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## *MADISON LECTURE*

### OUR BROKEN DEATH PENALTY

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Thank you, Dean Morrison, for the invitation to deliver this year's Madison Lecture, and thank you, Professor Dorsen, for your generous introduction. I am honored to give a lecture on the death penalty here at New York University, the longtime home of some of the most distinguished death penalty lawyers in the country. I am particularly honored because my mother, Judge Betty B. Fletcher, gave the Madison Lecture nineteen years ago, also on the death penalty.<sup>1</sup>

This lecture is titled *Our Broken Death Penalty*. But the title is misleading, for it suggests that our death penalty might, at some earlier time, have been something other than broken. It has always been broken. And, as you will hear tonight, it cannot be repaired.

In 1972, in *Furman v. Georgia*, by a vote of five to four, the Supreme Court almost held the death penalty unconstitutional as cruel and unusual punishment under the Eighth Amendment.<sup>2</sup> The

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\* Copyright © 2014 by William A. Fletcher, Judge, U.S. Court of Appeals for the Ninth Circuit. I delivered this lecture as the James Madison Lecture of the New York University School of Law on October 15, 2013. I first spoke publicly about the death penalty when I was Jurist in Residence at the University of Nebraska in 2009. I later gave versions of what has become this lecture at the University of Southern California, Gonzaga University, the University of Washington, the Faculté de Droit de l'Université d'Aix-Marseille, and the Berkeley-Albany Bar Association. I thank those institutions for hosting and listening to me on those occasions. I also thank my many law clerks who have worked on the death penalty cases on which I have sat, and who have assembled material for this lecture.

<sup>1</sup> Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811 (1995).

<sup>2</sup> 408 U.S. 238 (1972).

five Justices in the majority each wrote an opinion. Justices Brennan and Marshall concluded that the death penalty was flatly unconstitutional.<sup>3</sup> The three others in the majority—Justices Douglas, Stewart, and White—wrote only that the death penalty was unconstitutional as then administered. Justice Douglas wrote that the death penalty was unconstitutional because it was unevenly applied.<sup>4</sup> Justice Stewart wrote that death sentences were “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>5</sup> Justice White wrote that the death penalty was infrequently applied, with too few constraining principles. He particularly objected to the “recurring practice of delegating sentencing authority to the jury.”<sup>6</sup> The four dissenters were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.<sup>7</sup>

In response to *Furman*, the states that had the death penalty did not abandon it.<sup>8</sup> Instead, they redrafted their statutes in an attempt to meet the objections of Justices Douglas, Stewart, and White. There were essentially two kinds of new statutes. One imposed mandatory death sentences for murders committed under certain circumstances—such as murder of a law enforcement officer, multiple murders, and murder for hire.<sup>9</sup> The other channeled the imposition of the death penalty by specifying particular aggravating circumstances that had to be found before the death penalty could be imposed.<sup>10</sup> Many of these circumstances were the same as those listed in the mandatory death penalty statutes. The central difference between these two kinds of statutes was that in the first the particular circumstance mandated the death penalty, whereas in the second an aggravating circumstance was a necessary—but not sufficient—condition for imposing the death penalty.

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<sup>3</sup> *Id.* at 305–06 (Brennan, J., concurring); *id.* at 370–71 (Marshall, J., concurring).

<sup>4</sup> *Id.* at 255–57 (Douglas, J., concurring).

<sup>5</sup> *Id.* at 309 (Stewart, J., concurring).

<sup>6</sup> *Id.* at 314 (White, J., concurring).

<sup>7</sup> *Id.* at 375 (Burger, C.J., dissenting).

<sup>8</sup> See *Gregg v. Georgia*, 428 U.S. 153, 179–80 & n.23 (1976) (describing the state and federal governments’ responses to *Furman*).

<sup>9</sup> See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976) (“The North Carolina General Assembly in 1974 followed the court’s lead and enacted a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory.”).

<sup>10</sup> See, e.g., *Gregg*, 428 U.S. at 165 (“Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute.”).

Four years after *Furman*, the Supreme Court responded to the two kinds of statutes, striking down the mandatory statutes<sup>11</sup> and upholding those that relied on specified aggravating circumstances.<sup>12</sup> In the three cases upholding the Georgia, Florida, and Texas statutes, the vote was not close. The vote in all three cases was seven to two.<sup>13</sup> Justice Douglas was no longer on the Court. He had been replaced by Justice Stevens, who voted to uphold the death penalty. Justices Stewart and White, who had voted to strike down the death penalty in *Furman v. Georgia* four years earlier, now voted to uphold it.

In *Gregg v. Georgia* and *Proffitt v. Florida*, the Court upheld statutes requiring the existence of one or more specified aggravating circumstances and permitting the consideration of mitigating circumstances.<sup>14</sup> In *Jurek v. Texas*, the Court upheld a statute limiting the death penalty to five specific types of crimes, and requiring the jury to consider three short questions before imposing the death penalty.<sup>15</sup> Without going into detail, suffice it to say that the Texas statute upheld in *Jurek* is hard to distinguish from the mandatory statutes the Court held unconstitutional.<sup>16</sup>

It may be helpful to describe the procedure established under Georgia law and upheld by the Court in *Gregg*, as this statute is the model upon which most modern death penalty statutes have been constructed. Georgia's statute provided that the punishment for first-degree murder was either the death penalty or life in prison.<sup>17</sup> A capital murder trial was conducted in two phases—a guilt phase and a penalty phase. At the end of the penalty phase, the jury recommended to the judge either imposing or not imposing the death penalty. The judge was bound by the jury's recommendation.<sup>18</sup> In order to recommend to the judge that the death penalty be imposed, a jury had to find beyond a reasonable doubt that at least one of ten specified aggravating circumstances was present.<sup>19</sup> In addition, the jury was per-

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<sup>11</sup> *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976); *Woodson*, 428 U.S. at 305.

<sup>12</sup> *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976); *Gregg*, 428 U.S. at 207.

<sup>13</sup> See *Gregg*, 428 U.S. at 227 (1976) (Brennan, J., dissenting) (dissenting from *Gregg*, *Jurek*, and *Proffitt*); *id.* at 231 (Marshall, J., dissenting) (same).

<sup>14</sup> *Proffitt*, 428 U.S. at 248–49; *Gregg*, 428 U.S. at 161.

<sup>15</sup> *Jurek*, 428 U.S. at 269.

<sup>16</sup> See EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 343 (2013) (describing the three overbroad questions required by the Texas statute as an “effectively mandatory” death penalty, similar in nature to the North Carolina and Louisiana statutes the Court found unconstitutional).

<sup>17</sup> *Gregg*, 428 U.S. at 160.

<sup>18</sup> *Id.* at 163, 165–66.

<sup>19</sup> *Id.* at 164–65 & n.9.

mitted to consider mitigating circumstances.<sup>20</sup> There was a mandatory appeal to the state supreme court.<sup>21</sup>

It has now been almost forty years since *Gregg v. Georgia*. What has been our experience with the death penalty since then?

## I

### OVERVIEW

The United States is unusual among the large industrialized nations of the world. Among those nations, only Japan and China join the United States in retaining the death penalty.<sup>22</sup> Stated another way, we are the only Western industrialized country that still has the death penalty.<sup>23</sup> All countries adhering to the European Convention of Human Rights have renounced the death penalty. Signatories to the Convention include not only the countries of Western Europe, but also many Eastern European and Central Asian nations.<sup>24</sup> Many countries in Western Europe renounced the death penalty by statute even before the European Convention abolished it in 1982.<sup>25</sup> At the time some of these countries abolished the death penalty, popular sentiment (as measured by polling numbers) showed that considerable majorities in those countries supported the death penalty.<sup>26</sup>

Within the United States, there is substantial variation. Thirty-two states and the federal government have the death penalty.<sup>27</sup> Eighteen states, largely in the Northeast and northern Midwest, do not

<sup>20</sup> *Id.* at 163–64.

