

WHOSE JUSTICE? PROSECUTION AND DEFENSE REACTIONS TO CAPITAL-CASE REVERSALS*

PAUL PARKER AND BEN COATE

As many as two-thirds of capital cases are reversed due to serious error, an aggregate rate critics interpret as evidence of a malfunctioning system and which others portray as a system correctly functioning to detect errors. This article investigates reactions of prosecutors and defense attorneys to reversals in individual cases. Theoretically, both sets of actors are officers of the court with a duty to promote justice and may be pleased to see courts upholding due-process standards of legal guilt. However, defense attorneys and prosecuting attorneys have different commitments and incentives that likely affect their views of individual cases. From news articles reporting reversals in death penalty convictions and sentences between 1981 and 2005, we code reported reactions regarding the case outcomes and examine these reactions relative to case characteristics. We find a difference in the reactions of prosecutors and defense attorneys, which is better explained by a commitment to winning the case than by the theoretical role to see that justice is done. Notably, while the aggregate rate of reversals might be evidence the system is working, prosecutors rarely interpret an individual loss this way. Whether a sentence or conviction was overturned; whether this was done by a state or federal court; the reason for the reversal; and the length of time since the crime do not influence reactions.

In the decade after deciding that the death penalty was not per se unconstitutional in *Gregg v. Georgia* (1976), the Supreme Court developed jurisprudence that “death is different” (see Abramson, 2004:n. 1). The irreversibility of the penalty requires special care in securing and reviewing convictions of capital defendants. An important aspect of death penalty cases has been the review by courts of death penalty convictions. Statutes require automatic review by the state supreme court of each death penalty conviction, and state and federal courts often have been willing to entertain post-conviction collateral reviews of death convictions and sentences. The result has been a high rate of reversals in death penalty cases; one study estimated that a sentence or conviction is overturned in 68 percent of death penalty cases (Liebman et al., 2000).

Those reacting to the reversals in death penalty cases have fallen into two main camps. Those critical of the criminal-justice system have argued that the death penalty system is inherently flawed and that the reversals are clear evidence of this. High-profile studies by Bedau and Radelet (1987), Gross (1996), and Liebman et al. (2000) assert that police practices, prosecutorial discretion and behavior, procedural rules, and inadequate support for defense attorneys unfairly bias capital trials. And

* We thank Stephen L. Wasby and the anonymous reviewers whose helpful suggestions and careful editing have improved this paper.

despite appellate review that presumes the constitutionality of the trial, courts detect flaws at a rate that casts doubt on the entire capital-punishment system.

Defenders of the system, however, point to these very reversals as evidence the system is working. Concurring in *Kansas v. Marsh* (2006), Justice Antonin Scalia responded to concerns raised in a dissenting opinion that an increasing number of exonerations undermined the legitimacy of the criminal-justice system:

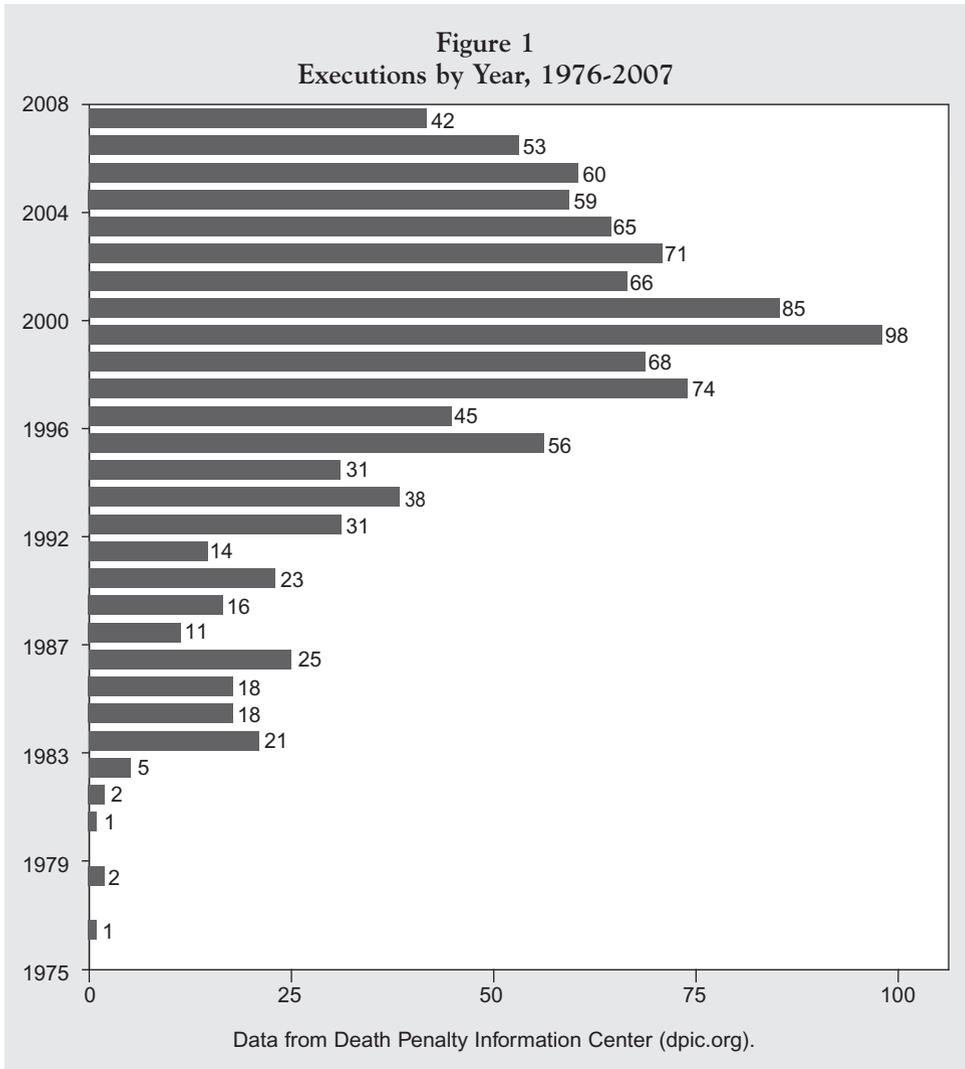
[The dissent] speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than *as a consequence of the functioning of our legal system*. Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out (at 13-14, emphasis in original).

