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The Death Penalty Failed Experiment: From Gary Graham to Troy Davis in Context

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Diann Rust-Tierney became the Executive Director of the National Coalition to Abolish the Death Penalty in 2004. She manages and directs programs for the organization and its 100 affiliates around the country, seeking to change public policy on the death penalty.

Rust-Tierney is an experienced nonprofit manager with more than 20 years of public policy advocacy. Previously, Rust-Tierney served as the Director of the American Civil Liberties Union Capital Punishment Project. She also served the ACLU as the Chief Legislative Counsel and as the Associate Director of its Washington, D.C., office, where she supervised six senior legislative counsel and lobbyists and managed the civil rights and civil liberties legislative program. During her tenure at the ACLU, she was the lead advocate on capital punishment on Capitol Hill, coordinating a coalition of national organizations on the issue.

Prior to joining the ACLU staff, Rust-Tierney engaged in litigation and public policy advocacy to advance the rights of women and girls at the National Women's Law Center.

Rust-Tierney received her undergraduate degree in political science from the College of Wooster in Ohio and her law degree from the University of Maryland.



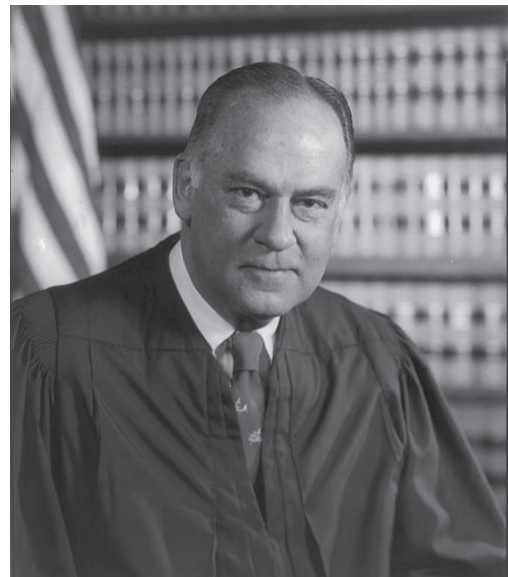
Gary Graham to Troy Anthony Davis in Context: A 35 Year Failed Experiment

Thirty-five years ago the [Supreme Court](#) set in motion an experiment that has had enormous implications for the rule of law and the principles of equality and fairness. The experiment was modern day capital punishment.

In 1976, when, in *Gregg v. Georgia*, the court approved a death penalty statute that purported to guide prosecutors, judges and ultimately juries in determining who among those convicted of capital crimes should be punished with death—the hypothesis was that a punishment as uniquely severe as death could be meted out fairly, error-free and without undermining the constitutional principle recognizing the intrinsic value of the individual.

The *Gregg* decision was intended to set executions in the “modern era” of capital punishment apart from executions imposed under the slave codes influenced by Jim Crow laws. The statute approved in *Gregg* and its progeny were supposed to prevent the death penalty from being imposed, as famously observed by [Justice Potter Stewart](#), as arbitrarily as “being struck by lightning.”

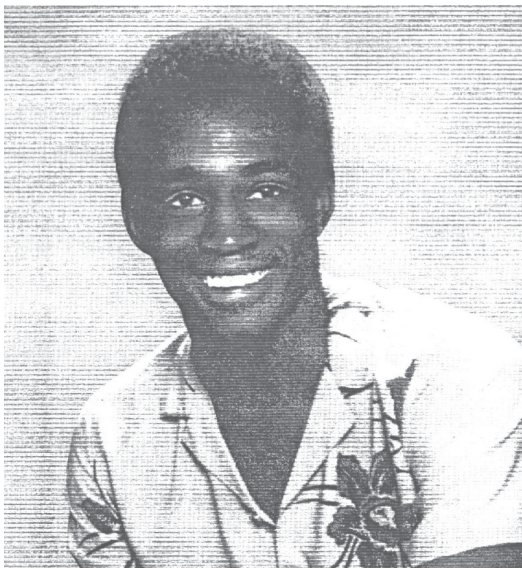
The complicated death penalty statutes approved by the Court in 1976 were designed to ensure accuracy, fairness and reliability as a matter of law. As a matter of policy, the death penalty was meant to deter murder, provide just retribution and affirm society’s commitment to the rule of law.



