisions often hinge on the defendant’s luck of the draw. A defendant who gets a panel with 2 liberals has a far greater chance of avoiding execution than one with 2 conservatives.

“It’s a roll of the dice. When I look at a lineup of a panel in this kind of case, you can almost go to the bank on what the result is going to be,” said Nathaniel Jones, a retired Sixth Circuit judge appointed by President Jimmy Carter. Arthur Hellman, a University of Pittsburgh law professor added, “It looks very much like a lottery.”
Struck by Lightning, p. 25

Literally, if someone lives or dies depends on the panel they get. 

According to the Cincinnati Enquirer investigation, appointees of President George H. W. Bush posted the most lopsided track record, voting 50-4 against granting inmates’ capital appeals. President George W. Bush’s appointees voted 34-5 against granting such appeals. By contrast, President Carter’s appointees voted 31-4 in favor of the inmates’ appeals. Appointees of Presidents Clinton and Reagan were slightly less skewed. President Clinton’s voted 75-32 in favor of inmates’ appeals, and President Reagan’s voted 39-13 against them. Ten of the 16 judges who currently hear Sixth Circuit death penalty appeals vote the same way (for or against the defendant) at least 80% of the time.

**ARBITRARINESS IN THE COURTS:** Votes in Capital Appeals by judges of the U.S. Court of Appeals for the Sixth Circuit

<table>
<thead>
<tr>
<th>President Making Appointments</th>
<th>% of Votes by Judges Against Defendant</th>
<th>% of Votes by Judges for Defendant</th>
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<tbody>
<tr>
<td>Jimmy Carter</td>
<td>11%</td>
<td>89%</td>
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<tr>
<td>Ronald Reagan</td>
<td>75%</td>
<td>25%</td>
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<tr>
<td>George H.W. Bush</td>
<td>93%</td>
<td>7%</td>
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<tr>
<td>Bill Clinton</td>
<td>30%</td>
<td>70%</td>
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<tr>
<td>George W. Bush</td>
<td>87%</td>
<td>13%</td>
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</table>

Source: Cincinnati Enquirer, April 15, 2007.

Regardless of one’s position on which set of judges was “correct,” the influence of politics on what should be apolitical legal judgments is disturbing. Statistics like these do not prove that judges’ decisions are influenced by their political leanings, but the stark contrast in outcomes strongly suggests that judgments in death penalty cases are subjective and influenced by other factors that interject a high degree of arbitrariness into the process.

**Costs**

Part of the reason why geography plays such a prominent role in determining the use of the death penalty is the disparate resources available to counties responsible for paying for capital prosecutions. Death penalty cases are exorbitantly expensive, often putting them out of reach for smaller counties. For a poorer rural county, paying for one death penalty case has been compared to coping with the effects of a natural disaster, and may require an increase in taxes.

Texas prosecutors acknowledge that many smaller counties never send anyone to death row, partly because of a lack of funding. Wharton County District Attorney Josh McCown noted:

This is one of those things a district attorney doesn’t like to talk about. You don’t want to think that you’re letting money come into play. You ought to consider the facts of a case and make your decisions in a
vacuum. In a perfect world, that's the way you do it. But in a county this size, you have to consider the level of expertise, the financial resources. If you don't, you're stupid. This is not a perfect system or a perfect world.\textsuperscript{108}

Michael Rushford, president of the Criminal Justice League Foundation, a California pro-death penalty advocacy group, said, "I've got to believe in some places that money becomes a problem. If it's going to clean out the budget, there may be some pressure not to go for the death sentence."\textsuperscript{103}

In Florida, a budget crisis has led to a cut in funds for state prosecutors. As a result, some prosecutors are cutting back on their use of the death penalty, and perhaps on other prosecutions. Florida State Attorney Harry Shorstein explained how available funds affect the administration of justice: "There will be cases that can't be tried. . . . We are strained to the breaking point. . . . Instead of seeking the death penalty, maybe we'll seek something else."\textsuperscript{105}

Other Factors

Several other factors that have nothing to do with the severity of the crime or the culpability of the criminal can affect the ultimate outcome of a capital case. States differ vastly in the quality of representation afforded indigent defendants. The number of attorneys assigned, their experience in death penalty matters, their rate of pay, and the funding made available for defense investigators and experts all affect a defendant's chances of avoiding a death sentence.\textsuperscript{106}