While these two positions are responses to aggregate levels of reversals, we are interested in reactions to reversals in individual death penalty cases. Do prosecutors and defense attorneys equally celebrate the functioning of the legal system? Or do they respond, as we might expect, more in terms of their professional self-interest and as adversaries in the immediate case? We read several hundred newspaper articles about reversals in capital cases, published between 1981 and 2005, to discern the reactions of defense attorneys and prosecuting attorneys. We find clear differences between the two types of actors, which suggests that their public reactions are based upon their daily professional commitments to the cases before them, rather than to a broader theoretical commitment. Notably, despite Justice Scalia's suggestion that we ought to celebrate that justice is done, this rarely is the prosecutorial reaction.

We first review the recent history of the death penalty in the United States, with attention to the role of litigation, executions, and reversals. We then review literature on the incentives and roles of prosecutors and defense attorneys. This discussion includes consideration of the external factors that might influence a reaction, including the grounds for the decision, the court making the decision, and significantly, whether the reversal is of a conviction or only of the sentence. We then present our evidence of clear differences between prosecuting attorneys and defense attorneys, and we conclude by discussing the limitations of our findings.

TO SEE THAT JUSTICE IS DONE

In the years after the Supreme Court reauthorized the death penalty in *Gregg v. Georgia* (1976), there have been several notable periods of activity. In the first, state policies and procedures were litigated for how they comported with the fairness required by the due-process clause. There were relatively few executions, except for the "volunteers" who refused to appeal their cases. But by the late 1980s, most due-process issues had been litigated; after the Supreme Court's holding in *McCleskey v.*



Kemp (1987) that a pattern of racial disparity in death sentences did not violate the equal-protection clause, there were few procedural obstacles to executions. After an average of only 1.5 executions per year in 1977-83, the pace picked up to over 18 per year in 1984-91, and then climbed steadily through the 1990s (see Figure 1).

In addition to the resolution of the serious constitutional challenges, the Supreme Court reined in federal courts' review of state penalties, asserting that states have an interest in the finality of their criminal-justice sentences (e.g., *Teague v. Lane*, 1989; *McCleskey v. Zant*, 1991). In a case narrowing the grounds for federal habeas-corpus review, Justice Sandra Day O'Connor, concurring, expressed the view that "our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the inno-

cent” (*Herrera v. Collins*, 1993, at 420). Three years later, Congress further limited federal habeas-corpus review in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Between 1992 and 1999, executions averaged fifty-five per year, with a high of ninety-eight in 1999.

Despite efforts by the Supreme Court and the Congress to remove legal barriers to executions, by the late 1990s pressure began to mount on state officials to reexamine their criminal-justice systems. In 1997 the American Bar Association called for a moratorium on executions until procedures were adopted that “(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed” (ABA, 1997). Multiple studies indicted faulty criminal-justice procedures, and in 2000, Liebman et al. claimed that 68 percent of death penalty convictions since 1976 had prejudicial error. More than one-third of these errors stemmed from inadequate defense counsel, with prosecutorial misconduct and faulty jury instructions each accounting for about 20 percent of reversals (see also Gross, 1996; Joy, 2006; Uphoff, 2006; Walker, 2006). Gross et al. (2005) identified seventy-four capital defendants who were exonerated in a fifteen-year period, but it was the drama of the exoneration of thirteen men on Illinois’s death row that invited scrutiny from beyond the academy and the legal profession (e.g., *Chicago Sun-Times*, 2003). After a peak of ninety-eight executions in 1999, the pace tapered off; although the average of sixty-two executions a year between 2000 and 2007 was higher than that for the previous eight years, the trend was downward.

Critics have leveled two main responses at claims of systemic problems. First, some have disputed the veracity of the Liebman et al. (2000) study (e.g., Latzer and Cauthen, 2000a, b; Hoffman, 2001; Willing, 2007; but see Liebman, Fagan, and West, 2000; Fagan, Liebman, and West, 2000). Second, some have drawn the conclusion from the reversals and the exonerations that the system is working as it should. These are not exclusive responses: Hoffman (2001) argues that Liebman et al. overstated the rate of reversals, which he places at about 40 percent instead of 68 percent, and which Latzer and Cauthen (2000a:64) placed “at closer to 27%.” Additionally, although acknowledging that post-conviction reviews reveal serious procedural problems of misconduct and ineffective counsel, Hoffman notes these are a small and unrepresentative proportion of the overall cases. “The core question, in a sense, is whether the reversals identified in the Liebman study stand as evidence that there are significant numbers of substantively flawed death sentences, or whether they stand as evidence that our system is simply over regulating (and over litigating) the procedures that are used in capital cases” (Hoffman, 2001:947; see also, Latzer and Cauthen, 2000a, b; but see Marshall, 2002).

