



The BBA and the Death Penalty

As approved by the Council of the Boston Bar Association on December 17, 2013

For the last forty years, in amicus briefs, testimony before the legislature, and public statements, the Boston Bar Association has been a powerful voice against the death penalty. The BBA's longstanding opposition to capital punishment rests on the principled judgment that the death penalty is fundamentally inconsistent with the fair administration of our system of justice.

Over those four decades, the BBA has sought to bring evidence to the emotionally charged death penalty debate. The BBA's leaders have consistently pointed out what the data show about the death penalty:

- that the inevitability of error in criminal cases makes it overwhelmingly likely that reliance on the death penalty will lead to the execution of innocent defendants;
- that, in practice, the death penalty has a disproportionate impact on members of racial and ethnic minorities; and
- that death penalty prosecutions are more expensive, more subject to prolonged delays, and unlikely to produce a different result than cases where the prosecution seeks life without parole.

The BBA has not hesitated to speak out about capital punishment, even when horrific crimes have prompted public calls to revive the death penalty, and opposition to the death penalty is unpopular. Indeed, that is when the BBA has spoken most clearly. And the BBA has spoken out about capital punishment's *systemic* flaws even when the facts known about particular cases do not appear to raise questions about innocence or racial discrimination, or when a crime in the public spotlight is so outrageous that focus on issues like cost or delay may seem out of place given the suffering of victims and their families.

Recent Death Penalty Scholarship and Other Developments

In recent years, the case against capital punishment has only grown stronger. In 2009, the American Law Institute, whose work in the 1960s provided the intellectual foundation for modern death penalty laws, eliminated the death



penalty provisions from its Model Penal Code. It did so because of what it described as “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”¹

The ALI’s action followed a report prepared at the ALI’s request by Harvard Law School Professor Carol Steiker and Texas Law School Professor Jordan Steiker.² The Steiker report shows that the evidence of defects in the capital punishment system has grown more compelling over time, in ways that reinforce the BBA’s longstanding concerns about the risk of executing the innocent, about discrimination, and about cost and delay. In the 40 years since the BBA filed its first death penalty amicus brief, more than 143 wrongfully convicted defendants on death row have been exonerated.³ Evidence of racial discrimination in the administration of the death penalty is now more clear than ever: for example, “defendants charged in white-victim cases, on average, face odds of receiving a death sentence that were 4.3 times higher than the odds faced by similarly situated defendants in black-victim cases.”⁴ And the expense of death penalty prosecutions is staggering: “the total costs of processing capital cases are considerably greater than those of processing non-capital cases that result in sentences of life imprisonment . . . even when the costs of incarceration are included.”⁵

Concerns about putting innocent prisoners on death row, discrimination, and cost have led a number of states to abandon the death penalty over the past decade. New York (2004), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012) and Maryland (2013) are the most recent states to abolish the death penalty. And in opening remarks before the November 13,

¹ AM. LAW INSTITUTE, REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4 (2009), available at http://www.ali.org/doc/Capital%20Punishment_web.pdf

² Carol S. Steiker and Jordan M. Steiker, *No More Tinkering: The American Law, Institute and the Death Penalty Provisions of the Model Penal Code*, 89 Tex. L. Rev. 354 (2010) (“Steiker Report”), available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991314.

³ *Id.* at 408. The figures here are updated. See <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>, visited December 6, 2013.

⁴ Steiker Report, at 397.

⁵ *Id.* at 405.



2013 American Bar Association National Symposium on the Modern Death Penalty, former President Jimmy Carter called on the American Bar Association to support the abolition of the death penalty.⁶

The Massachusetts legislature has resisted efforts that have been generally fueled by legitimate public outrage about particularly terrible crimes to reinstitute the death penalty. The BBA applauds our state legislature's recognition that no useful purpose would be served by bringing capital punishment back to Massachusetts. That recognition has resulted in eliminating the risk of the ultimate injustice—the execution of an innocent criminal defendant—as well as averting the enormous costs the criminal justice system incurs when a prosecutor decides to seek the death penalty.

