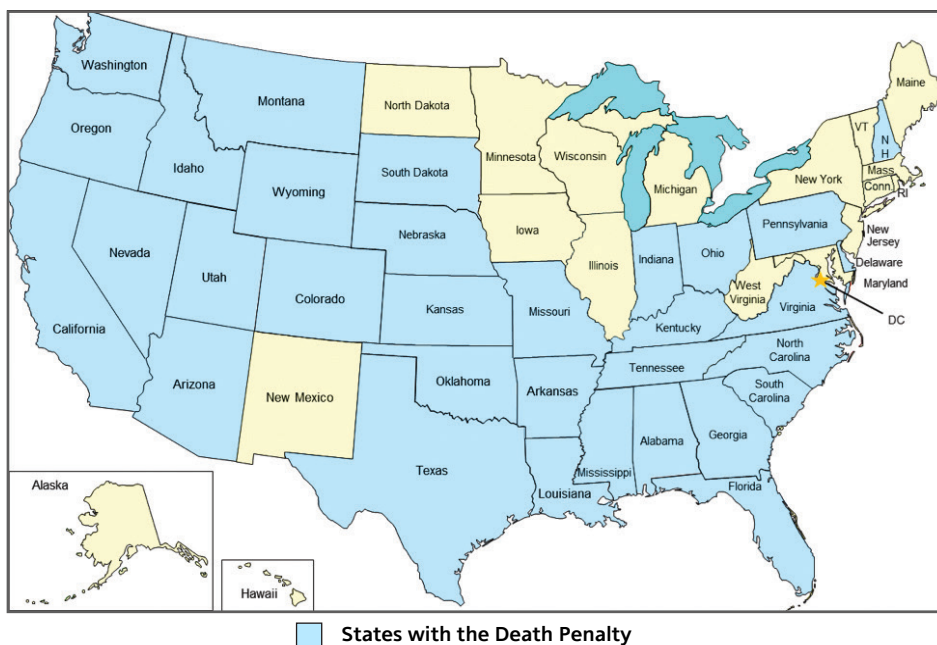

SNAPSHOT OF LEGAL AND POLICY LANDSCAPE

Since the issuance of the Committee’s *Mandatory Justice 2005* report, a number of legal and policy decisions have been made at the state and federal government levels affecting the administration of the death penalty. The Committee provides a snapshot of these developments below as they indicate the continued import and influence of the Committee’s work, and also underscore the urgent need for reform and issuance of new and revised recommendations.

Repeal and the Declining Application of Capital Punishment

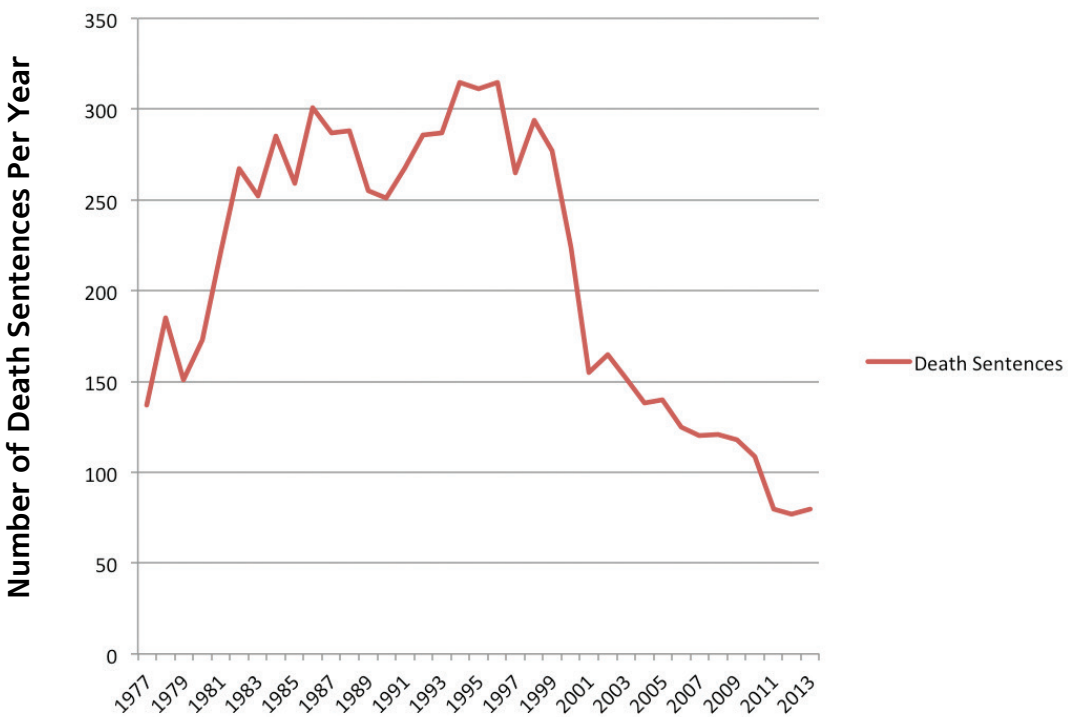
Many states have been active in limiting the application of the death penalty under state law. Since 2007, five states have repealed capital punishment entirely. New Jersey did so in 2007, passing legislation after a one-year moratorium that began in 2006 (and the governor granted clemency to the remaining inmates on death row). New Mexico followed two years later, passing legislation in 2009, with Illinois and Connecticut following suit in 2011 and 2012, respectively. With a bill passed in May of 2013, Maryland became the 16th state in the United States to abolish the death penalty. In California, a ballot referendum to fully abolish the death penalty and replace it with life without parole failed in the November 2012 election by a narrow, four-point margin. In 2011, Oregon’s governor declared a moratorium on executions during the entirety of his term in office and in 2014, Washington State’s governor declared a suspension of executions as well.