These two interpretations are reminiscent of Herbert Packer’s (1968) distinction between legal guilt and factual guilt. Critics of the death penalty system are concerned that the imbalance of resources and the desire for conviction produces legal guilt absent factual guilt. Illinois governor George Ryan demonstrated a concern

with legal guilt when he commuted to life in prison the sentences of 164 death-row prisoners and pardoned four others, three years after imposing a moratorium on executions. Defenders of the capital-punishment system argue that, as it is the legal system that is correcting the cases of questionable factual guilt, it is almost impossible to have legal guilt without factual guilt. In response to Governor Ryan's moratorium, DuPage County state's attorney Joseph Birkett "said the system proved itself reliable by releasing innocent inmates before they were executed. 'There is no chance an actual innocent (person) will be executed,' Birkett said. 'It doesn't exist'" (Keith, 2000:1).

While the reactions discussed so far have been system-level interpretations of a high rate of reversal, we are interested in examining reactions to reversals in individual cases. While prosecutors and others in the law-enforcement community may understand the cumulative effect of reversals to be evidence that the system is working, how do they respond to a reversal in an individual case? We expect to find that a reversal will be seen as a victory for the defense attorney, but a loss for the prosecutor. The reasoning behind the expectations is straightforward based on the particular interests of the parties in the case, which we now discuss.

THE ACTORS

Just as judges experience different expectations stemming from different audiences (Baum, 2006), prosecutors also have competing expectations from their audiences and roles. As noted by the Supreme Court in *Berger v. United States* (1935), the prosecutor's interest "is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer" (at 88). Similarly, according to Comment 1 on Rule 3.8 of the American Bar Association's model rules, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence" (ABA, 2002).

Despite this "public minister" role, a large body of literature has characterized prosecutors as zealous political actors. They are recognized to have considerable discretion whether to bring a case and what charges to bring, and they also are influential with judges in recommending appropriate sentencing (Flemming, Nardulli, and Eisenstein, 1992; Utz, 1979). The ability to control the flow of cases represents an immense power: "These prosecutors are consciously using the screening function to selectively ration the limited available court resources. In so doing, they act in the capacity of quasi-legislator" (McDonald, 1979:40).

While prosecutors have this great amount of power, how will it be used? Like any other professional, prosecutors are interested in advancing their personal careers. Cole (1970), examining prosecutors as part of a larger political system, analyzed their motives as part of a series of clientele relationships with the police, with the court,

with defense attorneys, and with the larger public and found that some cases create higher public expectations for prosecutorial aggressiveness (Cole, 1970:340). This role of institutional incentives is echoed by other research on both elected prosecuting attorneys and appointed U.S. attorneys. Future job prospects, whether retention of a job, reelection, or a move to a desirable private firm, shape prosecutors' behaviors. Lochner (2002) found that federal prosecutors hoping to receive a judgeship or more powerful position within the Justice Department more closely follow protocol, while prosecutors hoping to enter private practice will be more interested in appearing as a unique and individual leader. Indeed, prosecutors are intimately aware of how they are perceived and of the importance of this perception to their personal goals and satisfaction (Eisenstein, 1978; Perry, 1998). In addition, prosecutors, especially if elected, are interested in maintaining a positive image with the public.

More interesting for this research is what prosecutorial discretion and zeal means for prosecutors' willingness or reluctance to reconsider whether "justice was done" once a conviction has been secured. Medwed (2004:128-29) discusses the numerous ways in which prosecutors may actively attempt to thwart the reconsideration of a conviction, such as stalling, encouraging judges to deny the consideration of new evidence, and suppressing evidence (see also Kreimer and Rudovsky, 2002). He adds,

A political incentive . . . exists for prosecutors to fight post-conviction innocence claims, to duke it out in the courts, so to speak. Opposing an innocence claim and letting the motion wend its way through the adversarial system not only reinforces a prosecutor's tough-on-crime message, but any political capital lost due to a subsequent vacatur of a conviction can be attributed to the system as a whole (Medwed, 2004:156).

While rational self-interest related to preserving a job or institutional relations may contribute to prosecutorial zeal, cognitive biases may make even conscientious prosecutors reluctant to reconsider evidence (Burke, 2006). Humans process information selectively, seeking out information that confirms their biases. Further, as a result of the concepts of belief perseverance and cognitive dissonance, humans are slow to accept new information that works against our beliefs or convictions. In this regard, prosecutors, like police investigators, may be unwilling to reexamine a theory once they have developed it, and that theory will influence the "facts" that they then perceive. A conviction only reinforces the belief that they had the correct person, creating a great psychological commitment to an outcome that mitigates against a willingness to reconsider a murder conviction or sentence (Burke, 2006:1603-13; see also, Medwed, 2004). For example, Gross et al. (2005:525-26) report, "When Charles Fain was exonerated by DNA in Idaho in 2001, after eighteen years on death row for a rape murder, the original prosecutor in the case said, 'It doesn't really change my opinion that much that Fain's guilty.'"

While less is known about defense attorneys, often they are deeply dedicated to their work (Siemsen, 2004; Sarat, 1998), and they are near-universally overmatched, especially in capital cases. This stems from a discrepancy between the challenges presented by death penalty cases and the resources committed to them: "Defending a capital case . . . requires mastery of a plethora of legal, criminological, medical and psychological concepts; a commitment of investigative resources that is unprecedented in the annals of criminal defense work; and a level of expert assistance that is largely unknown in non-capital criminal cases" (Vick, 1995:332). However, criminal defense is considered a low-status practice (Heinz and Laumann, 1982), and it pays poorly, with underfunding of public defenders a perennial problem. While some defendants have private counsel, the National Center for State Courts (2007) estimates that 80 to 90 percent of the criminally accused qualify for indigent defense. At the trial level, public defenders and assigned counsel are part of a bureaucratic workgroup, and they thus value good long-term working relations with prosecutors, judges, and police (Blumberg, 1967). Not surprisingly, Casper (1972:105) reports that only 20 percent of the noncapital defendants he interviewed reported feeling their assigned counsel was "on their side."