<sup>21</sup> *Id.* at 166–68.

<sup>22</sup> See AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2012, at 7–9, available at <http://www.amnesty.org/en/library/asset/ACT50/001/2013/en/bbfea0d6-39b2-4e5f-a1ad-885a8eb5c607/act500012013en.pdf> (identifying reported executions occurring in 2012).

<sup>23</sup> Several industrialized countries have retained the right to use the death penalty, but have not done so in over ten years. These nations have been termed “Abolitionist in Practice.” *Id.* at 51.

<sup>24</sup> *Death Penalty: Ratification of International Treaties*, AMNESTY INT’L, <http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties> (last visited Apr. 22, 2014).

<sup>25</sup> For example, Portugal renounced the death penalty in 1976, Denmark in 1978, Norway in 1979, and France in 1981. *Abolitionist and Retentionist Countries*, AMNESTY INT’L, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Apr. 22, 2014).

<sup>26</sup> See Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 430–31 (explaining that when Great Britain suspended the death penalty in 1965, only twenty-one percent of the country favored the decision); see also ROBERT BADINTER, *L’ABOLITION* 262 (2000) (stating that sixty-three percent of the French population supported the death penalty in 1981, the year it was abolished by statute under the Mitterrand government).

<sup>27</sup> *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 22, 2014).

have it. The New York Court of Appeals struck down the death penalty in 2004.<sup>28</sup> New Jersey abolished the death penalty in 2007.<sup>29</sup> New Mexico abolished it in 2009.<sup>30</sup> Illinois abolished it in 2011.<sup>31</sup> Connecticut abolished it in 2012.<sup>32</sup> Maryland abolished it in 2013.<sup>33</sup> California, my state, came close to abolishing it in 2013 by statewide initiative.<sup>34</sup>

As of 2013, there were about 3100 people on death row around the country. About 98% of death row inmates are male. About 43% are white, 42% are black, and 12.5% are Latino.<sup>35</sup> Since 1976—that is, since *Gregg v. Georgia*—there have been more than 1300 executions in the United States.<sup>36</sup> The peak year was 1999 with 98 executions.<sup>37</sup> That number has been diminishing in recent years. There were 53 executions in 2006, 42 in 2007, 37 in 2008, 52 in 2009, 46 in 2010, and 43 in both 2011 and 2012.<sup>38</sup> In 2013 there were 39.<sup>39</sup> Beginning with the states with the largest number of executions from 1976 to 2013 and working toward the smallest, Texas leads the other states by far with 493.<sup>40</sup> After Texas come Virginia (110), Oklahoma (103), Florida (74), Missouri (68), Alabama (55), Georgia (53), Ohio—here is the first nonsouthern state on the list—(50), North Carolina (43), South Carolina (43), Arizona (34), Louisiana (28), and Arkansas (27).<sup>41</sup> At

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> New Mexico's repeal was not retroactive. As a result, two people in that state were left on death row. *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16; *States With and Without the Death Penalty*, *supra* note 27.

<sup>31</sup> *States With and Without the Death Penalty*, *supra* note 27.

<sup>32</sup> Connecticut's repeal was not retroactive, leaving eleven people on death row. Peter Applebome, *Bill to Repeal Death Penalty in Connecticut Goes to Malloy*, N.Y. TIMES, Apr. 12, 2012, at A21; *States With and Without the Death Penalty*, *supra* note 27.

<sup>33</sup> Maryland's repeal was not retroactive, leaving five people on death row. *States With and Without the Death Penalty*, *supra* note 27.

<sup>34</sup> See Mark Z. Barabak, *L.A. as Death Penalty Capital Belies California's Political Image*, L.A. TIMES, Oct. 4, 2013, <http://articles.latimes.com/2013/oct/04/news/la-pn-la-as-death-penalty-capital-belies-california-image-20131004> (describing Proposition 34's fifty-two percent to forty-eight percent failed effort to abolish the death penalty).

<sup>35</sup> DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND CRIMINAL JUSTICE PROJECT, DEATH ROW U.S.A.: SPRING 2013, at 1 (2013), available at <http://www.deathpenaltyinfo.org/documents/DRUSASpring2013.pdf>.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *Execution List 2013*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/execution-list-2013> (last visited Apr. 22, 2014) (listing the people executed in 2013, a list that totals thirty-nine people).

<sup>40</sup> FINS, *supra* note 35, at 8.

<sup>41</sup> *Id.*

the bottom are New Mexico, Colorado, Connecticut, and Wyoming with one execution each.<sup>42</sup>

Most states execute most of their death row prisoners sooner or later. But that is not true for two states. As of April 2013, California had 731 prisoners on death row; it has had only 13 executions since 1976.<sup>43</sup> Pennsylvania had 198 prisoners on death row in 2013; it has had 3 executions since 1976.<sup>44</sup> These numbers, of course, suggest a deep ambivalence about the death penalty in those states.

Popular sentiment in favor of the death penalty has varied over the years. According to a series of Gallup polls, the percentage of the American population in favor of the death penalty between 1965 and 1972—that is, in the years leading up to *Furman v. Georgia*—fluctuated between 42% and 54%.<sup>45</sup> The low point was 1966 with 42%.<sup>46</sup> In March of 1972, three months before *Furman* was decided, 50% of the population favored the death penalty.<sup>47</sup> In March of 1976, three months before *Gregg v. Georgia*, 66% favored the death penalty.<sup>48</sup> Support for the death penalty climbed to a high of 80% in 1994, but declined thereafter.<sup>49</sup> Between 2008 and 2013, it has hovered at or below 65%.<sup>50</sup> The lowest approval rating for that period was 60% in 2013.<sup>51</sup> Of the things I will say today, the fact that just over 60% of the population now favors the death penalty may have the most practical importance.

Popular sentiment in favor of the death penalty varies from region to region. Sixty-eight percent of people in the South favor the death penalty, compared to 66% in the Midwest, 60% in the West, and 54% in the East.<sup>52</sup>

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<sup>42</sup> *Id.* at 9.

<sup>43</sup> See *id.* at 8 (listing the number of executions); *id.* at 36 (listing the number of prisoners on death row).

<sup>44</sup> *Id.* at 9, 36.

<sup>45</sup> *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Apr. 22, 2014).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* (presenting statistics going back through 1936).

<sup>50</sup> *Id.*

<sup>51</sup> Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More than 40 Years*, GALLUP (Oct. 29, 2013), <http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx>. At the time of this lecture, the lowest approval rating was sixty-one percent in 2011. *Death Penalty*, *supra* note 45. The text has been updated to reflect more recent data.

<sup>52</sup> Lydia Saad, *U.S. Death Penalty Support Stable at 63%*, GALLUP (Jan. 9, 2013), <http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx>.

## II THE MODERN DEATH PENALTY

The Supreme Court has tinkered with the death penalty since *Gregg* in 1976. The Court has required that a wide range of mitigating circumstances be presented to the jury.<sup>53</sup> Further, it has required that juries—rather than judges—determine whether there are aggravating circumstances that qualify a defendant for the death penalty.<sup>54</sup> For a time in some states, that determination was made solely by a judge. The Court has forbidden the imposition of the death penalty in certain circumstances. In *Atkins v. Virginia* (2002), the Court held that it is unconstitutional to execute a mentally retarded person.<sup>55</sup> In *Roper v. Simmons* (2005), the Court held that it is unconstitutional to execute someone who was under eighteen at the time of the commission of the crime.<sup>56</sup> In *Kennedy v. Louisiana* (2008),<sup>57</sup> it extended its 1977 holding in *Coker v. Georgia*<sup>58</sup>—which had held capital punishment for rape of an adult unconstitutional—to cases of rape of a child. But the basic legal structure of the death penalty has not changed substantially since 1976.