Justice Potter Stewart. Photograph courtesy of [Wikipedia](#).

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That was the theory. “Struck By Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Reinstatement in 1976,” a report released by the [Death Penalty Information Center \(DPIC\)](#), documents the degree to which the experiment has failed. The death penalty continues to be administered as randomly as ever. As for accuracy, there are 140 living testaments—people released from death row because of their innocence—who by their presence prove that the system gets it wrong with a regularity that is appalling.



Gary Graham. Photograph courtesy of the [Canadian Coalition Against the Death Penalty](#).

In 35 years capital punishment has failed to amass the weight of empirical data needed to prove it has any value as a crime fighting measure. Most advocates for capital punishment concede the limited evidence to support deterrence. Police chiefs from around the country consistently rank the death penalty low on their wish list of tools that would help them to do their jobs effectively.

Regarding retribution, we are left with troubling and persistent evidence that decisions about which murders merit the death penalty are still heavily

influenced by race, class and social status.

In full recognition of the failure of this decades-long experiment, the [American Law Institute](#) withdrew its model death penalty statute that was the prototype for the Georgia law.

It also turns out that in those same 35 years another experiment was launched called the [National Coalition to Abolish the Death Penalty](#).

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That experiment is succeeding.

Originally “The National Coalition Against the Death Penalty,” the organization found its purpose and organizing strategy in the words of Justice Thurgood Marshall’s dissent in *Gregg vs. Georgia*.

“The American people, fully informed as to the purposes of the death penalty and its liabilities, would, in my view, reject it as morally unacceptable.”

“How do you administer the most severe punishment imaginable in a manner that is accurate, free from bias and demonstrably fair?”

The National Coalition to Abolish the Death Penalty (NCADP), and an increasingly influential network of national and state affiliated organizations, embody Marshall’s dissent. Questioning, calling for moral accountability, providing the facts and perspective that would prod policymakers and the public to rethink their views on capital punishment and confront the reality that despite our best efforts, the system is

unwieldy, expensive and incapable of overcoming the influence of bias and human error.

Since 1976 the National Coalition to Abolish the Death Penalty and their partner organizations have dedicated themselves to thoroughly and patiently implementing Justice Marshall’s thesis. Just as he predicted, law enforcement officials, judges, victims, advocates, crime victims, policymakers and the public are abandoning the death penalty. The public’s assessment of capital punishment is rooted in both the traditional theoretical debate and the pragmatic virtue of continuing the practice despite its widely recognized flaws.

The public is turning away from capital punishment because the experiment has not worked, and the price of continuing is too high. We simply cannot

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afford to continue spending enormous financial and human resources on a system that cannot be shown to have a measurable effect on safety and sends a mixed message about the value and quality of justice in our society.

I am proud to lead the NCADP. The organization and its programs have expanded and adapted to new opportunities, strategies and tactics. But we have remained true to the vision of planting the seeds of a dissenting view to grow a broad, diverse and inclusive grassroots movement that can create an alternative vision for justice. That is why the NCADP, through its Rachel's Fund Program and affiliated national and state organizations, is working with family members and service providers for victims, law enforcement and community leaders to forge a response to homicide that is not as flawed as capital punishment.

That is why in every state where fair consideration is given, a consensus is being formed beyond partisan and ideological divides that death penalty statutes should be repealed.