The mismatch in representation is part of the reason for the ABA's 1997 call for a death penalty moratorium; the association repeatedly has proposed guidelines for the resources for and training of lawyers in capital cases (ABA, 2003; Weinstein, 2003). The Antiterrorism and Effective Death Penalty Act of 1996 encouraged states to improve their defense funding in exchange for allowing fewer habeas claims, but none of the few states that attempted to comply with the policy were found to have set adequately high standards for defense counsel (Parker, 2007; Rundlet, 1999; see also Gould, 2008). Thus, without elections, and with relatively low pay, capital-defense attorneys are considered to be either those who have relatively few professional options or those who are quite committed to death penalty defense (e.g., Sarat, 1998; Siemsen, 2004). It is this latter group that commonly handles death penalty appeals, and we expect their commitment to this cause will show up in their reactions.

METHODS AND DATA

Our data set was derived from a search of Nexis for news reports of a court overturning a death sentence or conviction for the years 1981-2005; this systematic search produced 424 usable articles.¹ Each article was coded for seven variables: the name

¹ The specific search was "death sentence OR death penalty OR execution AND reversed OR overturned OR struck." News-source availability in Nexis varies across the years, and thus we have many more stories in later years than earlier years. The data set is not a population of all of the reversals during this time period, and our content analysis is limited by the availability of articles in the database, as well as by the choices of the reporters and the editors regarding what to report. For instance, many stories reported the positions of the judges, or the families, but not the attorneys. An additional group of articles were short reports, such as "state briefs" in *USA Today* and minimalist newswire reports. We ran a narrower search of the years 2000-05 and have fewer cases from that period. See Neundorf (2001) for more discussion of content analysis.

of the defendant; the date of the story; the year of the original crime; whether the court was a federal or state court; the reason for the reversal; whether the reversal was of a sentence only, or also the conviction; and then the nature of any comments made by a prosecutor or a defense attorney.² We also gathered stories on twenty cases of exoneration, as these cases present less opportunity for mixed motives or reactions.³ We were able to code 211 prosecuting attorneys' reactions in 197 stories, and 145 defense-attorney reactions in 140 stories. Articles reported both prosecutor and defense reactions 101 times; prosecutors' reactions alone were reported 96 times, and 39 articles reported only defense attorneys' reactions. Case characteristics did not affect whether stories reported an attorney reaction. (See Table 1 for the stories' main characteristics.)

Studying news articles enabled us to gather more responses across time and from a greater geographic region than interviews would have allowed. However, the responses recorded public reactions that are further limited by reporting practices that emphasize conflict and the use of official sources (Haltom, 1998; Bennett, 2006; Graber, 2006). In the adversarial system, a reversal is an emotional event that creates a winner and a loser, and a reporter is asking for a public reaction. These reactions may be crafted for a news audience, rather than intended to be revelations of true beliefs, and quotes may be selected by reporters for their utility in writing the story. Despite these limitations, reported reactions help to create and reinforce a public understanding of the functioning of the criminal-justice system.

Reactions of defense and prosecuting attorneys were coded into five categories. Two types of statements, including variants of "the system failed at trial" and "the system worked on appeals," were coded as supporting a reversal. Statements indicating a failure at trial include a defense attorney who asserted, "This case exposes what the public fears, that prosecutors do, sometimes, break the law in trying to convict a citizen" (*Houston Chronicle*, 1996). The other supportive statement celebrates the appellate decision: "The chickens have come home to roost in this case," said Atlanta death penalty lawyer Steve Bright, an attorney in the case. "The court has recognized a pattern of discrimination that is so pervasive it meets the very high standards' set by previous court decisions in such cases" (Goldberg, 1991).

Two other types of statements—variants of "the system worked at trial" and "the appeals decision was wrong"—were coded as critical of the case outcome. Here is a

² Our data are limited to attorneys connected with the case. Many articles clearly describe the attorney's role in the litigation, but in others it was not possible to identify whether the attorney was directly involved in the trial or the appeal. A previous smaller study found 20 percent of the articles quoted other professionals, such as law professors or lawyers associated with the state or national Innocence Projects (Coate, Lewis, and Parker, 2007), but we did not track those reactions here.

³ For exonerations, we chose defendants from the Death Penalty Information Center's Innocence List. As the other cases included in this study are reactions to court decisions, we selected those that met the following standard: "Defendants must have been convicted, sentenced to death and subsequently either- a) their conviction was overturned AND i) they were acquitted at re-trial . . ." (www.deathpenaltyinfo.org/article.php?scid=6&did=110). We then identified articles reporting the acquittal.

Tables 1a-1e
Characteristics of Death Penalty Cases Overturned,
as Determined from News Articles

Table 1a
Court Action

Conviction overturned	159 (37%)
Sentence overturned	253 (58%)
Exoneration	20 (5%)
(n=432)	

Table 1b
When Overturned

1981-89	106 (25%)
1990-95	127 (29%)
1996-99	128 (30%)
2000+	71 (16%)
(n=432)	

Table 1c
Years After Conviction

0-4	116 (27%)
5-8	133 (31%)
9-14	104 (24%)
15-20	66 (15%)
21+	13 (3%)
(n=432)	

Table 1d
Reason for Overturning

Evidentiary	106 (25%)
Procedural	280 (65%)
Other	46 (10%)
(n=432)	

Table 1e
Court Overturning

State	304 (70%)
Federal	128 (30%)
(n=432)	

district attorney supporting the trial: “I believe he had a fair trial, a fair death penalty phase” (AP, 2001). The second type of statement is directly critical of the appeals decision, such as a prosecutor’s characterization of a federal judge’s decision as “shocking”: “‘There is no basis for Judge Tanner’s ruling on the merits,’ he said. ‘We are confident that the appellate court will reverse Judge Tanner and reinstate the jury verdict’” (Houston, 1993). A fifth form of statement—statements about the case’s future (“we will have to decide whether to retry the case”) or a statement of concern for the family of the victim—was coded “neutral.” (See Table 2 for more examples.)

