The death penalty evokes a passionate response from almost every American — both from those who believe it is a moral and appropriate punishment for the most heinous of murders, and those who ardently oppose it as inhumane or irreparably flawed. Passion alone, however, does not typically motivate courts and lawmakers to seriously examine the fairness, accuracy, or appropriateness of the death penalty. Meaningful reform on capital punishment must also be driven by the collection and analysis of data. Many defenders know and use research that has examined the death penalty at the national level, but may less often appreciate the impacts and value of single state examinations on capital punishment in their advocacy.

Even some defense lawyers might be surprised by the significant differences in how U.S. states redesigned their death penalty laws post-"Furman v. Georgia" in their efforts to address the Court’s concerns about arbitrariness. Given this variation, jurisdiction-specific studies are necessary to understand how each state’s death penalty functions, provide data about the effects of different practices, and identify outlier states (or even counties or localities). This information is already having a significant impact on the current discussions about capital punishment in this country, as national reviews are not always focused or specific enough to draw the attention of state legislators, governors, and judges. Evidence suggests that these stakeholders are more likely to act on findings unique to their state, whose relevancy is more difficult to deflect than more generalized, national data.

Prior to the publication of rigorous state studies, most jurisdictions possessed only anecdotal evidence about the functioning of their capital systems. However, over the last decade, state examinations have led to a wide range of reforms, fueled legislation, inspired judicial review, and fostered renewed public debate — all of which can be useful to criminal defense lawyers who seek policy reform or represent clients facing the death penalty.

Examples of State Study Models

Over the last 15 years, researchers have approached examinations of state death penalty systems in a variety of ways, with different scopes, time periods of review, topics and purposes, leading to both quantitative and qualitative data that has illuminated how capital punishment is administered throughout this country and practices that continue to result in arbitrariness or disparities in sentencing.

For example, from 2003 to 2013, the American Bar Association (ABA) Death Penalty Due Process Review Project used an innovative research and evaluation model to conduct a series of comprehensive State Death Penalty Assessments on the administration of capital punishment.
in 12 states.1 The ABA devoted full-time staff to conduct the primary research for each report. They gathered all of a state’s relevant laws and policies, interviewed and surveyed relevant government agencies, courts, prosecutors and defenders, made public records requests, and obtained other available data. Then, the ABA convened state-based “Assessment Teams” that included current or former judges, state legislators, prosecutors and defense attorneys, state bar association leaders, law school professors, and others with a diversity of roles and viewpoints. These teams worked with the ABA to review and confirm the accuracy of the factual findings and make recommendations for reform.

The Assessment Teams also compared their state’s actual practices with the uniform benchmarks laid out in the ABA Protocols on the Administration of Capital Punishment that cover varied aspects of the death penalty from arrest to execution, including the following: collection and preservation of forensic evidence; law enforcement techniques; prosecutor practices; defense services; direct appeals and state postconviction proceedings; clemency; jury instructions; judicial independence; race; intellectual disability; and mental illness.2 Through the process of conducting these Assessments, the ABA has found that poor lawyering, racial bias, lack of proportionality, and incomplete record-keeping are among the consistent problems that exist across capital jurisdictions.

The ABA Assessments have been effective advocacy tools for a wide range of stakeholders, including governors, legislators, judges, advocates, and the public by fostering direct comparisons of state practices using standard and uniformly applied metrics. Many have suggested the assessments were also effective because they were developed with experts who lived and practiced in the studied states and never took a position about the morality or constitutionality of the death penalty per se. In fact, the teams deliberately included individuals who both supported and opposed capital punishment.