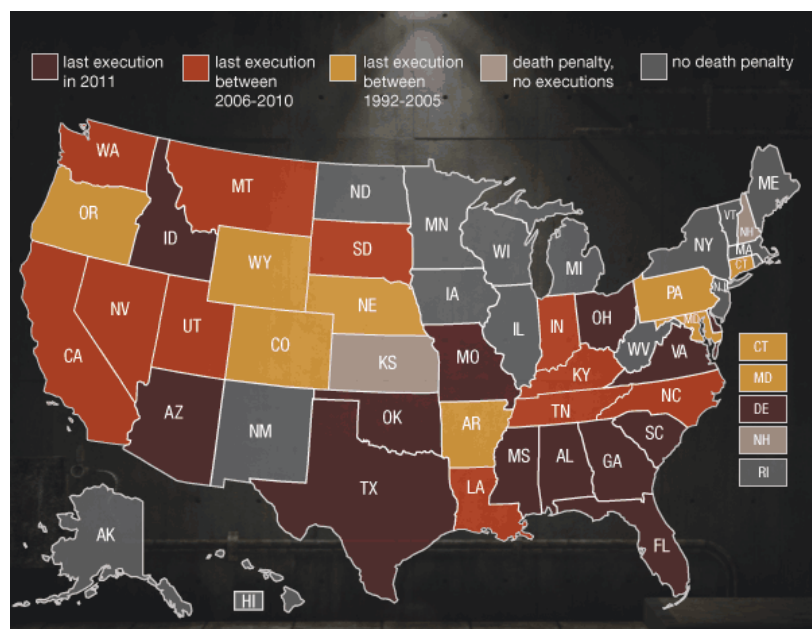
It will not take another 35 years for the NCADP to achieve its mission, but we must move quickly. Every day that the system remains in place, lives are at risk and people are being harmed. The lives of the condemned hang in the balance, and the quality of life for prosecutors, defense attorneys, judges and jurors and ultimately wardens and guards is also affected. They bear the burden of deciding who will live or die and then imposing the frightening punishment.

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Gary Graham was executed in Texas in 2000. Troy Anthony Davis was executed in Georgia in 2012, more than a decade apart—What did we learn from both cases?

This country has grappled mightily with the central challenge identified by the Supreme Court case in *Furman v. Georgia*. How do you administer the most severe punishment imaginable in a manner that is accurate, free from bias and demonstrably fair?

Not coincidentally, Texas and Georgia are two states at the center of this inquiry. In 1972, the Supreme Court ruled that the Georgia death penalty, and all statutes like it, failed to provide enough guidance to prevent death sentences from being imposed as arbitrarily as “being struck by lightning.”



State of the death penalty in 2011. Graphic by Mary Mahling and Maggie Clark.

In 1976, Georgia ushered in the modern death penalty era when the Supreme Court approved a “guided discretion statute” that was designed to provide assurances that the death penalty would be free from racial bias and reserved for the worst crimes and the worst offenders. Like Georgia, the Supreme Court’s approval of the Texas death penalty statute in the case of *Jurek v. Texas* formed the legal underpinnings for the yet untested

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theory that capital punishment could be administered in an accurate, logical and bias-free manner.

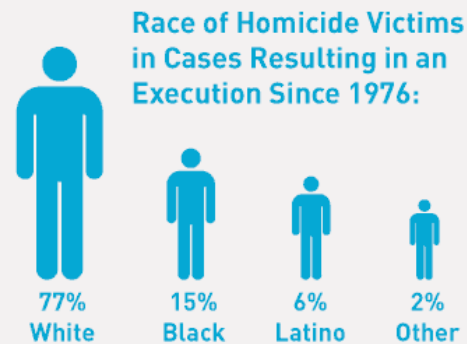
Ten years later the Georgia system was challenged again when death row prisoner Warren McCleskey asked the Supreme Court to intervene because defendants charged with the murder of white victims were more

than four times as likely to be sentenced to death than others. April 22, 2012 marks the 20-year anniversary of the Supreme Court's decision. Although the court did not deny that a racially biased pattern of sentencing existed, it declined to grant relief, suggesting it was not its place to rule in McCleskey's favor.

Now the tragedy of Troy Anthony Davis's execution brings us full circle. Despite the promise to ensure that the guilty are not punished along with the innocent, the question being weighed by the Georgia Board of Pardons and Parole and other state officials was, how much doubt is too much before an execution can proceed? In Davis's case the system was prepared to continue with an execution despite substantial doubt—a stunning, chilling conclusion.

Observing the Troy Davis case, we were able to closely examine the workings of a system many Americans assumed operated fairly. As deeply troubling as it was to watch how the Georgia justice system ruled in a compelling case of innocence, it was equally troubling to see how indifferent

“ Since 1977 (when the death penalty was reinstated), the overwhelming majority of death row defendants have been executed for killing white victims, although African Americans make up about half of all homicide victims. ”
—Amnesty International



Source: Death Penalty and Race (Amnesty International)

“American Punishment: In Life and Death.” Photograph courtesy of [ColorLines](#).