There are many arguments for and against the death penalty. I do not mean to suggest that the appropriateness, or the constitutionality, of the death penalty can be decided simply by counting the number of arguments on each side, for some arguments count for more than others, and people have quite different views of the relative importance of the arguments. I will not attempt to analyze and evaluate all of them. I will note some important arguments and then pass on to my principal concern today. Those arguments are:

First, the death penalty is extremely expensive. It costs more to execute a person than to keep him in prison for life. A recent California study concluded that from 1978 to 2011, California spent \$4 billion more in cases imposing the death penalty than it would have spent on those same cases if life imprisonment without parole had been imposed.<sup>59</sup> Another recent study concluded that a death-eligible case in Maryland in which the death penalty is not sought would cost, over the prisoner's lifetime, about \$1.1 million; a case in which the

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<sup>53</sup> See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (holding that relevant evidence of mitigating circumstances may not be excluded from consideration).

<sup>54</sup> *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

<sup>55</sup> 536 U.S. 304, 321 (2002).

<sup>56</sup> 543 U.S. 551, 578 (2005).

<sup>57</sup> 554 U.S. 407, 446 (2008).

<sup>58</sup> 433 U.S. 584, 592 (1977).

<sup>59</sup> Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 *LOY. L.A. L. REV.* S41, S65–102 (2011).

death penalty is successfully sought would cost about \$3 million.<sup>60</sup> Still another study concluded that North Carolina spent \$11 million more each year prosecuting capital cases than it would have spent if it had prosecuted the cases as life imprisonment cases.<sup>61</sup>

Second, the death penalty is extremely slow. In some states, it is not unusual for there to be more than twenty years between the time of the crime and the time of the execution.<sup>62</sup> And those are just the defendants who are executed. In states like California, many more death row inmates have died of natural causes and suicide than by execution.<sup>63</sup>

Third, despite numerous studies, we do not know whether the death penalty deters crime. Indeed, many studies show that the death penalty has no deterrent effect. I will not enter that debate here, and will content myself with saying only that we do not know whether there is a deterrent effect.<sup>64</sup>

Fourth, certain methods of execution are, or may be, unconstitutional. For example, the electric chair, once thought more humane than hanging, has been held to be unconstitutional in Nebraska, the last state that used it.<sup>65</sup> Lethal injection is now the preferred method

<sup>60</sup> JOHN ROMAN ET AL., URBAN INST. JUSTICE POLICY CTR., *THE COST OF THE DEATH PENALTY IN MARYLAND* 27 (2008), available at [http://www.urban.org/uploadedPDF/411625\\_md\\_death\\_penalty.pdf](http://www.urban.org/uploadedPDF/411625_md_death_penalty.pdf).

<sup>61</sup> Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 499 (2009).

<sup>62</sup> See Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 707–08 (2007) (finding that the average time spent on death row for California inmates is 17.2 years, and that 119 inmates had been on death row for more than twenty years).

<sup>63</sup> See Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 46 LOY. L.A. L. REV. 221, 225, 235 & n.56 (2012) (finding that, at the state's rate of execution, fourteen death row inmates would be executed before 2050, while more than 500 would die of natural causes).

<sup>64</sup> Compare Gary S. Becker, *On the Economics of Capital Punishment*, ECONOMISTS' VOICE, Mar. 2006, at 1 (arguing that capital punishment has a deterrent effect), and Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 (2005) (arguing that the death penalty has a significant deterrent effect and is therefore morally required), with John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 792–94 (2005) (doubting the validity of recent empirical studies purporting to find that the death penalty has a deterrent effect). For a compilation of articles on capital punishment and deterrence, see MANDERY, *supra* note 16, at 474 n.300 (giving an overview of the debate on the death penalty and deterrence); *Death Penalty: Deterrence*, CRIM. JUST. LEGAL FOUND., <http://www.cjlf.org/deathpenalty/dpdeterrencefull.htm> (last visited Apr. 22, 2014) (collecting articles on “the deterrent effect of capital punishment”).

<sup>65</sup> See Adam Liptak, *Nebraska's Top Court Forbids Electrocuting*, N.Y. TIMES, Feb. 9, 2008, at A9 (reporting that the Nebraska Supreme Court held electrocution to be cruel and unusual punishment in violation of the state constitution).



in almost all states, but there has been extended litigation over the manner in which it may be carried out.<sup>66</sup> There is currently a moratorium in effect in California because of concerns about lethal injection.<sup>67</sup>

Fifth, there are strong noninstrumental arguments both for and against the death penalty. Opponents of the death penalty emphasize the sanctity of human life, and argue on that basis against state-sanctioned killing. Proponents also emphasize the sanctity of human life, and argue that certain killers—the worst of the worst—having violated the sanctity of human life, have forfeited any claim to their own.

But I will not dwell on those arguments. Instead, I will return to the theme of *Furman v. Georgia* in 1972, when the Supreme Court struck down the death penalty, as then administered, across the entire country.<sup>68</sup> The Court in *Furman*—particularly the swing Justices Douglas, Stewart, and White—was concerned about the death penalty being applied erratically and arbitrarily, and therefore unfairly.<sup>69</sup> Those Justices' central articulated concern was that juries were given insufficient guidance by death penalty statutes to enable them to distinguish those killers who deserved to die from those who did not.<sup>70</sup>

I will address the problem of arbitrariness and unfairness more broadly than the Court in *Furman*. I will not be concerned solely with arbitrary jury decisions, for that is hardly the only area in which we see arbitrariness and unfairness. Rather, I will consider the entire process by which we choose those whom we will execute: beginning with the initial police investigation; running through the decisions by prosecutors of whom to charge and how to present evidence; running through the judicial process, focusing on the behavior of judges; and finishing with executive clemency by the governor.<sup>71</sup>

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<sup>66</sup> *Id.*; see also *Baze v. Rees*, 553 U.S. 35, 40–41, 44–45, 63 (2008) (describing lethal injection protocols and holding that Kentucky's protocol does not violate the Eighth Amendment).

<sup>67</sup> See *Sims v. Dep't of Corr. & Rehab.*, 157 Cal. Rptr. 3d 409, 428–29 (Ct. App. 2013) (holding the state's lethal injection protocol invalid and enjoining executions); see also *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (concluding that absent remedial state action, the system of lethal injection was broken).

<sup>68</sup> 408 U.S. 238, 256–57 (Douglas, J., concurring) (1972).

<sup>69</sup> See *id.* at 253 (concluding that leaving the decision for life or death to the discretion of the judge or jury is unconstitutional).

<sup>70</sup> For a discussion of the unarticulated concerns of those Justices, and a narrative suggesting a deeper and more categorical unease about the death penalty, particularly for Justice Stewart, see MANDERY, *supra* note 16, at 129, 166–67.

<sup>71</sup> In taking this approach, I am substantially indebted to the late Professor Charles L. Black, Jr., who first introduced me to serious analysis of the death penalty. For more on this approach, see CHARLES L. BLACK JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974).

I will do this by way of example, rather than by way of statistical proof. Examples for each section will be drawn from the West Coast, for two reasons. First, it is the region whose laws and practices are most familiar to me. Second, and more important, I want to make the point—often overlooked in eagerness to use southern states to exemplify the problems with the death penalty—that problems with the administration of the death penalty are widespread and endemic, rather than merely regional or episodic.