However, the ABA Assessments are only one of several approaches to the study of state death penalty systems.3 A handful of commissions have been convened by governors or legislatures, sometimes following a wave of exonerations or a significant case decision.4 Also, empirical analyses have been conducted by academics using stringent social science research methods to collect and analyze data and report findings with statistical or legal significance.5 Unlike the ABA Assessments or some of the state commissions, these academics have occasionally used their results to draw conclusions about the constitutionality or public policy value of the death penalty.6 Researchers have also looked at the financial implications of the death penalty as compared to life without parole. The methodologies and findings of these studies have varied significantly, but have consistently found that capital punishment is more expensive — sometimes dramatically so — than the cost of pursuing a noncapital conviction.7 Finally, state-based interest groups have also undertaken examinations of their systems, and newspapers and media outlets are exposing problematic capital punishment practices in particular jurisdictions. While these may not follow a particular social science or standard research model, they often provide critical information about state practices.8

The Impacts of Existing Studies
Defenders should not overlook the potential — and proven — value of studies examining and critiquing their state’s practices. Indeed, ample evidence supports that state research has already meaningfully improved justice or, at the very least, better educated the public and caused policy-makers and judges to be more concerned about how their jurisdiction’s justice system is functioning. This concern has manifested in a variety of ways, several of which are described below.

Government-sponsored study commissions. Although there have been some instances when state officials convened a commission with no obvious correlation to the publication of new research, there have been several occasions when officials established public boards largely because of the results of capital punishment studies in their jurisdiction. In Tennessee, the legislature established the Study Commission on the Death Penalty in 2007, just three months after the ABA Assessment was released.9 In 2007 Indiana also established its bipartisan “Bowser Commission” months after the release of the ABA Assessment to study capital punishment and its imposition on individuals with mental illness. Like the ABA, it ultimately recommended exempting those with severe mental illness from the death penalty.10

In 2011 Pennsylvania established a bipartisan Task Force and Advisory Committee on Capital Punishment, citing the findings of both the ABA Assessment and the state’s Supreme Court Committee on Racial and Gender Bias in the Justice System as evidence of the need for further study.11 Finally, the Supreme Court of Ohio and State Bar Association appointed a task force whose explicit purpose was “to review the 2007 American Bar Association report … and offer an analysis of its findings; assess whether the death penalty in Ohio is administered in the most fair and judicious manner possible; and determine if the … administration of the death penalty in Ohio [is] in proper form or in need of adjustment.”12 The task force’s final report made 56 recommendations, which led to legislation that sought to establish higher standards for proving guilt, exempt those with serious mental illness, make fewer crimes death-eligible, and enact a Racial Justice Act, among others things.

Legislative reforms and abolition. A frequent and important result of many death penalty studies has been the introduction of bills to change a jurisdiction’s laws to adopt a particular recommendation or, in some cases, abolish the death penalty altogether. The ABA Assessments, for example, helped spark legislative proposals in at least five states and provided support for legislative efforts in several others.13 Members of the Assessment Teams and ABA staff have provided technical support to policymakers and advocates in developing the bills responding to assessment recommendations, and several have testified at legislative hearings following the introduction of those bills. The ABA and other researchers have also been able to provide policymakers with their state’s specific data, but also present comparative information about the practices and policies in other studied states, which can include ideas for better legislative models.

After California’s 2011 cost study was released, an abolition bill was introduced in the state legislature.14 That bill and subsequent referenda to end the death penalty failed, but this research has continued to inspire advocates to push for change. In Illinois, the General Assembly passed legislation in 2003 that addressed several of Gov. George Ryan’s Commission’s recommendations, and eight years later the state abolished capital punishment.15 Similarly, Maryland, New Jersey, and New Mexico all passed repeal laws after major state studies identified problems with the death penalty.16

This is not to say that research was
the singular causation for abolition, as the political will for repeal was already growing prior to the studies in several of those states. However, in many other places where abolition is not currently viable, research findings have contributed to creating a climate where dialogue on capital punishment is possible, and has even helped instill the political will to fix some of the problems identified. All of this makes clear that state-based research can have significant impacts on whether citizens and policymakers believe that their death penalty is “fixable,” or is so irreparably broken as to no longer justify being state law.

Moratoria. As of this writing, four gubernatorial moratoria are currently in place. In 2015, Gov. Tom Wolf suspended executions in Pennsylvania, citing the state’s task force, the ABA Assessment, and other evidence indicating that biases affect the makeup of their death row. The statements of Washington’s Gov. Jay Inslee and Oregon’s Gov. John Kitzhaber when announcing their moratoria suggest that they also relied on research about their states’ systems in choosing to halt executions. Kitzhaber said that “many … have agreed that Oregon’s system is broken,” while Inslee noted too many “flaws in the system,” citing data about the lack of deterrence, case reversals, and high costs.