The same is true on appeal. There are no binding national standards for appellate representation, and states are not constitutionally required to provide attorneys for death row inmates throughout the entire appeals process.\textsuperscript{107} While some states have public defender offices completely dedicated just to comprehensive capital defense, others leave defendants with no representation for parts of their appeal. Although a few fortunate defendants have their appeals voluntarily taken on by large law firms that work for free and provide a high quality defense, many cases slip through the cracks—poorly defended at trial and even more poorly defended on appeal.

On rare occasions, the U.S. Supreme Court will review the quality of representation provided capital defendants, but the standard of review it and lower courts apply is highly deferential to the strategic decisions made by defense attorneys and to the state court that conducted or reviewed the trial. Even where inadequate representation is apparent, such as when a lawyer has slept through part of the trial or failed to investigate critical facts, a court may still affirm the death judgment on the rationale that in its view better representation would not have made a difference in the outcome.

Victim Impact Evidence

Since 1991 prosecutors have been allowed to interject another influential variable into death penalty sentencing trials: in-person statements from members of the victim's family about how they were affected by the murder. Although this may be accepted as a way to counterbalance evidence about the redeeming qualities or disabilities of the accused, it can introduce arbitrariness into the proceedings. Jurors are likely to be heavily influenced by emotional stories from distraught and angry family members about how the death of a loved one impacted them.\textsuperscript{108} In contrast, some victims' families may oppose the death penalty; other victims may have no family at all.\textsuperscript{109} Whether the defendant receives a death sentence may be more heavily influenced by statements of the
victim's family than by the crime he committed.

In a recent California case, the family of a murdered young woman was allowed to put on a lengthy video about their daughter's childhood, friends, and important life milestones. The video was carefully edited, accompanied by moving, professionally produced music; it concluded with beautiful pictures of people—unrelated to the victim—riding horses in Canada as the music reached an emotional climax. This compelling video may have been the deciding factor in the jury's death sentence, even though it made the crime no worse than a similar one in which the victim had a tough life that was not amenable to a moving portfolio of a photogenic family.
VI. Conclusion

When the death penalty was permitted to go forward in 1976, many distinguished legal scholars warned that the task of creating an objectively fair system for deciding which criminals deserved to die and which should be allowed to live was impossible. A majority of those on the Supreme Court that approved the experiment ultimately concluded the attempt to fix the death penalty had failed.

Thirty-five years later a strong body of empirical evidence confirms that race, geography, money, politics, and other arbitrary factors exert a powerful influence on determining who is sentenced to death. This is the conclusion not only of experts, but increasingly that of the general public as well. Unfairness ranks near the top of the American public’s concerns about the death penalty.

As the use of the death penalty has declined, the rationale for its continuation has disappeared. With defendants already facing life without parole, no one is likely to be deterred by an added punishment that is rarely imposed and even more rarely carried out many years later, and that is dependent on so many unpredictable factors. Nor does the wish for retribution justify a death penalty that is applied so sporadically. The reality is that those in society generally, and those families of murder victims in particular, who look to an execution to counter a terrible homicide will very likely be disappointed. Very few of those cases result in execution, and those that do are often not the most heinous, but merely the most unlucky, recalling Justice Stewart’s comparison in 1972 that receiving the death penalty is like being struck by lightning.

No longer looking only to the Supreme Court to review these issues, some states are choosing to act on their own. Four states in the past four years have abolished the death penalty, bringing the total of states without capital punishment to sixteen. As growing costs and stark unfairness become harder to justify, more states are likely to follow that path.

The post-Gregg death penalty in the United States has proven to be a failed experiment. The theory that with proper guidance to juries the death penalty could be administered fairly has not worked in practice. Thirty-five years of experience have taught the futility of trying to fix this system. Many of those who favored the death penalty in the abstract have come to view its
practice very differently. They have reached the conclusion that if society’s ultimate punishment
cannot be applied fairly, it should not be applied at all.