I will begin with police investigations. The case I am about to describe is horrible in many ways.<sup>72</sup> The murders were horrible. And Kevin Cooper, the man now sitting on death row, may well be—and in my view, probably is—innocent. He is on death row because the San Bernardino Sheriff's Department framed him. You can find my dissent from our circuit's failure to take this case en banc in the *Federal Reporter*.<sup>73</sup>

On the morning of June 5, 1983, a father came to a semirural home in Chino Hills, California, where his son had spent the night as an overnight guest. He found the mother and father, their daughter, and his own son dead, killed during the night.<sup>74</sup> They had been chopped with a hatchet, sliced with a knife or knives, and stabbed with an icepick or icepicks.<sup>75</sup> The son of the dead mother and father, Josh Ryen, had been left for dead, but he survived.<sup>76</sup> His throat had been cut. The family station wagon was gone.<sup>77</sup> There was money left in plain sight on the kitchen counter.<sup>78</sup>

The San Bernardino Sheriff's Department deputies who responded to the call decided almost immediately who was the likely killer. Kevin Cooper had escaped two days earlier from a nearby minimum-security prison by walking across an open field.<sup>79</sup> He had been in prison for burglary. He hid out in the house next door, 125 yards away, for two days.<sup>80</sup> He repeatedly called two women friends from this house, asking for money to help with his escape. They refused.<sup>81</sup> Cooper testified at trial that he had left his hideout house as

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<sup>72</sup> Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009).

<sup>73</sup> *Id.* at 581–635 (Fletcher, J., dissenting from denial of rehearing en banc).

<sup>74</sup> *Id.* at 584; People v. Cooper, 809 P.2d 865, 875 (Cal. 1991).

<sup>75</sup> Cooper v. Brown, 565 F.3d at 608 (Fletcher, J., dissenting from denial of rehearing en banc); People v. Cooper, 809 P.2d at 875–76.

<sup>76</sup> Cooper v. Brown, 565 F.3d at 608 (Fletcher, J., dissenting from denial of rehearing en banc).

<sup>77</sup> People v. Cooper, 809 P.2d at 875–76.

<sup>78</sup> Cooper v. Brown, 565 F.3d at 584 (Fletcher, J., dissenting from denial of rehearing en banc).

<sup>79</sup> *Id.* at 582.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

soon as it got dark on June 4, the night of the murders, and had hitchhiked to Mexico. We know that Cooper checked in to a hotel in Tijuana at 4:30 PM on June 5.<sup>82</sup> Tijuana is about 125 miles south of Chino Hills.<sup>83</sup> The Ryen family station wagon was discovered several days after the murders in a church parking lot in Long Beach, California, about forty-five miles *west* of Chino Hills.<sup>84</sup>

Eight-year-old Josh was “interviewed” at the hospital by a clinical social worker.<sup>85</sup> Because his throat had been cut, Josh could not talk. He pointed to letters and numbers on a board, indicating that there had been three or four killers and that they had been white.<sup>86</sup> Cooper is black.<sup>87</sup> During his stay in the hospital, Josh twice saw a picture of Cooper on television. Both times, he said that Cooper was not one of the killers.<sup>88</sup>

A Sheriff’s Department deputy repeatedly interviewed Josh at the hospital after his initial interview with the social worker. The deputy got Josh to change his story so that he no longer maintained that three or four white men had committed the murders.<sup>89</sup> Eventually, Josh said that he had seen a man with a great “puff of hair” standing over his parents’ bed.<sup>90</sup> At the time of the killing, Cooper’s hair had been in cornrows.<sup>91</sup> When Josh repeatedly saw Cooper’s widely shown picture on television after his arrest, his hair was in an afro.<sup>92</sup> During the day or so after discovery of the crime, deputies “discovered” a bloody button from a prison-issue jacket in the house where Cooper had been hiding out.<sup>93</sup> I use the word “discovered” in quotation marks because they “discovered” it in the middle of the floor of an empty bedroom that they had previously searched.<sup>94</sup> The Sheriff’s Department later learned that the prison jacket Cooper had been wearing had buttons of a different color than the button the dep-

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 584.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 610.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 584.

<sup>88</sup> *Id.* at 613.

<sup>89</sup> *See id.* at 612 (indicating that one detective spoke with the victim about twenty times during his hospital stay and that later testimony showed that the detective’s reports distorted the victim’s words); *id.* at 610–13 (indicating that Josh first identified his attackers as multiple white men and stated that Cooper was not his attacker, before later stating that he saw a person with a “puff of hair” and finally naming Kevin Cooper as his sole attacker).

<sup>90</sup> *Id.* at 613.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 608–09, 612–14.

<sup>93</sup> *Id.* at 619.

<sup>94</sup> *Id.*

uties had “discovered.”<sup>95</sup> Deputies also “discovered” matching footprints in the murder house and the hideout house supposedly made by special prison-issue tennis shoes that are not sold on the open market.<sup>96</sup> But they managed not to report a telephone call they had received from the warden of the prison from which Cooper had escaped, who said that no such special shoes were worn in her prison.<sup>97</sup> The deputies withheld from Cooper and his lawyers the fact that the prison warden had made several attempts to contact them.<sup>98</sup>

On June 9, a woman named Diana Roper called the Sheriff’s Department to tell them that her boyfriend, Lee Furrow, had come home in the early hours of the night between June 4 and 5.<sup>99</sup> He arrived in an unfamiliar station wagon with some people who stayed in the car. He changed out of his coveralls, which he left on the floor of a closet.<sup>100</sup> He was not wearing a T-shirt that he had been wearing earlier in the day. Furrow left the house after about five minutes and did not return.<sup>101</sup>

Roper concluded that the coveralls were splattered with blood and called her father, who called the Sheriff’s Department.<sup>102</sup> Roper turned the coveralls over to the Sheriff’s Department and told the deputy that she thought Furrow was involved in the murders. Roper later provided an affidavit stating that a bloody T-shirt found beside the road leading from the Ryen house had been Furrow’s. It was an unusual Fruit of the Loom T-shirt with a breast pocket that she said Furrow had been wearing on the day of the murders.<sup>103</sup> Roper recognized the T-shirt because she had bought it for Furrow. She also stated that a bloody hatchet with a distinctive American Indian–patterned handle found beside the road matched a hatchet that was now missing from her house.<sup>104</sup>

An imprisoned acquaintance of Roper and Furrow, Kenneth Koon, later told a fellow prisoner that he had participated in the killings. According to the fellow prisoner, Koon recounted that they had

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 620.

<sup>97</sup> *See id.* (describing a sworn declaration that the assertion that the shoeprints could only come from a prison was inaccurate).

<sup>98</sup> *Id.* at 621.

<sup>99</sup> *Id.* at 587.

<sup>100</sup> *Id.* at 586.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 587.

<sup>103</sup> *See id.* at 585–86 (stating that on the date of the murder, Furrow was wearing a beige Fruit of the Loom T-shirt, matching the one recovered near the scene, that she had bought him before June 4, 1983).