While prosecutors and defense attorneys share a systemic interest in justice being done, we expect their reactions to be rooted in their immediate position. Thus, we expect prosecutors and defense attorneys to differ on whether the case reversal amounts to “justice being done.” And there are differences in reactions to the reversal (see Table 3); moreover, those differences are statistically significant. Unsurprisingly, defense-attorney reactions never included satisfaction with the trial. Inadequate representation is a frequent reason for reversal, and the appeal is often the culmination of years of effort by deeply committed attorneys who lack financial resources (Sarat, 1998). The two cases in which defense attorneys were critical of the appeal involved reversals of the death sentence when the underlying conviction was not also overturned. Only two articles reported agreement between the prosecutor and the defense attorney that the trial verdict was unsupportable. One involved a trial judge who had pressured a deadlocked jury to continue deliberations, and a second was a 35-year-old case in which the FBI had suppressed evidence of a man’s innocence, causing the district attorney to say, “Today we are at the conclusion that justice may not have been done” (Lawrence, 2001:1).

Next, we sought to determine whether prosecutors’ reactions varied depending on characteristics of the case. First, because more than half (58 percent) of the coded cases involved a reversal of only a sentence, prosecutors may have considered the court action less problematic, as they still had the satisfaction of a conviction. Alternatively, the prosecutor may feel they have the “real killer”—witness the conviction—and be disappointed in the outcome because they had brought a capital charge. (Indeed, much of the criticism of the work of Liebman and his colleagues is the inclusion of sentence reversal in arguing that there are systemic flaws in capital trials [e.g., Latzer and Cauthen, 2000a, b].)

Second, differences in the reactions might depend on when the case was reversed or the length of time since the crime. When the reversal is removed in time from the crime, the consequences are somewhat mitigated. First, the prosecutors’ emotional investment in the case would likely decrease (e.g., Medwed, 2004). As time passes, prosecutors are likely to be replaced, and the person asked to comment on the reversal may not be the one who tried the case, further reducing the current prosecutor’s emotional investment. Additionally, we expect, as it became clearer in the late 1990s that flawed procedures had placed wrongly convicted persons on death row, prosecutors might be more willing to be supportive, or at least not critical, of a

Table 2
Selected Prosecutor and Defense-Attorney Reactions to
Reversals in Capital Cases

PROSECUTOR CRITICAL OF TRIAL OUTCOME

“[District Attorney] Chapman, who did not conduct McMillian’s trial, said new evidence surfaced in connection with the murder case, and ‘I think it’s clear that the real killer is out there somewhere.’” (AP, 1993)

PROSECUTORS SUPPORTING TRIAL OUTCOME

“I can’t think of anybody that deserves [the death penalty] more than Henry Hays,’ said Assistant District Attorney Tom Harrison.” (AP, 1985)

“The facts as I know them and as presented to the jury clearly reflected a cold, calculated and premeditated killing,’ he said. ‘I would suspect that the Florida Supreme Court wasn’t enthralled with the prospect of executing someone who was 18 at the time and who blew his brains out with a gun.’” (Ellicot, 1998)

PROSECUTORS CRITICAL OF APPELLATE OUTCOME

“I find it somewhat disconcerting that the efforts of this office have been disturbed by what I consider to be a rather singular and a rather narrow reading of these instructions.” (Rollenhagen, 1998)

“District Attorney Danny Craig said he agreed with the minority dissenting opinion, which basically states that Mr. Stephens’ sentence never should have been overturned in the first place.” (Hodson, 1998)

“Angry over having had to prosecute confessed killer Donald Owens four times, Mobile County Dist. Atty. Chris Galanos called the state appeals court—which reversed the three previous convictions—‘the five dumbest white men on earth.’” (USA Today, 1993)

“St. Louis Circuit Attorney George Peach called the decision ‘stupid.’ ‘That just shows how ridiculous the law has become when we can prove a man has killed two women under remarkably similar circumstances and we’re stopped from doing the sensible thing,’ he said. ‘It just shows the ridiculous depths that the law has reached,’ Peach said.” (Ganey and Jackson, 1991)

“‘This is outrageous,’ said Stuart attorney Richard Barlow, who prosecuted Rogers in his 1990 trial. ‘He is one of the most dangerous characters I’ve ever encountered. Reducing the charge to second-degree will mean he will be out and able to walk the streets again.’” (Moore, 1995)

PROSECUTORS’ MIXED REACTIONS

“‘It just mushroomed into a horrible mistake,’ [the district attorney] said in an interview last week. ‘I don’t want to call it that. A horrible incident.’”

“He contended that Mr. McMillian’s release proved the system worked.” (Applebome, 1993)

Table 2, continued

The District Attorney “said he was not disappointed by the 5th circuit’s decision, which upheld an earlier ruling” ... ‘Their reasoning was not unsound. I was surprised by the shenanigans that went on,’ he said. ... ‘Do we think she’s now innocent?’ he said. ‘No. The only impediment to a new trial I can think of is that after 16 years some witnesses might not be around.’” (Tedford, 2000)

DEFENSE ATTORNEYS CRITICAL OF TRIAL OUTCOME

“We feel there was gross error in the (trial) record. We intend to prove that the defendant did not get a fair trial.” (AP, 1985)

“‘The death penalty issue was a no-brainer,’ an unusually angry Shaughnessy said yesterday. ‘We expected that Zingale [the judge] wouldn’t listen. He gave Soke the death penalty because he was running for re-election’ and wanted to be seen on television handing down a tough sentence.” (Ewinger, 1995)

“‘Implicitly, someone is to blame,’ the defense attorney said. ‘The judge’s duty is to be infallible. It was a difficult case factually and there was an overzealous prosecutor. He was over-reaching in a subtle but continual way that is hard for a judge to police.’” (Barbosa, 1998a).

