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Stephen Rohde*

INTRODUCTION

My earliest awareness of the death penalty came in 1953, when I was nine years old living in Port Washington, a quiet suburb of New York City, with my parents and my older sister, Elaine. There was talk around the house and on TV about Julius and Ethel Rosenberg, who were accused of being spies.[1]

As a kid, I didn't really understand what was going on, but I've since learned that the Rosenbergs were accused of heading an espionage ring that allegedly passed top-secret information concerning the atomic bomb to the Soviet Union.[2] The Rosenbergs and their allies, including Albert Einstein, Pablo Picasso, and Jean-Paul Sartre, vigorously protested their innocence, but they were convicted at a March 1951 trial and sentenced to death.[3] During two years of legal appeals, the couple became the subject of national

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1. *See June 19, 1953: Julius and Ethel Rosenberg Executed*, HISTORY (June 19, 2009), http://www.history.com/this-day-in-history/julius-and-ethel-rosenberg-executed/print.

2. *Id.*

3. ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 8 (Kelly Grondin, 1999).

and international debate.[4] No less an international figure than Pope Pius XII urged President Dwight D. Eisenhower to spare their lives, but the President declined to invoke executive clemency.[5] Many people believe that the Rosenbergs were the victims of anticommunist hysteria in the United States.[6]

On June 19, 1953, Julius Rosenberg was executed first.[7] Ethel was next, but after receiving three electric shocks, she was still alive.[8] She only died after receiving two more jolts.[9] A reporter who witnessed the execution said that smoke rose from her head. Julius and Ethel both refused to admit any wrongdoing and proclaimed their innocence right up to the time of their deaths.[10]

What I remember most was feeling very scared that the government itself was going to deliberately kill these people, and it did in fact kill them. I didn't realize the government could do such a thing. I was also vaguely aware that the Rosenbergs had two sons around my age, Michael, ten, and Robert, six,[11] who lost both their parents in one day.

Facing execution, Julius said,

> Th[e] death sentence is not surprising. It had to be. There had to be a Rosenberg Case. There had to be a Rosenbeg Case because there had to be an intensification of the hysteria in America to make the Korean War acceptable to the American people. There had to be a hysteria and a fear sent through America in order to get increased war budgets. And there had to be a dagger thrust in the heart of the left to tell them that you are no longer gonna give five years for a Smith Act prosecution or one year for contempt of court, but we're gonna kill ya![12]

Years later I met Robert. We were on a panel together at an historic death penalty conference at Northwestern Law School. He was an outspoken opponent of capital punishment and had dedicated his life to human rights and drawing attention to the injustices suffered by his parents. Over the years, new evidence came to light shedding serious doubt on Ethel's guilt but

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4. HISTORY, *supra* note 1.

5. Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 413 (2007).

6. HISTORY, *supra* note 1.

7. *Id.*

8. Henry Lee, *Julius and Ethel Rosenburg are Executed in 1953*, N.Y. DAILY NEWS.COM (June 18, 2015, 12:00 PM), http://www.nydailynews.com/news/crime/rosenbergs-executed-1951-article-1.2259786.

9. *Id.*

10. HISTORY, *supra* note 1.

11. Sam Roberts, *Father Was a Spy, Sons Conclude with Regret*, N.Y. TIMES, (Sept.16, 2008), http://www.nytimes.com/2008/09/17/nyregion/17rosenbergs.html.

12. ROBERT MEEROPOL & MICHAEL MEEROPOL, WE ARE YOUR SONS: THE LEGACY OF JULIUS AND ETHEL ROSENBURG 326 (Houghton Mifflin Co. Boston 1975).

largely confirming that Julius had been spying for the Soviet Union, although the importance of the information he passed along remains an open question.[13] David Greenglass, Ethel's brother, recanted his testimony which had incriminated her, admitting that he lied to protect his wife, who may well have been more culpable that Ethel.[14] He said the prosecutors had encouraged him to lie so they could up the ante by seeking the death penalty against Ethel and thereby put pressure on Julius to confess and name names.[15] Had the extent of prosecutorial misconduct come to light while the case was pending, their convictions might have been overturned and it's doubtful the courts would have allowed the executions to go forward.

The Rosenberg case has haunted me all my life. It was definitely an impetus to become actively involved as a lawyer and an activist in the abolition movement. The Rosenbergs began a long list of people whose death sentences and executions have intensified my opposition to capital punishment. That the Rosenbergs were executed before their lawyers could fully investigate the government's misconduct exemplifies the unique and pernicious aspect of this final, irreversible form of punishment. The subsequent discovery of evidence establishing innocence or reversible error is of no use to a man or woman we've already killed.

The more I studied the Rosenberg case and the many that followed, the more I realized that the death penalty had no place in a constitutional democracy. Given human error, not to mention willful misconduct by police and prosecutors, mistakes by jurors and judges alike, and ineffective assistance of overworked counsel who are outspent by the government, coupled with racial and geographical disparities, we simply cannot entrust the government with the awesome power to take a life. I decided to work as hard as I could to help end state killing.

Most recently, I joined with hundreds of thousands of activists, volunteers, donors, elected officials, religious leaders, and voters in California seeking to repeal the death penalty by passing Proposition 62, the Justice That Works Act, which was on the November 8, 2016 ballot.[16] I was deeply disappointed that we lost. Although more than six million voters voted in favor of Proposition 62, the measure lost by 46.8% to 53.2%.[17] After a few

13. SAM ROBERTS, THE BROTHER 507, 509 (Simon & Schuster 2014) (2001).

14. *Id.* at 489-90.