Judicial recognition. In addition to legislators and governors, the judiciary is, of course, a critical audience for state capital punishment studies. Research can inform and help shape judges’ constitutional considerations of the death penalty in both state and federal courts. For example, Justice Breyer’s June 2015 dissent in Glossip v. Gross received national attention, not only because of his searing indictment of the death penalty, but also because of his reliance on scholarship and data — including several state-specific studies — to explain many of the problems with the administration of capital punishment. Last year, the Delaware Supreme Court held its own death penalty statute unconstitutional in light of Hurst v. Florida and cited a 2012 academic study of Delaware’s system. When U.S. District Court Judge Cormac Carney issued his 2014 Order declaring California’s death penalty unconstitutional in Jones v. Chappell, he used the state commission’s findings to support his decision. In addition, the ABA Assessments have been cited in several U.S. Supreme Court, federal appellate, and state high court opinions. Finally, the assessments and other studies have also been used to encourage judiciaries to change problematic court rules.

Use of State Death Penalty Studies by Capital Defenders

State studies of capital punishment can be a vital tool for defense lawyers who frequently present and frame research findings on behalf of their clients. Defenders have presented study findings in a variety of creative ways and at different stages of litigation, ranging from arguments that the state’s capital punishment law is unconstitutional, to claims that particular provisions in the law are comparative outliers or have led to an unfair result in a case, or render a particular death sentence unconstitutional.

For example, state-specific research noting race and geographic disparity data has been presented before and at trial to challenge death certification or voir dire. In Georgia, Assessment Team members’ testimony was previously admitted before trial courts in litigation on the ineffectiveness of that state’s proportionality review. In postconviction proceedings, state studies have been used to support ineffective assistance claims, as many of the reports provide evidence that buttresses national standards for counsel performance like the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. For example, when trial counsel fails to seek preservation of evidence or conduct adequate mitigation work, studies can provide evidence of these known problems in particular states where counsel training or qualifications are substandard. They also have been used to support funding motions for counsel, mitigation, and experts.

Defenders should also consider soliciting testimony, affidavits, or amicus briefs from individuals who conducted research or served on commissions, task forces, or ABA Assessment Teams. Not only might such experts offer relevant evidence, but very often these groups include new or “unlikely voices,” such as law enforcement officials, prosecutors, conservatives, and former judges, who can provide independent and unique perspectives that may resonate with courts and the public.

Finally, state studies can also provide evidence in challenges to states’ laws governing a host of constitutional safeguards, such as a jurisdiction’s intellectual disability determination procedure, overbroad aggravators, or death-eligible crimes. They can also provide data that might be useful, as Justice Breyer suggested in Glossip, to broader Eighth Amendment challenges to the constitutionality of the death penalty.

The Need for Additional Research

Despite the excellent research that has already been done nationally and in some states, significant needs remain for additional study, not only to fill both topical and geographic gaps, but also to update research that has become dated. For example, the ABA was only able to study 12 of the 31 capital jurisdictions and several of those assessments are now more than a decade old. Additionally, very few states have had cost, race, or proportionality studies, and there are limited empirical examinations of the impacts of major legal changes in the last 20 years, such as the Anti-Terrorism and Effective Death Penalty Act (AEDPA) or state unitary appeals processes, on the correction of constitutional error in state capital cases.

Defense lawyers need to be part of the call for continued research at the state and local levels so that the public and decision-makers can all benefit from up-to-date evidence regarding the current problems with the administration of capital punishment in the United States. Organizations like the ABA, as well as many other researchers mentioned above, would welcome the opportunity — and funding — to continue conducting high-quality research on state capital punishment systems. However, this not only requires the dedication of resources to ensure that studies can be completed by qualified professionals, but it also requires the commitment of state governments to collect and maintain the data to accurately evaluate the death penalty.