DEFENSE ATTORNEY SUPPORTING APPELLATE OUTCOME

The defense attorney “called the ruling ‘a total victory.’

‘Florida law places great respect on human life and because of that, only the most extreme cases are appropriate for the death penalty,’ Hileman said. ‘This absolutely was not a death penalty case.’” (Barbosa, 1998b)

“‘Obviously we’re extremely pleased—the . . . system worked in this case,’ said San Francisco attorney Richard Jaegar, one of Hunter’s court-appointed lawyers. ‘We would hope they would bring this case to a conclusion. He has been in prison for 17 years.’” (Mintz, 1998).

Table 3
Prosecutors’ and Defense Attorneys’ Reactions to Death Penalty Reversal, in Stories Reporting Reactions

Quoted Party	Type of Statement				Support Appellate Ruling	Total
	Support Trial Verdict	Criticize Appellate Ruling	Neutral	Criticize Trial Verdict		
Prosecuting Attorney	61 (29%)	85 (40%)	52 (25%)	3 (1%)	10 (5%)	211
Defense Attorney	0	2 (1%)	37 (26%)	32 (22%)	75 (54%)	145

reversal. Thus, we measured both the number of years since the conviction and whether the reversal occurred before or after the ABA’s 1997 call for a moratorium.

We also explored whether the case was reversed by a state or a federal court. We assume that a desire for good relations with their state’s judges is an imperative for

Table 4
Prosecuting Attorney's Reactions to Death Penalty Reversal, by Case Characteristic

Prosecutor's Comment	What Was Overturned		Grounds for Reversal		Court Overturning		Time Period Overturned	
	Conviction	Sentence	Evidentiary	Procedural	State	Federal	Pre-1997	1998-
Not Critical of Appellate Outcome	24 (31%)	38 (34%)	17 (34%)	44 (31%)	43 (32%)	20 (32%)	39 (32%)	24 (32%)
Critical of Appellate Outcome	78 (69%)	74 (66%)	34 (66%)	99 (69%)	91 (68%)	43 (68%)	80 (67%)	52 (68%)
Column Totals	78	112	51	143	134	63	119	76

prosecutors and, conversely, that federal judges are handy foils for their criticism. Finally, we explored differences in reactions based on the reason for the reversal. We thought that a decision that is based on an action at the trial, such as jury instructions or the prosecutor's closing statement, will likely elicit more negative reaction than one based on a decision rooted in new evidence, such as DNA testing or a confession of another party. Similarly, a reversal because of a change in a legal rule after the conviction would provide less room for a prosecutor to question the judgment of the appellate court, although it still allows the prosecutor to declare a trial victory.

There was little variation in the prosecutors' reactions, so we attempted to explore a simplified model to predict whether a prosecutor's reaction would be critical of the reversal by recoding our five response categories into two: whether the prosecutor's reaction was critical of the outcome (Support Trial Verdict and Criticize Appellate Ruling) or not (Criticize Trial, Support Appellate Ruling, and Neutral). A neutral reaction is not condemnation; given a chance to be critical of a court, the prosecutor "passed." However, in the statistical model we used, none of the four case variables were found to be a significant predictor of the likelihood that a prosecutor would react critically to the reversal. Part of the reason is undoubtedly that the modal response is critical of the appellate-court ruling—or supportive of the trial court ruling—but the consistency of division across case statistics is surprising (see Table 4).

Reasons for the observed results might include the practices of reporting journalists. Reporters and editors are telling a story, and thus a quote that fits the narrative of murderers getting relief because of a technicality may be more commonly reported (Bandes, 2004). Alternatively, it might be that attorneys' reactions are not linked to any environmental or case characteristics studied here but are instead a function of the attorneys' own personal demeanor. The media have reported on prosecutors who are willing to reexamine contested cases (e.g., Blumenthal, 2007; Milloy, 2000), but overall the data here seem to support Medwed's argument about

the commitment that prosecutors have to a particular outcome. This is most clearly shown in reactions to exonerations. Of the twenty such cases we identified, in six of the seven in which there were prosecutors' statements, prosecutors indicated that they felt the outcome was an injustice, either through a statement that supported the original conviction, or a statement that was critical of the appellate court.

CONCLUSION

Theoretically, prosecutors and defense attorney are officers of the court who share an interest in seeing that justice shall be done, but they react quite differently to reversals in individual death penalty cases. We expected to find this pattern, based upon the immediate interest flowing from their daily jobs. Still this is notable, as it is different from the common reaction of legal elites that the aggregate high rate of capital-case reversals demonstrates that the system is working. With 70 percent of prosecutors' reported comments being critical of the reversal, there was little variation to explain, but we expected there might be variation in the reaction depending on the background characteristics of the case being reversed. For the four specific case characteristics we examined, there was no variation.

This study of reversals measures what Packer (1968) calls "legal guilt," which he distinguishes from "factual guilt." Defense attorneys are more deeply rooted in Packer's Due Process Model that demands fair play by the government in achieving its convictions, and their reactions often acknowledged that a reversal in their case, especially of only a sentence, was not the same as factual innocence of the underlying crime. The Crime Control Model of the criminal justice system tends to assume factual guilt, and it places faith that the police and prosecutors can and will weed out unwarranted cases. From this perspective, reversals by courts may take on two opposite connotations. Collectively, these reversals demonstrate that the system is working, as reflected in the statements quoted from Justices Scalia and Justice O'Connor. However, this very confidence in the system's ability to detect and correct errors means that a case before an appellate court has already been vetted. Thus, a reversal on matters of legal guilt—technicalities—frustrates the criminal-justice system's function of detecting and punishing crime. And this was the dominant reaction of prosecutors in this study.