<sup>104</sup> *Id.* at 586–87.

gone to the Ryen house as Aryan Brotherhood “debt collectors” and had “hit the wrong house.”<sup>105</sup>

Furrow had been released from state prison a year before the killings. He had been part of a murderous gang, but he only served a short sentence in return for testifying against the leader of the gang.<sup>106</sup> The leader was sentenced to death.<sup>107</sup> Furrow told friends that while he was part of the gang he had killed a girl, cut up her body, and thrown her body parts into the Kern River. The Sheriff’s Department never tested the blood on Furrow’s coveralls, and it never turned them over to Cooper or his lawyers. Deputies threw away the coveralls in a dumpster on the day of Cooper’s arraignment.<sup>108</sup>

Cooper has maintained his innocence from the beginning.<sup>109</sup> DNA testing was not available at the time of his trial. Long after his conviction—by which time DNA testing had become available—Cooper sought DNA testing of blood on the T-shirt. The DNA testing showed Cooper’s blood on the T-shirt. Cooper claimed that the only way his blood could be on the T-shirt was that it had been planted by the authorities, and that they had probably done it after he asked for DNA testing. The Sheriff’s Department had taken blood from Cooper two days after his arrest and had put it in a vial containing a preservative. Cooper claimed that the blood on the T-shirt had to have been taken from that vial. Cooper asked that the blood on the T-shirt be tested for the presence of that preservative.<sup>110</sup>

I will not delay you by recounting the way in which this testing was bungled. I will say only the following: During the testing process, the Sheriff’s Department inadvertently sent a sample of blood from the vial to one of the testing labs. The lab was startled to discover that this sample from the vial contained the DNA of two people: Cooper and one other person.<sup>111</sup> How could there be the blood of two people in that vial? I ask you to remember the trick of the teenager who takes whiskey from his parents’ bottle, and who then adds water to the bottle to bring it back up to the right level. Consider the possibility that some of Cooper’s blood was taken from the vial, and another person’s blood was added in order to bring the blood back up to the proper level.

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<sup>105</sup> *Id.* at 588–89.

<sup>106</sup> *Id.* at 585–86.

<sup>107</sup> *Allen v. Woodford*, 395 F.3d 979, 984 (9th Cir. 2005).

<sup>108</sup> *Cooper*, 565 F.3d at 588 (Fletcher, J., dissenting from denial of rehearing en banc).

<sup>109</sup> *Id.* at 581.

<sup>110</sup> *Id.* at 582–83.

<sup>111</sup> *Id.* at 599.

There is more, but you get the idea. What happened is a familiar story. It is by no means the usual story, but it happens often enough to be familiar. The police are under heavy pressure to solve a high-profile crime. They know, or think they know, who committed the crime. And they plant evidence to help their case along. By the time Diana Roper called the Sheriff's Department a few days after the murder, eight-year-old Josh had already been persuaded that he had been wrong about the three or four white men. Josh decided much later, after Cooper had been shown on television as a suspect with his hair in an afro, that the murderer had a "puff of hair."<sup>112</sup> The bloody button and the matching footprints in the two houses had been "discovered."<sup>113</sup> The bloody coveralls were, to say the least, inconvenient. So they were thrown away.

Next, let us look at prosecutorial discretion. As many of you already know, prosecutors have absolute immunity from damage suits for activities undertaken in connection with litigation.<sup>114</sup> A prosecutor may knowingly conceal exculpatory evidence or put on perjured testimony without fear of liability in a later civil suit from someone who has been wrongly convicted as a result. I want to emphasize that the great majority of prosecutors are hardworking and ethical. But there are exceptions. When there are exceptions, they often involve the failure to hand over to the defense exculpatory evidence in violation of *Brady v. Maryland*.<sup>115</sup>

One example is *Benn v. Lambert*.<sup>116</sup> On February 10, 1988, Gary Benn shot and killed his half-brother and a friend of his half-brother.<sup>117</sup> They had been drinking.<sup>118</sup> Benn immediately called the police and asked them to come to the house.<sup>119</sup> There was no question Benn had committed a double homicide.<sup>120</sup> The question was whether it warranted the death penalty. The Pierce County prosecutor's office (that's Tacoma, Washington, where I spent part of my growing-up years) decided to seek the death penalty. What made Benn death-eligible under Washington law was that—at least in the prosecutor's view—Benn had killed the men to cover up another crime. The other

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<sup>112</sup> *Id.* at 613.

<sup>113</sup> *Supra* notes 93–96 and accompanying text.

<sup>114</sup> *E.g.*, *Van de Kamp v. Goldstein*, 555 U.S. 335, 342–43 (2009).

<sup>115</sup> 373 U.S. 83 (1963).

<sup>116</sup> 283 F.3d 1040 (9th Cir. 2002).

<sup>117</sup> *Id.* at 1044.

<sup>118</sup> *See id.* at 1045 (noting that the victims had blood alcohol contents of .07 and .11 at their times of death, respectively).

<sup>119</sup> *Id.* at 1044–45.

<sup>120</sup> *Id.* at 1044.

crime, in the prosecutor's view, was arson, followed by insurance fraud.<sup>121</sup>

Benn's house trailer had burned some time before, and Benn had made an insurance claim based on the fire.<sup>122</sup> Two reports were prepared by fire marshals.<sup>123</sup> The first report tentatively concluded that the fire had been an accident.<sup>124</sup> After this report, the fire marshal and an electrical inspector conducted a second, more thorough investigation, and conclusively determined that the fire was an accident, noting that the Coleman heater in the trailer was known to have a flaw that caused fires.<sup>125</sup> A second report was prepared after the second investigation, but it was short and misleading. It did not recount the findings of the investigations; indeed, it suggested that the Coleman heater had not caused the fire.<sup>126</sup> The prosecutor gave Benn's lawyers both reports, but did not disclose the investigation's conclusion that the fire was accidental. He kept that conclusion secret.<sup>127</sup> At trial, the prosecutor used a jailhouse informant—a snitch—to provide evidence to support the arson theory.<sup>128</sup> This particular jailhouse snitch was known to the prosecutor as a drug user who had acted as a snitch in an earlier murder trial and who had lied to police on prior occasions.<sup>129</sup> The prosecutor revealed the name of the snitch only the day before trial in order to prevent the defense from investigating him.<sup>130</sup> The prosecutor told the court that he had delayed revealing his name because he was in a witness protection program. That was a lie. The snitch was not—and had never been—in a witness protection program.<sup>131</sup>

The Washington courts denied relief.<sup>132</sup> We unanimously affirmed the district court's decision to grant habeas based on the prosecutor's violation of *Brady v. Maryland*.<sup>133</sup> I remember asking at oral argument what had happened to Mr. Johnson, the prosecutor. The answer: "He has retired, your honor." In my view, the answer should have been: "He was held in criminal contempt by the state trial court, and

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<sup>121</sup> *Id.* at 1046.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1050.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* (stating that the second report was "misleading" and did not offer the "definitive conclusion" of the investigation).

<sup>127</sup> *Id.* at 1046, 1050, 1060.

<sup>128</sup> *Id.* at 1045.

<sup>129</sup> *Id.* at 1049–50, 1058.

<sup>130</sup> *See id.* at 1048.

<sup>131</sup> *Id.* at 1048–50.

<sup>132</sup> *In re Benn*, 952 P.2d 116, 122 (Wash. 1998).

<sup>133</sup> *Benn*, 283 F.3d at 1044.

he has been disbarred, your honor.” Or perhaps the answer should have been: “He is in jail, your honor.”

Next, let us look at the courts. Almost all death penalty cases are brought in state courts under state law. Federal judges are appointed for life. State court judges are generally elected. At the beginning of the republic, they were generally not elected, but rather appointed by the governors.<sup>134</sup> But during the wave of Jacksonian populism, in the 1830s and '40s, states began changing their systems in favor of popular elections.<sup>135</sup> The political vulnerability of state court judges has important consequences in death penalty cases (as does, indeed, the comparable vulnerability of elected state prosecutors). I will take as my example the Supreme Court of California.