Although the death penalty is arguably the most profound governmental function with the most severe consequences, most states fail to keep comprehensive, easily locatable, or searchable records on their death penalty administration. Some are also unwilling to share the information they do have. This is a major barrier to much of the research that can and should be done to evaluate the death penalty in the United States.

One area of particular difficulty is the frequent unwillingness of prosecutors’ offices to disclose information on capital charging practices and policies, trainings, and budgets. While the ABA
and many state commissions have successfully recruited prosecutors to serve as evaluators, they have had trouble securing participation in data collection efforts.29 Similarly, it is very difficult to obtain information about the capital clemency decision-making processes in most states, as many governors and parole boards function without transparent procedures or reporting requirements. The ABA is currently working to gather and publish more information in this area. Nevertheless, there is still a lot of valuable information about capital case administration that is not being shared with researchers — or collected at all — and it is important to educate policy-makers and courts about these barriers to comprehensive evaluation of existing government programs.

Finally, a chronic challenge for researchers is gathering the evidence to fully evaluate the proportionality of the death penalty as it is applied. In Georgia, for example, the Supreme Court is required to determine whether each death sentence is excessive or disproportionate.30 But that court has limited its review to the few cases in which the death penalty was imposed in similar circumstances and often explains its review by merely repeating the statute’s language that “[t]he death sentence is not disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. The similar cases listed in the Appendix support the imposition of the death penalty in this case.”31 This review — like what is done in many other states — is far too cursory and does not ensure proportionate sentences.

Thus, without data on all death-eligible cases — regardless of whether death was ultimately sought by prosecutors or imposed by a jury — neither state supreme courts nor prosecutors (let alone researchers) can ensure true fairness in charging or sentencing, nor can they determine the extent of racial or geographic bias in a given system. Interesting research in this area is currently underway in Missouri to analyze a uniquely comprehensive set of statewide trial court reports in capital charged cases. The results may be useful in understanding the role of race, geography, and proportionality in that state.32 More work like that is critically needed to fully understand how capital punishment is being used in the United States.

While it is obvious that the death penalty in this country is changing in a variety of ways — as prosecutors seek it more rarely, courts continue to clarify what the Constitution requires, and some states are abolishing it altogether — the specific forces causing that change are not always clear. There are certainly many factors at play, but individuals who work on criminal justice issues know that major legal change does not occur without significant advocacy and education. Lawyers rely on independent and well-designed research to accompany compelling client narratives and case facts as they seek to inform the public, judges, and policymakers about capital punishment. When stakeholders have a fuller picture of how the death penalty is functioning, they can better identify and address the parts of the system that do not adequately ensure due process and fairness for those facing the ultimate punishment.

Notes


2. The assessed states are Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. The assessment reports are available at http://www.americanbar.org/dueprocess.


7. See, e.g., Justin Marceau et al., Colorado Capital Punishment: An Empirical Study, University of Denver Sturm College of Law, Working Paper No. 13-08 (2013) (concluding that the Colorado death penalty is effectively unconstitutional because the statute, as written, can be applied to over 90 percent of all first-degree murders, but, in practice, is imposed too infrequently to allow for the narrowing of cases required by the Eighth Amendment).


9. See, e.g., Texas Coalition to Abolish the Death Penalty, Texas Death Penalty


24. For example, the Florida Supreme Court revised the standard jury instructions in capital cases and established an Innocence Commission, based in substantial part on recommendations in the 2006 ABA Assessment. See, e.g., Petition for a Rule Establishing an Actual Innocence Commission (Dec. 11, 2009), http://www.floridasupremecourt.org/pub_info/innocence.shtml. Additionally, in Missouri, Assessment team members proposed a Supreme Court rule to limit the number of clients under death warrant any one attorney could be required to represent in a six-month period. See Tony Rizzo, Attorneys Struggle to Keep up with Missouri’s Execution Pace, KANSAS CITY STAR (Mar. 10, 2015), http://www.kansascity.com/news/local/crime/article13220378.html.

25. American Bar Ass’n, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report 124 (Sept. 2006) (noting that the ABA sent surveys to all 20 state attorneys but only received back 3, none of which could articulate the method used to determine which cases would be charged capital).


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