
PREFACE

No matter what their political perspectives or views about capital punishment, all Americans share a common interest in justice for victims of crimes and for those accused of committing crimes. Through The Constitution Project's ("TCP") Death Penalty Committee, death penalty opponents and proponents have worked together to forge consensus-based recommendations aimed at achieving these common objectives.

For over a decade, TCP's Death Penalty Committee has provided a unique voice on death penalty policy. The Committee's members include both supporters and opponents of the death penalty. They are Democrats and Republicans, conservatives and liberals. They reflect the full range of criminal justice stakeholders, including those with experience as judges, prosecutors, defenders, law enforcement officers, policymakers, victim advocates and scholars. Committee members are motivated by a profound concern that the administration of capital punishment is deeply flawed and that years of mounting evidence demonstrate a continuing and alarming lack of accuracy and fairness. After more than a decade of work, the Committee remains devoted to its efforts to transcend the political and philosophical divisions that have long plagued this country's debate over the death penalty and to achieve consensus on meaningful measures to improve fairness and reduce wrongful convictions and executions.

The Committee has released two previous reports: *Mandatory Justice: Eighteen Reforms to the Death Penalty*, released in 2001 ("*Mandatory Justice 2001*") and an update, released in 2005, called *Mandatory Justice: The Death Penalty Revisited* ("*Mandatory Justice 2005*"). TCP and other organizations have widely distributed the Mandatory Justice reports. The consensus recommendations the Committee developed for these two reports have served as the foundation for improvements that courts and state and federal legislators around the country have instituted over the past thirteen years. With this new report, the Committee hopes to expand these efforts and also address new issues that have emerged since its last report. This report and the work of the Committee focus on the death penalty and the Committee takes no position on the application of the recommendations beyond the death penalty context.

The recommendations in *Irreversible Error*, the Committee's current report, each contain two parts. The first part is a black-letter statement urging policy and law reforms, which has been endorsed by the members of TCP's Death Penalty Committee. The second part is a discussion of the recommendations, prepared by the noted law firm Akin Gump Strauss Hauer & Feld LLP, which sets forth a more detailed legal and policy analysis supporting each of the Committee's recommendations. A draft of the full report was made available to the

Committee members as they developed their consensus statement. However, the Committee members have not been asked to endorse the specific language of the discussion portions of this report.

The Committee's efforts, and those of a host of other organizations and individuals across the country, have produced dramatic results. Notable examples of changes in constitutional law include the U.S. Supreme Court rulings that it is unconstitutional to apply the death penalty to individuals with intellectual disability¹ (*Atkins v. Virginia* (2002)) and to individuals who were minors when they committed the crime in question (*Roper v. Simmons* (2005)), both part of Recommendation No. 4 of *Mandatory Justice 2001* and *2005*. Just as significant has been the introduction of life without the possibility of parole ("LWOP") as an alternative sentencing option in capital cases in Texas and five other states. Today, the federal government, the military and all states with the death penalty make life without parole an available alternative to the death penalty, consistent with Recommendation No. 8 from the *Mandatory Justice* reports.

However, several jurisdictions have continued to maintain or have adopted outdated policies that do not reflect current best practices and that increase the risk of wrongful convictions and executions. As death penalty jurisprudence has evolved, new issues have arisen that the Committee did not address in its previous reports. For example, serious concerns about the safety and efficacy of lethal injection as a method of execution have resulted in litigation and suspensions of executions in some jurisdictions. Due to foreign and some domestic drug manufacturers now refusing to provide drugs if they are to be used for executions, prisons have also encountered difficulty in obtaining some drugs previously relied on for this purpose, thus creating acute shortages. In light of these shortages, some states have proceeded with executions using drugs never before used to execute humans. They have also used drugs whose safety and effectiveness cannot be assured because they are manufactured by "compounding pharmacies," which are not subject to FDA regulation.

The National Academy of Sciences and other well-regarded experts also have raised significant new questions about the scientific reliability of certain forensic disciplines, calling into doubt the convictions in hundreds, if not thousands, of capital and non-capital cases. Faulty eyewitness testimony and false confessions are now known to contribute greatly to wrongful convictions. Perhaps most disconcertingly, in the face of continued evidence of error, mistake and fraud in the administration of the death penalty, the Committee has observed some legislative and court developments that hinder the promotion of fairness in capital cases.

¹ The term "mental retardation" is now disfavored by advocates and the scientific community and is being replaced with "intellectual development disability" or simply "intellectual disability." The American Association on Mental Retardation also changed its name to the American Association on Intellectual and Development Disabilities. TCP uses the term "intellectually disabled" except where discussing judicial opinions that use the term "mental retardation."

These and other practices noted in this report have transformed the way that jurors, prosecutors, judges, victim advocates and others now view capital punishment. As a result, the application of the death penalty has become more limited, and the number of new death sentences and executions has steeply declined, as has the number of jurisdictions with the death penalty.

Significantly, several jurisdictions have repealed their death penalty laws or instituted a suspension of executions within the last several years. While the Committee takes no view on whether jurisdictions should impose capital punishment, its members' views and recommendations have informed policymakers of the numerous problems endemic in the administration of the death penalty. Six states have eliminated the death penalty in the last six years, concluding that reforms are insufficient to cure identified systemic problems. Thus, they have opted to do away with capital punishment altogether.