Professor Sam Kamin has studied the behavior of the California Supreme Court in capital cases between 1976 and 1986, and then between 1986 and 1996.<sup>136</sup> The first ten-year period, from 1976 to 1986, is the immediate post-*Gregg* period, when California had a new death penalty statute.<sup>137</sup> It was also a period of fairly liberal decisions by the California Supreme Court under Chief Justice Rose Bird. During this period, the Court found constitutional error in 60% of the guilt-phase capital cases that came before it.<sup>138</sup> It held that the errors were reversible in 67% of those cases, resulting in an overall reversal rate in just over 40% of the cases.<sup>139</sup>

In 1986, there was a contested election in which corporate interests mounted a campaign against three of the liberal justices on the California Supreme Court.<sup>140</sup> They did not campaign on a platform of making the world safe for corporations and insurance companies. Rather, they campaigned on a platform of making the world safe for individual voters by getting rid of justices who refused to

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<sup>134</sup> See Matthew J. Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 9 (Matthew J. Streb ed., 2007) (pointing out that all states that entered into the Union after the colonies and until 1830 appointed state judges).

<sup>135</sup> See *id.* (noting several reasons for a shift to state-elected judiciaries, including the influence of democratic Jacksonian principles).

<sup>136</sup> Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 62 (2002).

<sup>137</sup> See *History of Capital Punishment in California*, CAL. DEPARTMENT CORRECTIONS & REHABILITATION, [http://www.cdcr.ca.gov/capital\\_punishment/history\\_of\\_capital\\_punishment.html](http://www.cdcr.ca.gov/capital_punishment/history_of_capital_punishment.html) (last visited Apr. 22, 2014).

<sup>138</sup> Kamin, *supra* note 136, at 67.

<sup>139</sup> *Id.* at 67 & n.249.

<sup>140</sup> See Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at 8 (explaining that a sizable portion of the opposition's funding came from corporate interests like agribusiness, oil and gas, real estate, and insurance); Tom Wicker, *A Naked Power Grab*, N.Y. TIMES, Sept. 14, 1986, at E25 (citing oil and agriculture interest groups as big contributors to the anti-Bird court campaign).



impose the death penalty.<sup>141</sup> All three justices were defeated—Chief Justice Rose Bird, and Associate Justices Cruz Reynoso and Joseph Grodin.<sup>142</sup>

The new California Supreme Court, now under Chief Justice Malcolm Lucas, behaved differently. In the second ten-year period, between 1986 and 1996, the court found constitutional error in the guilt phase at about the same rate—55% of the cases (compared to 60% under the earlier court).<sup>143</sup> Now, however, almost all the errors were found to be harmless. The errors were nonharmless in not quite 7% of the cases (compared to 67% under the earlier court).<sup>144</sup> Now the overall reversal rate was 3.8%,<sup>145</sup> compared with a reversal rate of just over 40% under the earlier court.<sup>146</sup>

*Morris v. Woodford*<sup>147</sup> is an example of the behavior of the post-1986 California Supreme Court. To be fair, it is a somewhat extreme example, but it is an example nonetheless. During the penalty phase of the trial in *Morris*, the lawyers referred several times to the jury's choice as being between death and life in prison *without* the possibility of parole. That is the law in California. But for reasons that are unclear, the written jury instruction did not say that. The written instruction told the jury that the choice was between death and life in prison *with* the possibility of parole.<sup>148</sup> Part way through their deliberations, the jurors sent a note to the judge, stating that they were not unanimous and asking him to “please explain” the instruction.<sup>149</sup> The judge was not aware of the error in the typed instruction. He simply

<sup>141</sup> See, e.g., Clifford, *supra* note 140 (summarizing Justice Bird's campaign strategy during the repudiation election); Philip Hager, *Grodin Says He Was 'Caught' in Deukmejian's Anti-Bird Tide*, L.A. TIMES, Nov. 13, 1986, at A3 (claiming Justices Grodin and Reynoso lost the retention election because of opposition directed toward Justice Bird); Gary K. Hart, *Honor the People, Protect the Court: The Case for One 12-Year Term, with State Senate Approval*, L.A. TIMES, Nov. 12, 1986, at B5 (identifying implementation of the death penalty as the largest political issue during the 1986 retention election); Wicker, *supra* note 140 (claiming the death penalty was a pretextual motive for the anti-Bird campaign, which was actually motivated by corporate interests).

<sup>142</sup> Clifford, *supra* note 140.

<sup>143</sup> Kamin, *supra* note 136, at 66 fig.1, 67.

<sup>144</sup> *Id.* at 67 n.249, 68 n.251.

<sup>145</sup> See also *id.* at 70 n.255 (explaining that “[t]he Lucas court found penalty [phase] error to be reversible only 15% of the time,” with this number obtained by dividing the rate of nonharmless error (0.11) by the rate of constitutional error (0.74)).

<sup>146</sup> See also *id.* at 69 n.252 (explaining that in penalty phase cases, “[t]he Bird court reversed 97% of the cases in which it found constitutional error,” a rate that is obtained by dividing the rate of nonharmless error (0.90) by the rate of constitutional error (0.925)).

<sup>147</sup> 273 F.3d 826 (9th Cir. 2001); see also *People v. Morris*, 807 P.2d 949 (Cal. 1991) (refusing to find reversible error in capital murder case and affirming the defendant's death sentence).

<sup>148</sup> *Morris v. Woodford*, 273 F.3d at 837.

<sup>149</sup> *Id.*

told the jurors that the instruction was self-explanatory and urged them to return a verdict.<sup>150</sup> The jury then returned a verdict of death.<sup>151</sup>

The California Supreme Court held that the mistake in the written instruction was constitutional error, but that it was harmless.<sup>152</sup> If there is one thing more than any other on the minds of jurors in a capital case, it is whether the killer will ever be freed so he can kill again. Yet the Court said that the error was harmless. I do not think I need to say any more about the influence of the voters on the California Supreme Court.

The vulnerability of the state courts to political pressures in capital cases is partially counteracted by the availability of federal habeas corpus. The high-water mark of availability of federal habeas for state prisoners was *Fay v. Noia* in 1963.<sup>153</sup> After *Fay*—beginning in earnest in the mid-1970s—as a matter of judge-made law (or judicial activism if you like), the increasingly conservative Supreme Court made habeas corpus more difficult to obtain.<sup>154</sup> This culminated in the adoption of the Antiterrorism and Effective Death Penalty Act of 1996, often referred to by its acronym, AEDPA.<sup>155</sup> The purpose, and effect, of AEDPA was to codify—and then some—the restrictions on federal habeas corpus that the Supreme Court had imposed as it retreated from *Fay*.

There are many unfortunate aspects of AEDPA. I will describe only two. First, AEDPA requires federal courts to give extraordinary deference to state courts in considering habeas petitions. It is not enough for us to find that a state court has made a mistake of law or fact. In the case of a mistake of law, it is not enough that the state court wrongly applied a Supreme Court decision. In order to grant

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<sup>150</sup> *Id.* at 838.

<sup>151</sup> *Id.*

<sup>152</sup> *People v. Morris*, 807 P.2d at 998.

<sup>153</sup> *See* 372 U.S. 391, 398–99 (1963) (holding that federal courts can grant habeas relief though the petitioner had procedurally defaulted his state remedies).

<sup>154</sup> *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 752–55 (1991) (holding that ignorance or inadvertence of appellate post-conviction counsel does not constitute “cause” sufficient to excuse a procedural default); *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (holding that a federal district court must dismiss a habeas petition when it includes both exhausted and unexhausted claims); *Wainwright v. Sykes*, 433 U.S. 72, 89–91 (1977) (holding that when a federal habeas petitioner raises a claim that he had procedurally defaulted in state proceedings, the federal habeas court can only hear the claim if the petitioner can show “cause” for and “actual prejudice” from the default); *Stone v. Powell*, 428 U.S. 465, 494 (1976) (holding that a federal habeas petitioner cannot be granted relief “on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial”).

<sup>155</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2254 (2012)).

habeas, we need to find that the state court unreasonably (not merely incorrectly) applied a clear rule established by a decision by the United States Supreme Court.<sup>156</sup> It is not enough that the state court unreasonably applied a clear rule of the federal circuit courts. We can grant habeas only if the state court was unreasonably wrong in applying a clear rule of the Supreme Court.