States with the Death Penalty (32)



Even in states that retain capital punishment, the penalty is imposed less and less frequently. Delaware issues more death sentences per capita than any other state, closely followed by Alabama and Oklahoma. (See Appendix 2, Figure 4). While these states, and others like Florida, California and Texas, may continue to sentence people to death relatively frequently, in most states death sentences are increasingly rare. A 2013 report by the Death Penalty Information Center found that “only 2% of the counties in the U.S. have been responsible for the majority of cases leading to executions since 1976.”² Some of these counties represent an extraordinarily disproportionate number of death sentences. For example, Maricopa County, Arizona has “four times the number of pending death penalty cases as Los Angeles or Houston on a per capita basis.”³

Death Sentences Imposed Per Year 1977-2013



Since 2006, the total number of death sentences has dramatically declined, from 123 imposed in 2006 to 80 in 2013. This decline is part of a larger trend reversing decades of growth in death sentences that ended in the late 1990s. In the last ten years, seven jurisdictions with

² Death Penalty Information Center, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Sentences at Enormous Costs to All, Executive Summary*, at <http://deathpenaltyinfo.org/twopercentsummary>.

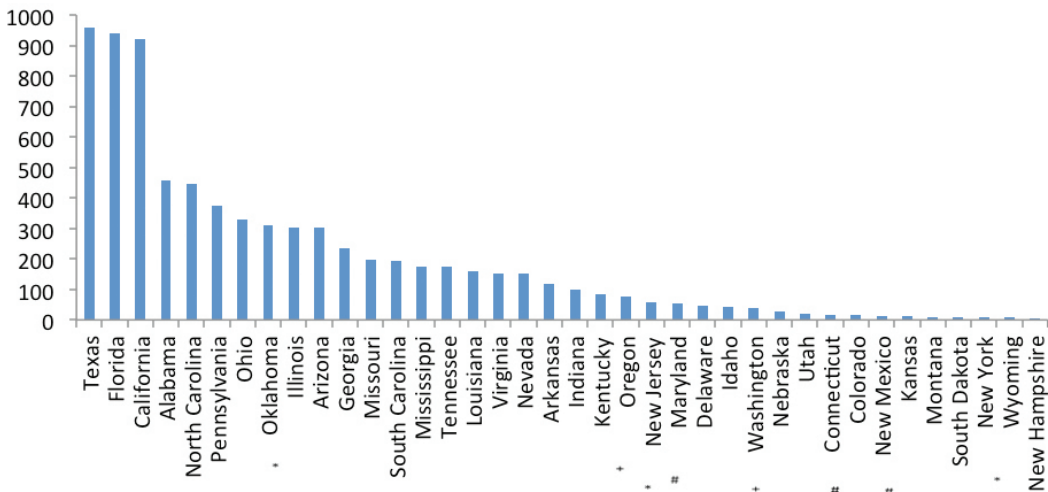
³ *Id.*

capital punishment – Colorado, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania and Wyoming – carried out no executions. In the last five years, an additional six death penalty states carried out no executions, including Arkansas, California, Kentucky, Maryland, Montana and North Carolina. (In Maryland, as noted above, the death penalty has now been repealed.)