Notably, we only studied legal guilt. Some defendants repeatedly won reversals of convictions or sentences, and several have been executed, which suggests that the prosecutorial reactions challenging the appellate outcome or the affirming the trial verdict were not wholly unwarranted. Still, the consistency of the reactions was impressive, and they showed a level of commitment to factual guilt that does not always seem warranted: recall that in several exonerations examined, prosecutors' reactions still challenged the court action. A future study might focus on cases of exoneration, to see if the same pattern held or whether a narrative of "innocence" (Baumgartner, DeBoef, and Boydston, 2008) has made a difference to these actors' public reactions. Additionally, surveys or interviews might reveal whether there is a similar consistency in private reactions. **jsj**

REFERENCES

- Abramson, J. (2004). "Death-is-Different Jurisprudence and the Role of the Capital Jury," 2 *Ohio State Journal of Criminal Law* 117.
- American Bar Association (2003). *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, rev. ed. Chicago: American Bar Association. <http://www.abanet.org/moratorium/DPGuidelines4-2003.pdf>
- (2002). "Model Rules of Professional Conduct Advocate Rule 3.8 Special Responsibilities of A Prosecutor—Comment." http://www.abanet.org/cpr/mrpc/rule_3_8_comm.html
- (1997). "Report with Recommendations No. 107." Section of Individual Rights and Responsibilities. <http://www.abanet.org/irt/rec107.html>
- Applebome, P. (1993). "Alabama Releases Man Held on Death Row for Six Years," *New York Times*, March 3, p. A1.
- Associated Press (2001). "Judge Overturns Death Sentence in 1987 Killing, Orders New Trial," September 7.
- (1985). "Court Sets Aside Klansman's Death Penalty in Slaying of Black," August 21.
- Bandes, S. (2004). "Fear Factor: The Role of Media in Covering and Shaping the Death Penalty," 1 *Ohio State Journal of Criminal Law* 585.
- Barbosa, S. (1998a). "Bartow Man Wins Death Row Reprieve," *Ledger* (Lakeland, FL), May 22, p. B1.
- (1998b). "Court Spares Polk County Killer From Death," *Ledger* (Lakeland, FL), June 12, p. B1.
- Baum, L. (2006). *Judges and Their Audiences*. Princeton, NJ: Princeton University Press.
- Baumgartner, F., S. L. DeBoef, and A. E. Boydston (2008). *The Decline of the Death Penalty and the Discovery of Innocence*. New York: Cambridge University Press.
- Bedau, H., and M. Radelet (1987). "Miscarriages of Justice in Potentially Capital Cases," 40 *Stanford Law Review* 21.
- Bennett, W. L. (2006). *News: The Politics of Illusion*, 7th ed. New York: Longman.
- Blumberg, A. S. (1967). *Criminal Justice*. Chicago: Quadrangle Books.
- Blumenthal, R. (2007). "For Dallas, New Prosecutor Means an End to the Old Ways," *New York Times*, June 3, p. A28.
- Burke, A. S. (2006). "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science," 47 *William and Mary Law Review* 1587.
- Casper, J. D. (1972). *American Criminal Justice: The Defendant's Perspective*. Englewood Cliffs, NJ: Prentice-Hall.
- Chicago Sun Times* (2003). "Ryan to Commute All Death Row Sentences," January 13, News Special Edition, p. 4.
- Coate, B., R. Lewis, and P. Parker (2007). "Miscarriages of Justice: Eye of the Beholder," 7 *Journal of the Institute of Justice and International Studies* 104.
- Cole, G. (1970). "The Decision to Prosecute," 4 *Law and Society Review* 331.

- Eisenstein, J. (1978). *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems*. Baltimore: Johns Hopkins University Press.
- Ellicott, V. (1998). "Hardy's Death Sentence Tossed Out; Deputy's Slaying Not Premeditated, Justices Rule," *Palm Beach Post*, June 12, p. 1A.
- Ewinger, J. (1995). "Court Overturns Soke Death Sentence," *Plain Dealer*, July 7, p. 1A.
- Fagan, J., J. S. Liebman, and V. West (2000). "Death Is the Whole Ball Game," 84 *Judicature* 144.
- Flemming, R., P. Nardulli, and J. Eisenstein (1992). *The Craft of Justices: Politics and Work in Criminal Court Communities*. Philadelphia: University of Pennsylvania Press.
- Ganey, T., and A. Jackson (1991). "Convictions Overturned in Slayings of Two Women," *St. Louis Post-Dispatch*, September 11, p. 4A.
- Graber, D. A. (2006). *Mass Media and American Politics*. Washington DC: CQ Press.
- Goldberg, D. (1991). "Verdict in D.A.'s Slaying Voided; Court Finds Minorities Excluded from Juries," *Atlanta Journal Constitution*. September 4, p. D1.
- Gould, J. B. (2008). "Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus," 29 *Justice System Journal* 273.
- Gross, S. R. (1996). "The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases," 44 *Buffalo Law Review* 469.
- Gross, S. R., K. Jacoby, D. J. Matheson, N. Montgomery, and S. Patil (2005). "Exonerations in the United States 1989 Through 2003," 95 *Journal of Criminal Law and Criminology* 523.
- Haltom, W. (1998). *Reporting on the Courts: How the Mass Media Cover Judicial Actions*. Chicago: Nelson-Hall.
- Heinz, J. P., and E.O. Laumann (1982). *Chicago Lawyers: The Social Structure of the Bar*. Chicago: Russell Sage Foundation and American Bar Foundation.
- Hodson, S. (1998). "High Court Favors New Sentencing," *Augusta Chronicle*, December 5, p. A1.
- Hoffman, J. L. (2001). "Violence and the Truth," 76 *Indiana Law Journal* 939.
- Houston, E. (1993). "Death Sentence Overturned for Goldmark Killer," *Seattle Post-Intelligencer*, August 7, p. A1.
- Houston Chronicle* (1996). "Court Reverses Death Sentence in Tyler Case," November 7, p. A41.
- Joy, P. A. (2006). "The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System," *Wisconsin Law Review* 399.
- Keith, R. (2000). "Legal Experts Debate Constitutionality of Execution Moratorium," *State Journal Register* (Springfield, IL), August 21, p. 1.
- Kreimer, S. F., and D. Rudovsky (2002). "Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing," 151 *University of Pennsylvania Law Review* 547.
- Latzer, B., and J. N. G. Cauthen (2000a). "Capital Appeals Revisited," 84 *Judicature* 64.