Second, in 2011, in *Cullen v. Pinholster*,<sup>157</sup> the Supreme Court construed AEDPA to say that a federal habeas court can look only at the record that was before the state courts when they made their decisions.<sup>158</sup> We cannot look at evidence that was discovered after federal habeas was filed. In my experience, *Pinholster* is most frequently applied to *Brady*<sup>159</sup> cases—where the prosecutor has concealed exculpatory evidence—and to ineffective assistance of counsel cases under *Strickland v. Washington*.<sup>160</sup> *Pinholster* is a catastrophe for capital cases, where *Brady* claims and ineffective assistance claims are two of the most frequent and most important claims. Evidence to support such claims is almost never available in the trial record. And state budgets for post-trial investigators who may be able to unearth evidence for state court habeas—even in capital cases—are stingy.<sup>161</sup> Only when a federal habeas petition in a capital case is filed is there finally enough money to do serious investigations.<sup>162</sup> But the Court in *Pinholster* has told us that we cannot consider the evidence discovered during federal habeas proceedings. The wrongheadedness of the Court may be most easily conveyed by noting that Justice Sotomayor, a liberal, and Justice Alito, a conservative, agreed in separate opinions that we should be able to consider evidence discovered during federal habeas.<sup>163</sup> What do these two Justices have in common? They are both

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<sup>156</sup> 28 U.S.C. § 2254(d)(1).

<sup>157</sup> 131 S. Ct. 1388 (2011).

<sup>158</sup> *Id.* at 1398.

<sup>159</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>160</sup> See 466 U.S. 668, 687–94 (1984) (establishing a two-part test for obtaining habeas relief due to ineffective assistance of counsel).

<sup>161</sup> See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1846–48 (1994) (describing a study of twenty capital cases in Philadelphia in 1991 and 1992, in which the court paid for investigators in only eight of the twenty cases, spending an average of \$605 in each of these eight cases, and an Alabama capital case where the attorney was granted only \$500 for expert and investigative expenses); Richard J. Wilson & Robert L. Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 335 (1989) (providing a chart of attorney's fees in state post-conviction capital cases).

<sup>162</sup> See 7 U.S. COURTS, GUIDE TO JUDICIARY POLICY § 640 (2013) (providing guidelines for the authorization of funding for investigative services associated with capital habeas representation).

<sup>163</sup> See *Pinholster*, 131 S. Ct. at 1413–38 (Sotomayor, J., dissenting) (dissenting from the Court's holding that AEDPA does not allow for admission of new evidence in federal

former prosecutors.<sup>164</sup> They are the only Justices who really know, from their own practical experience, how the criminal justice system works.

I could give you many figures to illustrate the practical effect of AEDPA, but I will confine myself to one comparison. AEDPA became the law in 1996. Between 1973 and 1995, federal courts in capital cases granted some form of relief on habeas—usually only from the penalty—in 40% of the cases.<sup>165</sup> Between 2000 and 2002, after the effect of AEDPA had been largely felt (but still before *Pinholster*), the success rate in capital cases had dropped from 40% to 12.4%—again, usually granting relief only from the penalty.<sup>166</sup> If you have been wondering why Kevin Cooper is still on death row, the answer is AEDPA.<sup>167</sup>

Finally, executive clemency. Fifty years ago, a clemency plea to a governor in a capital case meant something.<sup>168</sup> Governors took seriously their responsibility to decide whether death sentences should be carried out. In recent decades—with a few exceptions, notably Governor Ryan in Illinois<sup>169</sup>—clemency pleas have been a useless exercise. Governors, sensing political vulnerability in the same way state judges and state prosecutors sense their vulnerability, almost never grant clemency.<sup>170</sup>

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proceedings that petitioners were unable to develop in state court); *id.* at 1411–12 (Alito, J., concurring in part and concurring in the judgment) (agreeing “with the conclusion reached in Part I of the dissent”).

<sup>164</sup> For biographies of these two Justices, see *Biographies of Current Justices of the Supreme Court*, SUPREME CT., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 22, 2014).

<sup>165</sup> James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 37 (Columbia Law Sch., Pub. Law Research Paper No. 15, 2000), available at <http://www.ssrn.com/abstract=232712>.

<sup>166</sup> NANCY J. KING ET AL., NAT’L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 61 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

<sup>167</sup> See *Cooper v. Brown*, 510 F.3d 870, 1005 (9th Cir. 2007) (McKeown, J., concurring) (noting the constraints on the court’s review imposed by AEDPA).

<sup>168</sup> See Anthony Lewis, *He Was Their Last Resort*, N.Y. TIMES, Aug. 20, 1989, at BR7 (“As Governor of California from 1959 to 1967, Edmund G. (Pat) Brown had to decide 59 times whether to grant clemency to a state prisoner scheduled for execution. He commuted the sentences of 23 and sent 36 to the gas chamber.”).

<sup>169</sup> See Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at 1 (describing Governor Ryan’s decision to commute all Illinois death sentences, which, “[i]n one sweep, . . . spared the lives of 163 men and 4 women”).

<sup>170</sup> See Evelyn Nieves, *Granting Clemency: Being in the Wrong Place at the Right Time*, N.Y. TIMES, May 9, 1999, at 5 (“[G]ranting clemency has become an act of courage that requires an outlay of political capital few governors are willing to spend.”); see also Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J.

## III

## RACE, POVERTY, AND INNOCENCE

We have just gone up the ladder—from the police, to the prosecutors, to the courts, to the governors. At every rung, we encounter problems. There are also more general problems. I will describe two.

First, poverty and race make a big difference. It is very expensive to defend a capital case.<sup>171</sup> Good lawyers (and good investigators), with enough money to do the job right, can make a huge difference. And, as the numbers I gave you earlier demonstrate, members of racial minorities make up a disproportionate percentage of death row inmates.<sup>172</sup> The Supreme Court has recoiled from a race-based analysis of the death penalty, in part because of the consequences of such an analysis for our entire criminal justice system.<sup>173</sup> But any fair assessment of the death penalty must take into account its strikingly uneven impact on the poor and on racial minorities, particularly African Americans.<sup>174</sup>

Second, I suspect that there are more improper convictions and penalties in death cases than in more routine criminal cases. I say this in part based on my own experience over fifteen years of hearing appeals. But I also say it based on studies that have shown extremely high error rates in capital cases.<sup>175</sup> Death cases are by definition high-profile cases. Police are under pressure to arrest someone. Prosecutors are under pressure to obtain convictions. And state court judges are

CRIM. L. 37, 45–48 (2009) (explaining the history of grants of clemency in California, and showing that, through 2009, clemency was last granted in 1967).

<sup>171</sup> Cf. Alarcón & Mitchell, *supra* note 59, at S65–94 (finding that capital punishment in California costs an extra four billion dollars to administer).

<sup>172</sup> *Supra* note 35 and accompanying text.

<sup>173</sup> See, for example, *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987), in which a study concluded, after taking nonracial variables into account, that defendants charged with killing white victims were 4.3 times more likely to be sentenced to death than defendants charged with killing black victims. After noting that “McCleskey challenges decisions at the heart of the State’s criminal justice system,” *id.* at 297, the Court held that the district court properly rejected an equal protection challenge to the death penalty, despite the disproportionate racial impact found by the study, *id.* at 298–99.

<sup>174</sup> See, e.g., Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434–35 (1995) (describing studies showing “stark” racial disparities in the use of the death penalty); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 808, 838 (2008) (discussing the pivotal role that race plays in capital punishment cases and claiming that “[d]ecades of research on race and capital punishment . . . demonstrate that blind justice is a mirage”).