As many know, Texas has carried out the most executions of any state. By the close of 2013, Texas had executed over 500 people in the modern death penalty era. Yet in recent years even Texas has sentenced far fewer people to death – an average of 10 per year over the past five years, compared with an average of nearly 40 per year in the 1990s. This trend is due to myriad factors, including some of the constitutional limits discussed above. One important factor contributing to this decline is likely the introduction of an alternative sentence of life imprisonment without parole (“LWOP”) in capital cases, an important reform that the Death Penalty Committee advocated in its *Mandatory Justice 2001* and *2005* reports. Since 2000, six states with the death penalty made LWOP available in capital cases. Prior to 2005, sentencing juries in Texas were presented with two options in capital cases – a death sentence or the so-called “hard 40” sentence (life with the possibility of parole after 40 years). In September of 2005, Texas replaced the “hard 40” sentence with LWOP.

Taken as a whole, the changes in federal and state law, together with the dramatic decline in death sentences, may be viewed as a clear indication of America’s evolving standards of decency regarding the application of the death penalty. Although many states may exercise the death penalty for years to come, it is likely that the current trend of declining sentencing rates, legislative repeals and narrower application of the death penalty will continue.

Death Sentences by State (1977 - March 1, 2014)



* Illinois, New York and New Jersey no longer have the death penalty and all death sentences were commuted to life imprisonment in these states.

Maryland, Connecticut and New Mexico abolished the death penalty; however, prisoners sentenced prior to these states’ repeal of capital punishment remain on death row.

+ Washington and Oregon are presently under a suspension of executions issued by the governor.

State Legislative Reforms and Judicial Decisions

There have been numerous state legislative and judicial developments relative to the implementation of the death penalty since the issuance of *Mandatory Justice 2005*. Some of the most significant developments are described below and provide a relevant backdrop for the Committee’s recommendations found in this report.

In 2004, the highest state court in New York held that the state’s death penalty statute violates the New York State Constitution (*People v. LaValle*), effectively invalidating the death penalty in New York. In a 2007 decision (*People v. Taylor*), the New York Court of Appeals applied the principle of *stare decisis*, meaning “let it stand,” to commute the sentence of the last remaining death row inmate to life without parole. An executive order by then-Governor David Patterson required the removal of New York’s execution equipment in 2008, and legislation re-establishing the death penalty recently has died in committee twice. In 2006, a federal district court ruled that California’s method of execution violates the Eighth Amendment, thereby imposing a *de facto* moratorium on executions in that state (*Morales v. Tilton*). State supreme courts in Nebraska (*State v. Mata* (2008)) and Kansas (*State v. Kleypas* (2006)) also ruled that existing applications of the death penalty were in violation of the Nebraska Constitution and the federal Constitution, respectively. However, new legislation in Nebraska and a federal judicial appeal of the ruling in Kansas reinstated the death penalty in both states.

In 2009, North Carolina passed the Racial Justice Act (“RJA”), which allowed death row prisoners and capital murder defendants to challenge the application of the death penalty in their cases on the basis that race was a significant factor in the decision to seek or impose the death penalty. The RJA provided more expansive protections than those available under federal law, as it allowed reliance on statistics and other evidence showing disparities in the application of the death penalty and did not require that the prisoner prove intentional discrimination specifically in his or her case. In April 2012, a judge ruled under this act that a condemned killer’s trial had been so tainted by the racially-influenced decisions of prosecutors that his sentence should be commuted to life imprisonment instead. In response to this ruling, in 2012, the North Carolina General Assembly passed a major revision of the law, which, according to reporting in the *News & Observer*, “severely restricts the use of statistics to only the county or judicial district where the crime occurred, instead of the entire state or region.” In 2013, North Carolina repealed the Racial Justice Act in its entirety.⁴

⁴ In 1998, Kentucky was the first state to enact a Racial Justice Act. Unlike the version of the Act North Carolina passed in 2009, the Kentucky law is not retroactive. Under Kentucky’s law, a defendant can only raise a claim before his or her trial and must prove by clear and convincing evidence that race played a role in his or her specific case. The law does not permit defendants to challenge a jury’s decision to impose the death penalty based on racial bias. In 2011, the American Bar Association concluded that Kentucky’s Racial Justice Act “appears to have a number of restrictions limiting its effectiveness at identifying and remedying racial discrimination in the administration of the death penalty.”