- (2000b). “The Meaning of Capital Appeals: Rejoinder to Liebman, Fagan, and West,” 84 *Judicature* 142.
- Lawrence, J. M. (2001). “Wrongly Convicted Man Wins Freedom,” *Boston Herald*, January 6, p. 1.
- Liebman, J. S., J. Fagan, and V. West (2000). “Death Matters: A Reply to Latzer and Cauthen,” 84 *Judicature* 72.
- Liebman, J. S., J. Fagan, V. West, and J. Lloyd (2000). “Capital Attrition: Error Rates in Capital Cases, 1973-1995,” 78 *Texas Law Review* 1839.
- Lochner, T. (2002). “Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys’ Offices,” 23 *Justice System Journal* 271.
- Marshall, L. C. (2002). “Do Exonerations Prove That ‘The System Works?’” 86 *Judicature* 83.
- McDonald, W. (1979). “The Prosecutor’s Domain.” In W. McDonald (ed.), *The Prosecutor*, pp. 15-51. Beverly Hills, CA: Sage Publications.
- Medwed, D. (2004). “The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence,” 84 *Boston University Law Review* 125.
- Milloy, R. E. (2000). “A Texas Prosecutor Who Seeks Evidence of Innocence,” *New York Times*, October 21, p. A9.
- Mintz, H. (1998). “Judge Reverses Conviction of Death-Row Inmate,” *San Jose Mercury News*, December 17.
- Moore, P. (1995). “Killer’s Death Sentence Thrown Out,” *Palm Beach Post*, May 12, p. 1B.
- National Center for State Courts (2007). “Indigent Defense.” *CourTopics*. <http://www.ncsc.org/WC/CourTopics/FAQs.asp?topic=IndDef>
- Neuendorf, K. A. (2001). *The Content Analysis Guidebook*. Thousand Oaks, CA: Sage Publications.
- Packer, H. L. (1968). *The Limits of the Criminal Sanction*. Stanford, CA: Stanford University Press.
- Parker, B. D. S. (2007). “The Antiterrorism and Effective Death Penalty Act (‘AEDPA’): Understanding the Failures of State Opt-in Mechanisms,” 92 *Iowa Law Review* 1969.
- Perry, H. W., Jr. (1998). “United States Attorneys—Whom Shall They Serve?” 61 *Law and Contemporary Problems* 129.
- Rollenhagen, M. (1998). “Death Row Prisoner Gets Review of Sentence,” *Plain Dealer*, October 3, p. 1B.
- Rundlet, A. (1999). “Opting for Death: State Responses to the AEDPA’s Opt-in Provisions and the Need for a Right to Post-Conviction Counsel,” 1 *University of Pennsylvania Journal of Constitutional Law* 661.
- Sarat, A. (1998). “Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment.” In A. Sarat and S. Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities*, pp. 317-46. New York: Oxford University Press.

- Siemsen, C. (2004). *Emotional Trials*. Boston: Northeastern University Press.
- Tedford, D. (2000). "Federal Court Agrees Woman on Death Row Didn't Get Fair Trial," *Houston Chronicle*, March 4, p. A 39.
- Uphoff, R. (2006). "Convicting the Innocent: Aberration or Systemic Problem?" *Wisconsin Law Review* 739.
- USA Today (1993). "State Briefs," October 28, p. 8A.
- Utz, P. (1979). "Two Models of Prosecutorial Professionalism." In W. McDonald (ed.), *The Prosecutor*, pp. 99-124. Beverly Hills, CA: Sage Publications.
- Vick, D. W. (1995). "Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences," 44 *Buffalo Law Review* 329.
- Walker, N. R. (2006). "How the Malfunctioning Death Penalty Challenges the Criminal Justice System," 89 *Judicature* 265.
- Weinstein, H. (2003). "ABA Adopts Guidelines for Capital Cases," *Los Angeles Times*, February 18, p. A11.
- Willing, R. (2007). "Study Draft Decries Execution Appeals Process," *USA Today*, March 10, p. 3A.

CASES CITED

- Berger v. United States*, 295 U.S. 78 (1935).
- Furman v. Georgia*, 408 U.S. 238 (1972).
- Gregg v. Georgia*, 428 U.S. 153 (1976).
- Herrera v. Collins*, 506 U.S. 390 (1993).
- Kansas v. Marsh*, 548 U.S. 163 (2006).
- McCleskey v. Kemp*, 481 U.S. 279 (1987).
- McCleskey v. Zant*, 499 U.S. 467 (1991).
- Teague v. Lane*, 489 U.S. 288 (1989).