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and unresponsive the system was to the concerns expressed by millions of people around the world.



Troy Davis. Photograph courtesy of Hip-Hop.com.

It is because little improvement has been seen in the accuracy, reliability and fairness of the death penalty system that we have seen a shift in public support. Support for the death penalty continues to decline as evidenced by the decrease of death sentences being sought by prosecutors.

Most states that now have the death penalty are actively engaged in efforts to review the practice. In the past several years, New Jersey, New Mexico, Illinois and New York have engaged in such a review and either repealed their death penalty statute or declined to make it enforceable.

When Davis was executed on September 21, 2011 at 11:08 p.m., it was a moment of great sadness and disgrace. It was also a defining time for the death penalty in Georgia and across the nation.

Similarly, shock and revulsion at the execution of Jerome Bowden, a man with mental retardation and an IQ of 70, caused citizens in Georgia to mobilize to outlaw executions for people with mental retardation. This was years before the Supreme Court finally ruled that the practice of executing people with mental retardation was unlawful.

Today shock at the execution of Troy Davis amid so much doubt about his guilt has created a broad, politically and racially diverse surge of newly

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concerned citizens ready to end the death penalty. Communities are engaged as never before.

The Georgia that ushered in the modern experiment of capital punishment crossed a line that people on both sides of the debate contested: it matters whether the person being put to death is guilty of the crime for which he or she is sentenced to die, and when there is doubt about guilt, the death penalty is never right.

Three weeks after Davis's execution, *USA Today* reported that more than one third of Americans opposed the death penalty, the highest figure in 40 years. This increased opposition results from the rise in reports of a capital punishment system that has failed to deliver on its promise of fairness, accuracy and effectiveness. The Davis case gave the public a new opportunity to see the problem and, particularly for people of color, imagine how it could happen to someone in their family.



Americans protest Gary Graham's execution. Photograph courtesy of [Langley Creations](#).

Troy Davis, Gary Graham and the 140 innocent people released from death row serve as powerful testimony that our system is flawed. Twelve of those exonerated prisoners were on death row in Texas and five were on death row in Georgia.

Some have likened our nation's experiment with capital punishment to air travel. In the case of airplanes, every crash is closely examined for its

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cause, and steps are taken to prevent the error from recurring. The public's decision to continue to fly is thus based on the knowledge that government and industry have taken the necessary steps to make air travel as safe as possible.

Not so with capital punishment. In most death penalty states, including Texas, no such investigation routinely takes place. Few have taken meaningful preemptive steps to reduce the risk of error. States that have undertaken the inquiry have found fixing the problems to be enormously complicated and expensive. Most recently in Illinois, the public and policymakers concluded that the corrections were incomplete and in the end, not worth the trouble.

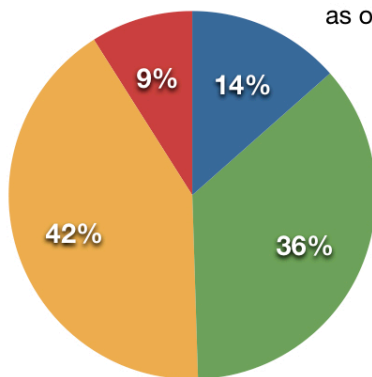
The same is true for the execution of Gary Graham where millions were awakened to a terribly broken system. But Georgia had not yet made its largest contribution to the nation's death penalty saga. September 21, 2011 at 11:08 p.m., the catalytic spark for ending the death penalty may have been lit once and for all.

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Death penalty remains unfair, arbitrary: It's time to abolish capital punishment

Education Level of Death Row Inmates

as of 12/31/09



- 8th Grade or Less
- High School Graduate / GED
- 9th-11th Grade
- Any College

Graph courtesy of [Death Penalty Information Center](#).

It's time for lawmakers to put the repeal of the death penalty on a faster track.