The Federal Death Penalty

But our legislature's rejection of capital punishment only keeps the death penalty out of Massachusetts *state* court. The Federal Death Penalty Act of 1994 permits the federal government to impose death sentences for approximately 50 federal crimes.⁷ The law authorizes the imposition of the death penalty in many cases historically prosecuted in state court by state prosecutors (for example, murder during a carjacking, murder by firearm used in connection with drug trafficking, or murder using bombs or other weapons of mass destruction.)

Before today, the BBA has never spoken directly about the federal death penalty.⁸ But the *reasons* the BBA has advanced to oppose capital punishment--the inevitability of error, capital punishment's discriminatory impact, and the extraordinary cost of capital prosecutions--apply with at least equal force to the federal system of capital punishment.

⁶www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/national_symposium_death_penalty_carter_center.html.

⁷ 18 U.S.C. § 3591, et. seq. An earlier federal statute, 21 U.S.C. § 848(e), enacted in 1988, permitted the use of the federal death penalty in a limited number of drug-related offenses.

⁸ In 2005, the BBA filed an amicus brief in *In re U.S.*, 426 F. 3d 1 (1st Cir. 2005), a government mandamus petition arising out of *United States v. Green*, 02-CR-1030-NG. The BBA's brief, written by lawyers at Goodwin Procter, addressed the United States District Court's jury selection process, arguing that it was particularly important not to exclude African-Americans from jury service in death penalty cases.



Wrongful Convictions. The factors experts recognize as causes of wrongful convictions, including, in particular, the failure to produce required evidence to the defense and the use of flawed forensic evidence,⁹ are by no means unique to state prosecutions or state crime labs.¹⁰ Indeed, the Department of Justice’s failure to embrace national reforms widely recognized as reducing the likelihood of wrongful conviction—for example, the video or audio recording of custodial interrogations¹¹—only increases the possibility that the federal system of capital punishment will lead the Justice Department to seek the death penalty against defendants who are factually innocent.

Racial Disparity. Data about the application of the federal death penalty show that it is used more often when the victims are white than when they are members of minority groups. The Department of Justice last released comprehensive statistical data about the federal death penalty in 2000,¹² and issued a study interpreting that data in 2001.¹³ Those data show that the

⁹ See generally, GETTING IT RIGHT: IMPROVING THE ACCURACY AND RELIABILITY OF THE CRIMINAL JUSTICE SYSTEM IN MASSACHUSETTS: A BOSTON BAR ASSOCIATION TASK FORCE REPORT (DECEMBER 2009), available at http://www.bostonbar.org/prs/reports/BBA-Getting_It_Right_12-16-09.pdf

¹⁰ See e.g., *Prosecutor’s Conduct Can Tip Justice Scales*, USA Today, Sept. 23, 2010 (USA Today series addressing federal prosecutors’ discovery violations); *United States v. Stevens*, 593 F. Supp 2d 177 (D.D.C. 2009) (District Court dismissed indictment against late Alaska Senator Ted Stevens on Department of Justice’s motion after Department conceded it had failed to produce required exculpatory evidence); NAT’L RESEARCH COUNCIL OF THE NAT’L ACAD., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at 46 (National Academies Press, 2009) (describing FBI Laboratory’s “bias and ‘circular reasoning’” in identifying the fingerprints on plastic bags associated with the March 2004 Madrid terrorist bombings as those of Oregon lawyer Brandon Mayfield. Mayfield was arrested but later exonerated; the government paid him \$2 million to settle his wrongful arrest claim); A Spencer Hsu, *Justice Dept., FBI to Review Use of Forensic Evidence in Thousands of Cases*, Washington Post, July 10, 2012 (reporting on review of FBI hair and fiber analysis practices associated with wrongful convictions); NAT’L RESEARCH COUNCIL OF THE NAT’L ACAD., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at 47 (documenting significant error rate in FBI hair analysis).