Other states have organized death penalty study task forces or groups or have commissioned studies to be done, focused on issues such as cost, race, fairness and accuracy. In many states, no significant legislative changes have yet to be made, although some are being actively considered. This is the case in states including New Hampshire, Ohio and Pennsylvania. These state studies have largely found inequities in the application of the death penalty and per application costs in the millions of dollars. Illinois, New Jersey and Maryland also undertook exhaustive reviews of the death penalty prior to those jurisdictions' repeal of capital punishment laws, as discussed above.

Conversely, a few states have proposed legislation to hasten the pace of executions, leading to reduced fairness and an increased risk of wrongful execution in death penalty cases. For example, in 2012, Florida adopted the "Timely Justice Act," which most commentators have asserted will speed up the execution process in the state, despite the fact that Florida has the highest number of death row exonerations in the country. Several other states, as of this writing, are considering similar legislation.

Other Reforms

The launch of the National Registry of Exonerations has increased awareness of the systemic problem of wrongful conviction in the United States. In the death penalty context, there have been 144 exonerations from death row since 1973. In Florida alone, 24 individuals have been exonerated from death row. The Registry reports that as of 2013, the ten states with the most recorded capital and non-capital exonerations were Texas, Illinois, New York, Washington, California, Michigan, Missouri, Connecticut, Georgia and Virginia. Importantly, while DNA exonerations have declined as DNA testing has become routine, the number of non-DNA exonerations has risen dramatically in the last year.

To correct past injustices, prosecutors have established conviction integrity units in several jurisdictions, including in Dallas, Texas, Manhattan and Brooklyn, New York, Chicago and Lake County, Illinois and Santa Clara County, California for the specific purposes of identifying and correcting the causes of wrongful convictions and maintaining pressure for continual systemic improvement. In 2012, for the first time, law enforcement actively assisted in more than 50 percent of all exonerations. Some prosecutors, like the District Attorney's Office in Dallas County – through the country's first conviction integrity unit – have looked into cases where DNA is available, even in cases where no claim of innocence has been raised, and identified defendants who were innocent of the crimes for which they were convicted. Harris County, Texas, which has the highest execution rate of any county in the U.S., also established a conviction integrity unit. However, it has had difficulty reviewing older cases because the county's crime lab did not preserve much of the evidence. These units can play an important role in limiting arbitrariness in the process for deciding whether to seek a death sentence and are consistent with the Death Penalty Committee's longstanding recommendations.

Notably, improvements also have been made in some states' provision of defense counsel for those facing the death penalty. For example, in Texas, the Regional Public Defender for Capital Cases provides counsel for indigent defendants facing capital charges in participating counties and the Office of Capital Writs, established in 2010, provides representation to defendants in capital post-conviction proceedings. These are the first statewide offices created to assist in the representation of capital defendants and death row inmates in Texas. The Louisiana Supreme Court also has adopted rigorous capital case representation requirements regarding the qualifications and performance of capital defense counsel in that state. Improvements to the representation of defendants before and after conviction are critical to ensuring the fairness of proceedings and the constitutional rights of defendants.

States also have addressed discrete areas affecting the fair administration of justice, including the death penalty. Missouri, for example, now requires all crime laboratories to obtain accreditation to better ensure reliable analysis of forensic evidence. Texas also has adopted a number of reforms in recent years, including more robust criminal discovery requirements, requiring law enforcement offices to promulgate written policies on conducting eyewitness identifications and requiring testing of biological evidence before trial in criminal cases.

U.S. Supreme Court Cases

Since 2006, the U.S. Supreme Court has issued dozens of rulings addressing the application of the death penalty, with more than 40 death penalty rulings issued in the past five years alone. Some of these rulings have restricted eligibility for the death penalty on constitutional grounds and clarified important procedural rights.

Since TCP released *Mandatory Justice 2005*, the Supreme Court has restricted eligibility for the death penalty beyond the limits set forth in *Atkins v. Virginia* (2002) (prohibiting the execution of people with intellectual disability) and *Roper v. Simmons* (2005) (prohibiting the application of the death penalty to individuals who were younger than 18 when they committed the crime in question). The Court's 5-4 decision in *Kennedy v. Louisiana* (2008) held that a person could not be eligible for the death penalty for the rape of a child that did not result in death. Although the Court did not decide whether the death penalty may be available for other non-homicide offenses, such as espionage and treason (and there is case law suggesting that the death penalty may be available in these circumstances), the *Kennedy* holding is consistent with the Committee's view that capital punishment should be reserved only for the most heinous offenses and most culpable offenders.