The study, "[Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Reinstatement in 1976](#)," reasons that the long effort to make the system fairer has failed. The DPIC report points out that factors such as race, wealth and geography

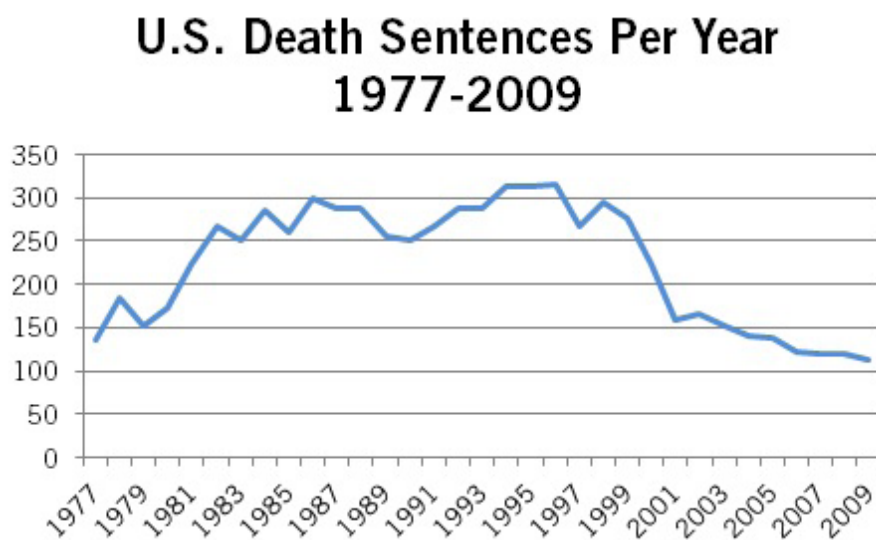
play a greater role in determining who faces the ultimate punishment than the crime itself or the character of the defendant. Because of these factors, and as reflected in Justice Blackman's dissent in *Callins v. Collins*, the Supreme Court justices who once thought the problems could be solved now believe that the practice should be abandoned.

More Americans are coming to understand why it makes sense to move away from capital punishment. A [research study](#) by Lake Research Partners found that a majority of the public supports ending the death penalty in favor of alternative punishments. According to the same study, 69 percent believe the death penalty is applied unfairly.

Even the most ardent supporters of capital punishment concede that it is not a matter of *whether*, but *when* the death penalty will be repealed.

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The momentum toward repeal is building. In fact, five states—Illinois, New Mexico, New Jersey, New York and, as of [April 12, 2012, Connecticut](#)—have rejected the death penalty in the past five years. The handwriting is on the wall—the death penalty is a failed, antiquated experiment on its way to extinction.



Graph courtesy of [Amnesty International](#).

Every day that the death penalty remains is a day when resources that should be going to support the needs of victims are siphoned off. At best, the death penalty responds to the loss and suffering of only a few.

It is obvious from the findings in “Struck By Lightning” that the responsible thing for our legislative representatives and the public is to pull the plug on the death penalty—clear the smoke and move forward with alternatives that hold people accountable for the harm they do without violating American society’s values of fairness.

More than three decades ago, Justice Potter Stewart wrote: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual ... I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence

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of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”

Until we are all seen and treated as equal, we cannot afford to keep capital punishment

I read the accounts of what happened to Trayvon Martin, half in disbelief but also with a strong sense of recognition.

A 17-year-old teenager was shot on his way home to a townhouse in a gated community in Sanford County, Florida. He was shot by George Zimmerman, a neighborhood watch captain who reported the youngster as “suspicious.” According to 911 tapes, Zimmerman pursued the boy despite being asked not to.



Trayvon Martin. Photograph courtesy of BET.