The Death Penalty Information Center (DPIC) is a non-profit organization serving the media
and the public with analysis and information on issues concerning capital punishment. The
Center provides in-depth reports, issues press releases, conducts briefings for journalists, and
serves as a resource to those working on this issue. The Center is funded through the generosity
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the European Union or other donors.
Endnotes


2 "Arbitrariness is pregnant with discrimination." Furman, 408 U.S. at 257 (Douglas, J., concurring).

3 Furman, 408 U.S. at 310 (Stewart, J., concurring).

4 Id. at 309.

5 Furman, 408 U.S. at 313 (White, J., concurring).

6 Gregg v. Georgia, 428 U.S. 153 (1976) and companion cases decided the same day.

7 Furman, 408 U.S. at 312.

8 From 1965 to 1972, there were a total of 10 executions in the country. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics (2000), at Table 6.92.

9 Furman, 408 U.S. at 293 (Brennan, J., concurring).

10 The number of murders in 1999 was 15,552; in 2009, it was 15,241. FBI Uniform Crime Reports, U.S. Dept. of Justice (2010).


15 The Oregonian, May 6, 2011.


One paragraph from a lengthy Ohio jury instruction in the mitigation phase of a capital trial reads:

27. Any one mitigating factor standing alone is sufficient to support a sentence of life imprisonment if the aggravating circumstance is not sufficient to outweigh that mitigating factor beyond a reasonable doubt. Also, the cumulative effect of the mitigating factors will support a sentence of life imprisonment if the aggravating circumstance is not sufficient to outweigh the mitigating factors beyond a reasonable doubt.


A Broken System, note 23 above, at State Comparisons.

Id. at Circuit Comparisons.


A Broken System, note 23 above, at State Comparisons.


A Broken System, note 23 above.


R. Feltz, “Despite a U.S. Supreme Court ban, Texas has continued to send mentally retarded criminals to death row,” Texas Observer, Jan. 8, 2010.


“Should Manny Babbitt Die?” SF Gate, April 5, 1999.


J. McElhatton, "A killer deal: Be a star witness, escape execution," Washington Times, January 14, 2011. Other examples in which sentences were reduced in exchange for valuable information include Phillip Leonetti, a member of the Philadelphia mob, who despite a criminal record that included 10 murders served just 5 years in prison because he cooperated with officials, and Salvatore Gravano, a well-known criminal who cooperated with the government and was sentenced to only 5 years, despite his involvement in 19 murders and other crimes. Id. Gravano was later imprisoned on unrelated drug charges.


45 Baze v. Rees, No. 07-5439 (U.S. 2008), slip op. at 17 (Stevens, J., concurring) (quoting Furman, 408 U.S. at 312 (White, J., concurring)).


47 Id. at Annex B, p.49 (emphasis added).


51 Moore v. Parker, No. 03-6105 (U.S. Court of Appeals for the Sixth Circuit, October 4, 2005) (Martin, J., dissenting) (emphasis added).

52 New Jersey Lawyer, May 19, 2008.

53 Available at www.deathpenaltyinfo.org/pollresults. The survey of 1,500 registered voters was conducted for DPIC in 2010. The margin of error is 2.5%.

54 Id. at question 57.

55 Id. at question 8.


McCleskey, 481 U.S. at 279.

Id. at 321 (1987) (Brennan, J., dissenting) (emphasis added).


A. Welsh-Huggins, “Death Penalty Unequal,” Associated Press, May 7, 2005; follow-up AP articles on May 8, 9, 2005. The study also pointed to other indicators of arbitrariness—some of the worst offenders did not receive the death penalty. Nearly half of the 1,936 capital punishment cases ended with a plea bargain to a sentence less than death, including 131 cases in which the crime involved two or more victims and 25 involving at least 3 victims.


Id.


97 See Welsh-Huggins, note 88 above.
99 Id.
101 Id.
103 “Can Austin County afford 4 capital cases?,” Houston Chronicle, Oct. 5, 2009.
106 “Slamming the Courthouse Doors: Denial of Access to Justice and Remedy in America,” American Civil Liberties Union, December 2010.
110 See Kelly v. California, No. 07-11073 (U.S. Nov. 10, 2008) (Breyer, J., dissenting from denial of certiorari review) (“the film’s personal, emotional, and artistic attributes themselves create the legal problem”).