In addition to limiting eligibility for the death penalty, in a handful of instances, the Court has clarified and expanded the procedural rights of individuals charged with capital crimes. The Court upheld the direction to jurisdictions that in the penalty phase of a death penalty case, jurors must be able to consider and give effect to all relevant mitigating factors, including low IQ, even where the defendant's IQ is not, by itself, sufficient to

establish that the defendant has an intellectual disability (*Tennard v. Dretke* (2004)). For indigent death row inmates sentenced under state law and denied state-funded counsel for a habeas corpus appeal, *Harbison v. Bell* (2009) held that federally-funded counsel may continue representation during state clemency proceedings and receive compensation for that representation. In *Panetti v. Quarterman* (2007), the Court clarified that inmates are not competent to be executed unless they have a rational understanding of why the death sentence was imposed.

The Court also eased, in very limited circumstances, some of the procedural obstacles that were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). In a highly unusual case, *In re Davis* (2009), the Court accepted an original petition for a writ of habeas corpus and directed the district court to hold an evidentiary hearing even though the district court would have been precluded from granting relief under AEDPA. In *Holland v. Florida* (2012), the Court determined that the one-year deadline for filing a federal petition for a writ of habeas corpus can be tolled for equitable reasons, and that an attorney’s unprofessional conduct may sometimes be an “extraordinary circumstance” justifying equitable tolling. In *Maples v. Allen* (2012), the Court held that the defendant had shown the requisite “cause” to excuse his procedural default, which occurred when his lawyer abandoned him and missed a filing deadline in state court, although the Court left for consideration on remand the question of whether the defendant had demonstrated “prejudice” from the missed filing.

In *House v. Bell* (2006), the Court ruled that evidence of actual innocence could excuse a death row inmate’s procedural default, a ruling the Court expanded in *McQuiggin v. Perkins* to include expiration of AEDPA’s statute of limitations. In *Martinez v. Ryan* (2012) and *Trevino v. Thaler* (2013), the Court ruled that when a state’s appellate review “makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, the federal courts will not bar habeas review of ‘a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or that counsel was ineffective.’”⁵

The Court also provided new avenues, in limited circumstances, to challenge a death sentence in light of the procedural obstacles often imposed under the federal habeas corpus statute. In *Hill v. McDonough* (2006), the Court allowed a death penalty defendant to challenge the protocol used by the state to administer the death penalty under 42 U.S.C. § 1983, the federal civil rights statute, even after exhausting his appeals under the federal habeas corpus statute. *Skinner v. Switzer* (2011) allowed a death row inmate seeking DNA testing of crime scene evidence to maintain an action under the federal civil rights statute.

⁵ *Trevino v. Thaler*, 569 U.S. ___, 133 S.Ct. 1911,1922 (2013) (quoting *Martinez v. Ryan*, 132 S.Ct. 1309, 1320 (2012)).

Although a number of its decisions reflected recommendations in *Mandatory Justice 2001* and 2005, not all developments at the Supreme Court were positive. In a number of death penalty cases, the Court continued to apply its ineffective assistance of counsel precedent, *Strickland v. Washington* (1984), to deny defendants relief in the face of counsel's egregious behavior. In *Cullen v. Pinholster* (2011), the Court held that AEDPA and previous precedent required deference to a state court's determination that trial counsel's failure to introduce mitigating evidence – evidence that included traumatic brain injury and mental illness severe enough to require institutionalization of the defendant at age 11 – did not constitute ineffective assistance of counsel. In his concurrence in *Smith v. Spisak* (2010), Justice Stevens acknowledged that defense counsel's closing argument “was so outrageous” that had it been made by a prosecutor “it would have rightly subjected a prosecutor to charges of misconduct,” and that it “alienated and ostracized the jury,” yet he joined the unanimous opinion of the Court that counsel's egregious behavior likely did not affect the outcome of the case. The varied reasoning applied in *Porter v. McCollum* (2009), in which the Supreme Court found that the lower court had “unreasonably” applied *Strickland v. Washington* and *Bobby v. Van Hook* (2009), in which the Court reversed a lower court's finding of ineffective assistance of counsel, reflects the need to reevaluate whether *Strickland* really protects a defendant from the unjust consequences of ineffective assistance of counsel, particularly in capital cases.