911 Operator: “Are you following him?”

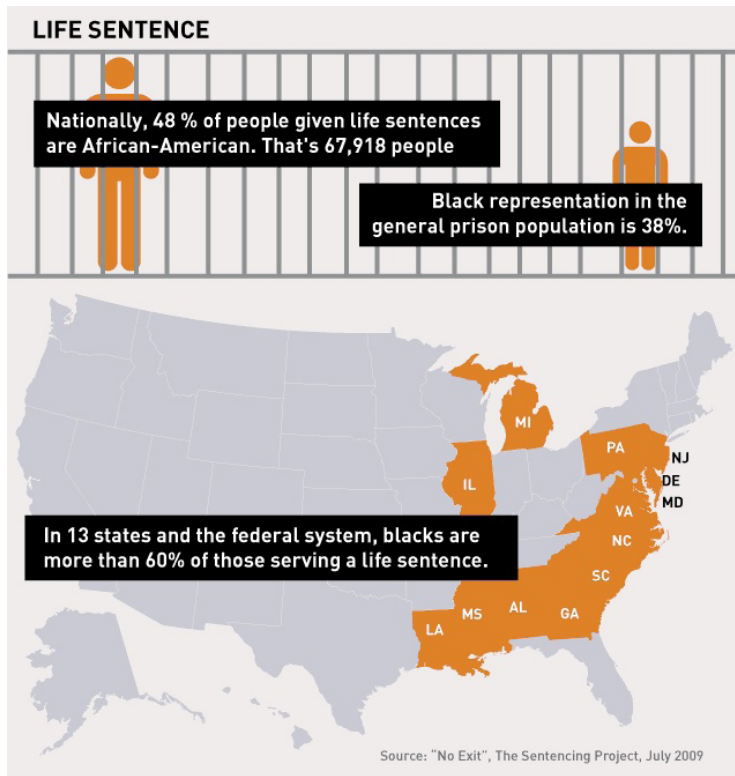
Zimmerman: “Yeah.”

911 Operator: “OK, you don’t need to do that.”

Listening to the 911 tapes is sickening on many levels. With the eerie advantage of hindsight you hear Trayvon described as suspicious and “having something wrong with him” by the man who would later kill him. We know as we are listening to the 911 call that Trayvon was only 17 and rightfully afraid of the man who was following him.

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Is this what we have become? Are young African American men suspects even in their own neighborhoods? Even as Martin lay dying, the fearful calls from neighbors seemed to treat him as a possible perpetrator and not



the victim. I understand concerns for personal safety and the critical instinct for self preservation and the protection of family. But the 911 calls paint a picture of a community on tenterhooks—where a tragedy of this kind was bound to happen. One of the shooter's neighbors explained the incident to the media by pointing out that there had been a number of robberies that he said were perpetrated by young black men. Can you imagine anyone coming forward to explain the

"American Punishment: In Life and Death." Photograph courtesy of [ColorLines](#).

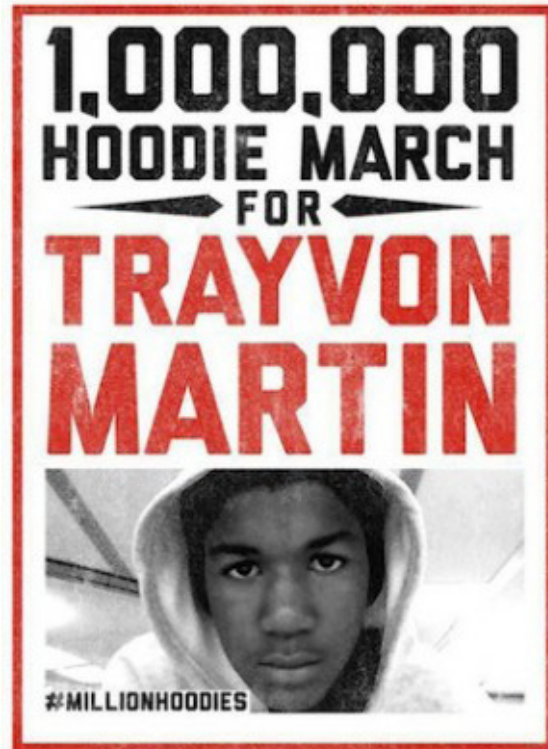
shooting of an unarmed white teenager by saying young white teenagers had been committing crimes in the area? The traditional response would be that not all white teenagers are suspects because some engage in criminal conduct.

While we may be shocked and outraged at the conduct of the shooter, let us not lose sight of the equally disturbing attitude of law enforcement. In this case, the local police department reinforced an unequal system of justice.