<sup>175</sup> See, e.g., Liebman et al., *supra* note 165, at 4–5 (reporting that, over a twenty-three-year study period, two out of every three capital punishment cases have been marked by serious error); see also Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFFALO L. REV. 469, 472–73 (1996) (arguing that the special nature of capital cases increases the likelihood that there will be error).

under pressure not to find even obvious misconduct or trial court errors harmful. Since 1973, over 140 death row inmates in the United States have been released based on later-revealed evidence of their innocence.<sup>176</sup>

We have already executed people who are actually innocent. We will continue to do so in the future. Many of you may have read a story in the *New Yorker* a few years ago about the execution in Texas of Cameron Willingham, who was convicted of killing his children in an arson fire at the family home.<sup>177</sup> It turns out that he was almost certainly innocent.<sup>178</sup> You may also have read a recent obituary in the *New York Times* recounting the life of Donald Cabana, a former warden of Mississippi State Penitentiary. The *Times* reported that after his retirement, Cabana testified about executions before the Judiciary Committee of the Minnesota House of Representatives.<sup>179</sup> Cabana testified:

[I]n the end, . . . my experience with condemned prisoners was always that once strapped to the chair, they came around somehow with something, if only something simple as ‘Tell the victim’s family I’m sorry,’ ‘Tell my mother I’m sorry,’ . . . . But not so with this young man. When I performed my ritualistic function of asking if he had a final public statement, this young man looked me in the eye with tears streaming down his cheeks, and he said: ‘Warden, you’re about to become a murderer. I did not kill that policeman, and dear God, I can’t make anyone believe me.’ . . . [O]f course, the average person who reads that, the average legislator probably who reads that, says, ‘Well, what did you expect him to say?’ I must tell you that four days ago I had a rather gut-wrenching meeting with a former high official who is now convinced the young man was, in fact, telling the truth. And I must say to you that however we do it, in name of justice, in the name of law and order, in the name of retribution you . . . do not have the right to ask me, or any prison official, to bloody my hands with an innocent person’s blood.<sup>180</sup>

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<sup>176</sup> *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Feb. 28, 2014).

<sup>177</sup> David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 42, 48; see also John Schwartz, *Evidence of Concealed Jailhouse Deal Raises Questions on an Old Execution*, N.Y. TIMES, Feb. 28, 2014, at A17 (explaining that a jailhouse informant who testified at trial received favorable treatment not revealed to defense for use as impeachment material).

<sup>178</sup> See Grann, *supra* note 177, at 63 (citing the Texas Forensic Commission’s “scathing report” on the investigation and expert testimony in Willingham’s case, and concluding that the investigation violated scientific standards of the time period).

<sup>179</sup> Bruce Weber, *Donald Cabana, 67, Warden Who Loathed Death Penalty*, N.Y. TIMES, Oct. 13, 2013, at A22.

<sup>180</sup> *Id.*

These men were entirely innocent. They did not commit the crimes for which they were executed. But there is also the subtler and more pervasive problem of “innocence of the death penalty.” The problem in such cases is that the defendant did in fact kill someone, but in circumstances that do not warrant the death penalty. One example is Gary Benn, the man who shot his half-brother and his half-brother’s friend, but who almost certainly did not commit arson or insurance fraud.<sup>181</sup> Jeffrey Landrigan, who was executed by Arizona in 2010, is another example.<sup>182</sup> He had brain damage and had been severely abused as a child. Largely due to the incompetence of his trial counsel, his brain damage and abuse had not been revealed during the penalty phase of the trial.<sup>183</sup> In Arizona when Landrigan was sentenced, the judge acted alone in determining the sentence. Because Landrigan’s lawyer put forth little mitigating evidence, the judge sentenced him to death. When the mitigating evidence later came out during federal habeas corpus proceedings, the state trial judge reassessed. That state judge stated publicly and repeatedly that, had she known at sentencing what she came to know later, she never would have sentenced Landrigan to death.<sup>184</sup> But she no longer had jurisdiction, and Landrigan was executed.<sup>185</sup>

#### IV OUR BROKEN SYSTEM

What if the death penalty could be administered fairly, evenhandedly, and predictably, sorting out reliably and uniformly those who deserve to die from those who do not? This is not an important question for those who are categorically against the death penalty, irrespective of the manner in which it is administered. But for many people, it is an important question. However, I am afraid, it cannot be a *real* question. I suppose it is theoretically possible that our death penalty system could be administered with sufficient consistency and evenhandedness to satisfy the standard of fairness articulated by the

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<sup>181</sup> *Supra* notes 116–32 and accompanying text.

<sup>182</sup> John Schwartz, *Murderer Executed in Arizona*, N.Y. TIMES, Oct. 28, 2010, at A16; see also *Brewer v. Landrigan*, 131 S. Ct. 445, 445 (2010) (vacating order by the district court granting a temporary restraining order against Landrigan’s execution).

<sup>183</sup> See Editorial, *No Justification*, N.Y. TIMES, Oct. 28, 2010, at A30 (recounting Landrigan’s execution and citing the efforts of the Honorable Cheryl Hendrix (the judge who condemned Landrigan to death) to have his sentence commuted to life); see also Chris McGreal, *Arizona Execution Goes Ahead After Stay Lifted*, GUARDIAN (Oct. 27, 2010), <http://www.theguardian.com/world/2010/oct/27/arizona-execution-stay-lifted> (noting Judge Hendrix’s pleas to a clemency board on behalf of Landrigan to reduce his sentence).

<sup>184</sup> Editorial, *supra* note 183.

<sup>185</sup> *Id.*

Court in *Furman*. But those of us who are part of the system know, from unhappy experience, that the problems I have just described are ineradicable in the real world in which we live.

In 1972, Justice Marshall wrote in his separate opinion in *Furman v. Georgia* that if the average citizen knew all about capital punishment, that citizen would find it “shocking to his conscience and sense of justice,” and he concluded on that basis that the death penalty is flatly unconstitutional.<sup>186</sup>

Three Justices eventually changed their minds. In 1991, in an interview with his biographer and former law clerk, then-retired Justice Powell said he had come to the conclusion that the death penalty should be abolished.<sup>187</sup> In 1994, Justice Blackmun, nearing the end of his career, wrote in *Callins v. Collins*:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved . . . , I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.<sup>188</sup>

In 2008, Justice Stevens, himself then nearing the end of his career on the Court, similarly renounced the death penalty in *Baze v. Rees*.<sup>189</sup>

Justices Powell, Blackmun, and Stevens had initially favored the death penalty. Justices Powell and Blackmun had dissented in *Furman* and concurred in *Gregg*. Justice Stevens, then a newly appointed Justice replacing Justice Douglas, had concurred in *Gregg*. But by 1991 in Powell’s case, by 1994 in Blackmun’s, and by 2008 in Stevens’s, they had seen enough.

I believe that if Justice Marshall’s “average citizen” knew what Justice Powell, Justice Blackmun, and Justice Stevens came to know, and what I think I know, only a minority of our population would favor the death penalty. But it is unrealistic to hope that the average citizen should come easily and quickly to this level of knowledge. In saying this, I am not criticizing. People are busy with other things.

<sup>186</sup> 408 U.S. 238, 369 (1972) (Marshall, J., concurring).

<sup>187</sup> MANDERY, *supra* note 16, at 437–38.

<sup>188</sup> 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

<sup>189</sup> See 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (“I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’” (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring))).



They live their lives, do their jobs, and educate their children. They have neither the time nor the incentive to learn about the death penalty as it is actually administered.

And yet, sooner or later, probably not in my lifetime, but perhaps in some of yours, I think that we will abolish the death penalty in this country. Perhaps, we, as a country, will eventually have seen enough.