¹¹ GETTING IT RIGHT, *supra* n. 8, at 46; Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 Am. Crim. L. Rev. 1297, 1299 (2008).

¹² THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000), available at http://www.justice.gov/dag/pubdoc/dp_survey_final.pdf.

¹³ THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS, AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW, United States Department of Justice, June 6, 2001, at 3, available at www.justice.gov/dag/pubdoc/deathpenaltystudy.htm.



government sought the death penalty in 37% of the cases presented where the victim was white, but in only 21% of the cases where the victim was African-American or Hispanic.¹⁴ It also revealed that juries vote in favor of the death sentence in twice as many cases where the victim is white as in minority victim cases.¹⁵ These racial and ethnic disparities provide grounds for concern. While it may be difficult to pinpoint their cause, a system that produces such different results depending on a defendant or victim's race or ethnicity raises serious questions.¹⁶

¹⁴ David C. Baldus, *DOJ Report on the Federal Death Penalty System (June 6, 2011)*, 14 Federal Sentencing Reporter 49, 50 (July/August 2001).

¹⁵ *Id.*

¹⁶ *Defendants* in federal death penalty cases are also more likely to be members of minority groups than white. Since 1988, 492 defendants have been authorized for federal death penalty prosecutions. 363 of those defendants—74%—are members of minority groups. Fifty percent are African American. 19% are Hispanic. See <http://www.capdefnet.org>, visited Dec. 6, 2013. *Id.* The BBA does not suggest that the Department of Justice engages in conscious racial bias in the selection of defendants for death penalty prosecution. Many factors are likely in play. The 2001 Department of Justice study cited above, *see* n. 13, concluded “the cause of this disproportion is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases . . . [particularly] drug trafficking enterprises and related criminal violence.” The study also concluded that “at no stage of the review process were decisions to recommend or approve the seeking of a capital sentence made at higher rates for Black or Hispanic defendants than for White defendants. For example, in cases considered by the Attorney General, the Attorney General approved seeking the death penalty for 38% of White defendants, 25% of Black defendants, and 20% of Hispanic defendants.” Nevertheless, the data about the application of the federal death penalty to defendants of color is worthy of mention. When the Justice Department first released data about the race of the defendant in death penalty prosecutions, then Deputy Attorney General Eric Holder told *The New York Times*:

I can't help but be both personally and professionally disturbed by the numbers that we discuss today. To be sure, many factors have led to the disproportionate representation of racial and ethnic minorities throughout the federal death penalty process. Nevertheless, no one reading this report can help but be disturbed, troubled, by this disparity.

Mary Lacey and Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, *The New York Times*, September 13, 2000, available at <http://www.nytimes.com/2000/09/13/us/reno-troubled-by-death-penalty-statistics.html>. Thirteen years later, the percentage of federal death penalty defendants of color remains the same as it was in 2000. *Compare* http://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094, n 12, *supra* (data through 2013) to THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000), available at http://www.justice.gov/dag/pubdoc/dp_survey_final.pdf (data through 2000).



Cost. There is little publicly available data about the costs the Justice Department incurs *prosecuting* death penalty cases, or the additional burdens those prosecutions pose on the District Courts and Circuit Courts of Appeal. However, a 2010 study shows that the median cost of *defending* federal death penalty cases is *eight* times higher than the costs of defending a death-eligible case where the Department of Justice does not seek the death penalty,¹⁷ and there is no reason to believe that ratio is not a useful guide for the costs the death penalty imposes on other actors in the capital punishment system. A study of a single 2013 federal death penalty case in Philadelphia concluded that the case carried a price tag of more than \$10 million.¹⁸

There are others reasons why the BBA believes pursuit of the death penalty in federal cases is inconsistent with sound public policy and with the fair administration of justice.