The double standard at work is patently and blatantly obvious. His killer has

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not, as of this writing been arrested. Where is the zero tolerance for violence that Florida's supporters of capital punishment have used to justify the corrupt death penalty system? Where is the swift move to justice that has been used to deny the constitutional rights of innocent people on death row? Florida's overall track record on justice is abysmal. The state has sentenced 23 men to death who were later released because of innocence. Of those 23, 15 have been black. Four were Latino and four white. These men were freed not because the system worked, but despite the state's best efforts to kill them.



Photograph courtesy of Black Youth Project.

This double standard extends to the treatment of victims. Trayvon Martin's parents have not been treated with the respect that should be afforded

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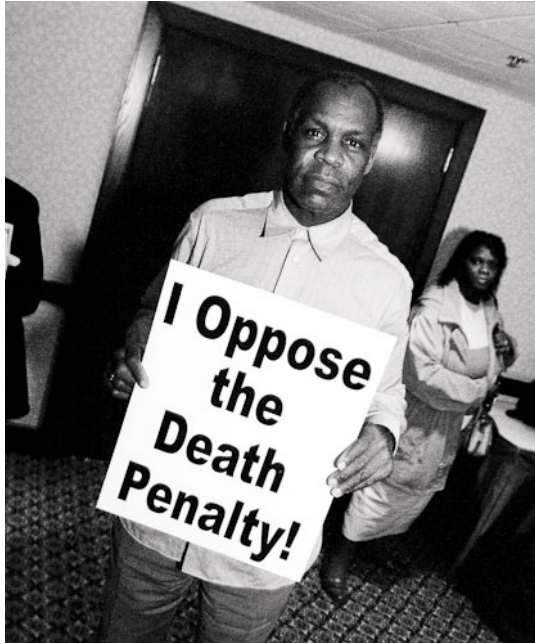
to a bereaved family. They had to retain a lawyer to obtain the transcripts of the 911 call that captured their son's last few minutes. They have had to endure local officials continuing to call their son a "suspect," despite evidence to the contrary. Trayvon Martin was a homicide victim. Local Florida officials have never treated him as such. Instead they accepted the claim made by his shooter that the killing was in self defense. They made no arrest and closed the book on the investigation.

If there were ever an argument against the death penalty, no more poignant one could be made today. We cannot have a criminal justice system that sentences people to death when we are not all truly equal in the eyes of the law or our neighbors.

As long as it is possible for a young black man to be shot on his way home from the store while his known assailant goes free, we cannot have the death penalty in Florida or anywhere else.

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Diann Rust-Tierney on McKinney



With the help of McKinney & Associates, Rust-Tierney enlisted the support of influential figures including Danny Glover, pictured here. Photograph courtesy of [Death Penalty Photography](#).

I remember working with McKinney & Associates on the case of Gary Graham (who later changed his name to Shaka Sankofa) when I served as the director of the [Capital Punishment Project](#) for the American Civil Liberties Union.

The first meeting of civil rights, civil liberties, human rights and religious organizations focused on the case was a real crossroads. This was when I first realized what an asset Gwen McKinney was going to be. In a time of great turmoil and heightened emotions, she had a confident and determined demeanor. She listened carefully and

skillfully translated the facts and the legal procedures in the case. She instinctively identified the themes and messages that would resonate in the public forum and could best be used to mobilize popular concern and opposition to Shaka Sankofa's execution.

[During the campaign] I watched Gwen and her team—with the same cool determination as in that first meeting—deftly pull together the structure of a coordinated campaign to publicize the injustice that we firmly believed was about to occur in Texas. As an added boost to our efforts, Gwen's long history of work and connections to high level civil rights and political

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leadership allowed us to put Sankofa's plight before these leaders quickly and garner their support and the assistance of their networks.

With Gwen's help, the growing coalition of organizations working to save Sankofa from execution took advantage of newly discovered evidence to highlight the case in the media and bring more people into the effort to save his life.

In the end, we failed to save Sankofa. He was executed by the state of Texas on June 22, 2000. But our effort to save his life did bring some victories. We were able to drive home how deeply flawed the system was in Texas—and, indeed, in every state that continues to cling to capital punishment.

The death penalty is clearly waning, with at least a half-dozen states within reach of ending the practice. I have no doubt that the early, determined effort, buoyed by the talent and commitment of Gwen McKinney and her team had an even greater impact than we could have imagined at the time.