While the past decade has been an important period of reform for the application of the death penalty in the United States, many issues must still be addressed. Juries continue to hand down death sentences and dozens of executions are carried out every year. Committee members' own experiences continue to support their conclusion that if the current system is to continue, it can and must be improved. While certain key recommendations made in the *Mandatory Justice* reports have become law, many critical procedural and legal safeguards have yet to be implemented. Moreover, as noted above, death penalty jurisprudence has continued to evolve, giving rise to new issues that require new recommendations.

As in the previous two reports, many of the recommendations in this report are aimed at improving the accuracy and fairness of capital trials. The Committee continues to emphasize that the lawyers provided to those charged with capital crimes *must* be adequately compensated, appropriately experienced and have sufficient resources to adequately and expertly represent their clients. Ineffective assistance of counsel continues to be a major reason for wrongful convictions and death sentences, and too many states continue to resist the reforms that must be made to ensure competent counsel in capital cases.

The Committee also offers a host of other recommendations to prevent and correct wrongful convictions. These include recommendations regarding the preservation, testing and presentation of forensic evidence; the creation of statutory remedies for wrongful convictions and the implementation of procedures for the systemic review to help avoid future errors; the videotaping of custodial interrogations – where practical – in order to avoid the documented problem of false and otherwise inaccurate confessions; the adoption of best practices for eyewitness identifications; the effective implementation of prosecutors' constitutional obligation to disclose exculpatory evidence; and enforcement of the Vienna Convention on Consular Relations.

The Committee continues to believe that in jurisdictions that impose capital punishment, it should be reserved for the most heinous crimes. The Committee, therefore, continues to offer

recommendations regarding death eligibility. For example, while its prior recommendation to prohibit imposition of the death penalty on those with intellectual disability is now the law of the land, jurisdictions have adopted widely divergent procedures to implement this ban. The Committee identifies and recommends best practices that various states have developed and implemented. As it did in the previous reports, the Committee recommends prohibiting capital punishment for individuals convicted of felony murder who do not personally kill, attempt to kill or intend that a killing take place. It also continues to recommend that jurisdictions not impose the death penalty on people with mental disorders that significantly impair their capacity to appreciate the nature, consequences or wrongfulness of their conduct; to exercise rational judgment in relation to the conduct; or to conform their conduct to the requirements of the law.

The Committee recommends procedural reforms to help reduce arbitrariness. It recommends that capital punishment not be imposed in the absence of a unanimous verdict both as to the death sentence, or the advisory sentence recommended to the trial judge, and as to each aggravating circumstance used to support that sentence. In the absence of a unanimous jury verdict for death, the sentence imposed should be life without the possibility of parole (and not a new sentencing trial). The trial court should instruct the jury about all available sentencing options. If a jury imposes a life sentence, the judge should not be allowed to “override” that recommendation and impose a sentence of death. The Committee also recommends reforms to procedural rules that unreasonably limit the ability to present meritorious claims in post-conviction proceedings. As it did in *Mandatory Justice 2001* and *2005*, the Committee recommends that every jurisdiction adopt a framework for the collection and use of statistical evidence regarding racial disparities in the application of capital punishment.

Finally, the Committee addresses the recent controversies regarding methods of execution, and it offers new recommendations to ensure open and transparent clemency procedures that include, at a minimum, notice, a meaningful opportunity to be heard and a written explanation of the clemency decision.

These are just some highlights of the many issues examined in this report. The Committee urges policymakers, courts, prosecutors, defenders, the media, the public and other interested parties to study this report and its recommendations with great care and to work together to achieve these critical reforms. Otherwise, this country’s untenable pattern of wrongful convictions and unjust death sentences will continue.

The Committee’s recommendations necessarily take into account the fallibility of our system of justice. The philosopher Albert Camus, in *Reflections on the Guillotine*, wrote about Burton Abbott, executed in California in 1957. “Today, as yesterday, the chance of error remains. Tomorrow another expert testimony will declare the innocence of some Abbott or other. But Abbott will be dead, scientifically dead, and the science that claims to prove

innocence as well as guilt has not yet reached the point of resuscitating those it kills If justice admits that it is frail, would it not be better for justice to be modest and to allow its judgments sufficient latitude so that a mistake can be corrected?” Camus’ statement, written in 1957, is as true today as it was then. No matter whether we support or oppose the death penalty, we must admit that the system makes mistakes.

The Committee’s fundamental mission has not changed, and it deserves restatement. Committee members believe that individuals who commit violent crimes deserve swift and certain punishment. Some of the members of the Committee believe that the range of punishments may include death; others do not. But they all agree that no one should be denied basic constitutional protections, including a competent lawyer, a fair trial and full judicial review of any conviction and sentence. The denial of such protections heightens the danger of wrongful conviction and sentencing. The recommendations that follow reflect the Committee’s belief that, despite greater public understanding and the progress that has been made, the risk of error in the application of the death penalty remains all too real and much more remains urgently to be done.

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