The Illusion of Ultimate Punishment. Statistics documenting the Department of Justice's use of capital punishment offer a telling picture of the federal death penalty system at work. Since 1988, the Department of Justice has filed notices of intent to seek the death penalty against 492 defendants.¹⁹ The vast majority of those defendants either received life sentences from juries or negotiated plea bargains to avoid the death penalty. Of those 492 defendants, only *three* have been executed.²⁰

Thus, when federal death penalty advocates speak about achieving justice for victims, or about the desire to make defendants pay the ultimate punishment for the crimes they committed, their statements should come with a clear and conspicuous disclaimer. A decision by federal prosecutors to seek the death penalty is almost certain to lead to years of expensive, time-consuming

¹⁷ Jon B. Gould and Lisa Greenman, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (SEPT. 2010), at 24.

¹⁸ John P. Martin, *Bill for Savage Trial Easily Tops \$10 Million*, Philadelphia Inquirer September 23, 2013, available at http://articles.philly.com/2013-09-23/news/42294616_1_kaboni-savage-savage-trial-savage-case.

¹⁹ See http://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094, visited Dec. 6, 2013.

²⁰ *Id.*



litigation. Twenty-five years of data show that the likelihood prosecutors will achieve what they seek—the defendant’s execution—is nearly negligible. The pursuit of the death penalty in federal cases is almost always an empty and inordinately expensive gesture, inconsistent with the sensible allocation of resources in a criminal justice system already laboring under great financial strain.²¹

The Federal Death Penalty in Massachusetts. Experience with the federal death penalty in Massachusetts is consistent with this national experience, and reinforces the BBA’s opposition to the federal death penalty.

Since 1994, the Department of Justice has sought the death penalty in three Massachusetts cases.

In the first, *United States v. Gilbert*,²² the defendant was convicted of murder and the jury’s verdict resulted in a sentence of life without parole rather than death.

In the second, *United States v. Sampson*,²³ the defendant pled guilty to two federal murder charges and agreed to serve a sentence of life without the possibility of parole. The Department of Justice rejected that offer and went forward seeking the death penalty. After a 48-day sentencing hearing, the jury recommended and the District Court imposed the death sentence. Years of appeals and post-trial hearings later, a new trial was ordered, and the case now stands precisely as it did when the death penalty was first authorized *twelve years ago*: back in the District Court, with proceedings underway to determine whether the jury will conclude that the death penalty, or life without the possibility of parole, is the appropriate punishment

In the third case, *United States v. Green*,²⁴ the Department of Justice sought the death penalty against two defendants charged with a gang-related Boston

²¹ See Eric H. Holder, Jr., *Defendants’ Legal Rights Undermined by Budget Cuts*, Washington Post, August 22, 2013, http://articles.washingtonpost.com/2013-08-22/opinions/41435818_1_defender-attorney-general-justice-department.

²² 96-CR-30054-MAP.

²³ 01-CR-10384-MLW.

²⁴ 02-CR-1030-NG.



murder. After years of litigation, the United States Attorney dismissed the federal murder charges against those two defendants in favor of state prosecution: in state court, the lead defendant was acquitted; his co-defendant pleaded guilty to manslaughter.²⁵

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In November, the legal community mourned the passing of one its greatest advocates, former BBA President John J. Curtin, Jr. More than 20 years ago, Curtin, then the President of the American Bar Association, testified about the death penalty in Congress. He told legislators:

A system that takes life must first give justice.

Twenty years later, the country's capital punishment system, in state and federal courts, continues to fail that test. The BBA now, as then, asks all public-minded women and men to recognize that capital punishment is simply too fraught with peril—too likely to lead to the execution of the innocent, too likely to result in discrimination against racial and ethnic minorities, and too expensive and time consuming—to deserve their support.

²⁵ See http://www.boston.com/news/local/breaking_news/2008/10/man_who_once_fa_1.html