In *Medellin v. Texas* (2008), the U.S. Supreme Court addressed the issue of 51 Mexican nationals on death rows in the United States who claimed that their sentences had been imposed in violation of the Vienna Convention on Consular Relations (“VCCR”). None of the foreign nationals had been given access to their consulate while their cases proceeded, as is required under the VCCR, and ultimately each was sentenced to death. The foreign nationals had previously obtained a ruling from the International Court of Justice (“ICJ”) stating that each was entitled to review of his case. However, in *Medellin*, the Supreme Court ruled that the VCCR is not enforceable as a matter of U.S. law absent enabling legislation and, therefore, the ICJ's ruling cannot trump state laws that prohibited the foreign nationals from obtaining any relief on their claims in state court. Four Mexican nationals in Texas – including *Medellin* – have been executed since issuance of this ruling.

States in Need of Significant Reform

While some jurisdictions have made progress toward implementation of best practices, others persist with policies that appear harder to justify in light of changing knowledge and standards. Texas, California and Alabama remain, by far, the most active states in terms of sentencing individuals to death, and all three require significant death penalty reforms. Pennsylvania, Alabama and Texas often compensate capital defense counsel at such low levels as to make effective representation nearly impossible.

Alabama, Delaware and Florida are the only states where judicial override may be exercised, allowing the trial judge to overturn a jury's verdict of life and to instead impose a death sentence. According to the Equal Justice Initiative, over 20 percent of prisoners presently on Alabama's death row were sentenced to death through judicial override. While almost all jurisdictions require unanimity in order to find a defendant guilty, in Florida, a death sentence may be imposed by a mere majority vote (7-5), and in Alabama, a jury may vote to sentence a defendant to death by a 10-2 vote.

While many jurisdictions now require preservation of forensic evidence after conviction, many of these jurisdictions' statutes and practices are limited in significant ways. Evidence often is not required to be retained for as long as the prisoner remains incarcerated and in many cases, statutes permit destruction of evidence after conviction, as in Virginia and Kentucky. Even in states with robust post-conviction testing statutes, death row inmates have been denied access to testing because the evidence in their case is lost or missing.

Further, in most jurisdictions, a prosecutor who becomes aware of credible evidence of innocence is not required to notify the inmate or his or her counsel. Thus, for example, a U.S. Justice Department task force reviewing shoddy work by the FBI crime lab completed its review in 2004 but never made the results public. Only prosecutors were notified of the results, and they had no obligation to notify defendants or their counsel.

A 2007 study by the Georgia Innocence Project also found that 82 percent of law enforcement agencies in that state had *no* policies for eyewitness identification procedures. A 2013 study conducted in Virginia found that while Virginia had adopted an "excellent" model policy on conducting eyewitness identifications, only 6 percent of law enforcement agencies in the Commonwealth had adopted the policy. In addition, revelations of misconduct and faulty practices in crime laboratories have undermined the confidence of outcomes in thousands of cases nationwide, including capital cases. For example, in North Carolina, an audit of the State Bureau of Investigation found that the Bureau failed to disclose exculpatory forensic testing results to defendants facing the death penalty. This omission undermined the reliability of the verdicts and death sentences in the cases of at least three North Carolina prisoners who were already executed.⁶

Since 2003, the American Bar Association ("ABA") has engaged in a series of assessments of specific state capital punishment schemes. Assessment teams – comprised of law school professors, current or former prosecutors, defense attorneys, judges, state legislators and state bar representatives – conducted a review of state laws, rules, procedures, standards and guidelines relating to the death penalty in their particular state. Each state-based team compared their findings to recommendations on the administration of the death penalty described in ABA protocols on the subject and then prepared a report with their analysis and recommendations. The ABA has completed assessments in twelve states in jurisdictions that comprise almost 65 percent of the executions that have taken place in the modern death penalty era. These reviews have found that in myriad areas from arrest to execution, states

⁶ Joseph Neff and Mandy Locke, *For executed men, audit's too late*, NEWS-OBSERVER, AUG. 19, 2010, at <http://www.newsobserver.com/2010/08/19/635619/for-executed-men-audits-too-late.html>.

did not sufficiently safeguard against wrongful conviction and execution and did not ensure fairness in capital proceedings.⁷

Relatedly, in 2009, the American Law Institute – the organization that promulgated the blueprint for death penalty laws in the U.S. for the last fifty years – repealed all provisions of its model penal code related to the death penalty “in light of the currently intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”⁸

⁷ The ABA Assessments on the death penalty can be found at www.americanbar.org/dueprocess.

⁸ American Law Institute, Message From ALI Director Lance Liebman, Oct. 23, 2009, at <http://www.ali.org/news/10232009.htm>.