15. *Id.* at 438.

16. Liliana Segura, *No Closure*, THE INTERCEPT (Nov. 1, 2016, 11:58 AM) https://theintercept.com/2016/11/01/end-the-death-penalty-or-speed-it-up-california-faces-opposing-ballot-initiatives/

17. SEC'Y OF STATE ALEX PADILLA, STATEMENT OF VOTE 12 (2016), http://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf

days of depression, I pulled myself together and decided to redouble my efforts to end state killing, buoyed by the example of so many movements for justice that have faced serious setbacks, fought on and eventually prevailed. I am sustained by those who have expressed hope in the face of daunting odds.

Dr. Martin Luther King, Jr., said, "We must accept finite disappointment, but we must never lose infinite hope."[18] All who are devoted to justice understand what Dr. King meant when he said, "Our lives begin to end the day we become silent about things that matter."[19] Or when Archbishop Desmond Tutu said, "If you are neutral in situations of injustice, you have chosen the side of the oppressor."[20] Or Albert Einstein when he said, "The world is a dangerous place to live; not because of the people who are evil, but because of the people who don't do anything about it."[21]

DEATH PENALTY FOCUS

In 1988, I read that former Governor Pat Brown and other opponents of capital punishment were forming a new organization, Death Penalty Focus of California ("DPF"), to abolish the death penalty in California. It would later drop the "California" signaling the desire to stake out its role in the national abolition movement. Shortly after it was founded, I joined the Board of DPF, on which I have served ever since, currently as Chair.

For the eight years that Brown served as Governor of California (1959-1967) he signed death warrants that led to the executions of thirty-six individuals, but he also granted clemency commuting the sentences of twenty-three inmates to life in prison.[22] On the eve of the execution of Caryl Chessman in 1960, his son Jerry Brown begged his father to grant a stay of execution and to ask the state legislature to impose a moratorium on capital punishment.[23] Governor Brown went further and urged the Legislature to

18. Keith Walker & Michael Atkinson, *Warranted Hope*, *in* POLITICAL AND CIVIC LEADERSHIP 181, 181 (Richard A. Couto ed., 2010).

19. JEFFREY KASSING, DISSENT IN ORGANIZATIONS 116 (2011).

20. NFOR N. NFOR, URGENCY OF A NEW DAWN: PRISON THOUGHTS AND REFLECTIONS 19 (2016).

21. WESS STAFFORD, TOO SMALL TO IGNORE 244 (2007).

22. EDMUND G. BROWN & DICK ADLER, PUBLIC JUSTICE PRIVATE MERCY xii-xiii (1989).

23. *Id.* at 20.

abolish the death penalty.[24] In words as passionate, powerful, true, and damning today as they were fifty-seven years ago, Brown said:

> I believe the death penalty constitutes an affront to human dignity and brutalizes and degrades society. . . . I have reached this momentous resolution after sixteen years of careful, intimate and personal experience with the application of the death penalty in this state. . . .
>
> [T]he naked, simple fact is that the death penalty has been a gross failure. Beyond its horror and incivility, it has neither protected the innocent nor deterred the wicked. The recurrent spectacle of publicly sanctioned killing has cheapened human life and dignity without the redeeming grace which comes from justice meted out swiftly, evenly, humanely.
>
> The death penalty is invoked too randomly, too irregularly, too unpredictably and too tardily to be defended as an effective example warning away wrongdoers. . . .
>
> I believe the entire history of our civilization is a struggle to bring about a greater measure of humanity, compassion and dignity among us. I believe those qualities will be the greater when the action proposed here is achieved—not just for the wretches whose execution is changed to life imprisonment, but for each of us.[25]

Tragically, the Legislature did not heed Brown's visionary words and California perpetuated the barbarism of state killing for another half century.

It was through Death Penalty Focus that I learned the history and shocking truth about capital punishment.

In *Gregg v. Georgia*, the U.S. Supreme Court lifted the de facto moratorium on capital punishment[26] after having called the death penalty arbitrary, capricious, and discriminatory just four years earlier in *Furman v. Georgia*.[27] Associate Justices William J. Brennan, Jr. and Thurgood Marshall dissented in *Gregg*, arguing that capital punishment was contrary to society's evolving standards of decency, and therefore inherently incompatible with the Eighth Amendment's prohibition on "cruel and unusual" punishment.[28]

Internationally, the United States is an outlier—some would say outlaw—when it comes to the death penalty. One hundred and forty

24. *Id.* at 42.

25. *Id.* at 43, 46.

26. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976).

27. *See* Furman v. Georgia, 408 U.S. 238, 241-43 (1972) (per curiam) (Douglas, J., concurring).

28. *Gregg*, 428 U.S. at 227, 229 (Brennan, J., dissenting).

countries have abolished capital punishment, in law or in practice.[29] Indeed, within the United States itself, eighteen states have abolished it and four more have imposed a moratorium.[30] The top five countries which continue state killing are China, Iran, Pakistan, Saudi Arabia, and the United States of America.[31] You are judged by the company you keep.

A survey by the *New York Times* found that states without the death penalty have lower homicide rates than states with the death penalty.[32] The *Times* reported that ten of the twelve states without the death penalty had homicide rates below the national average, and half of the states with the death penalty have higher homicide rates.[33] During the prior 20 years, the homicide rate in states with the death penalty had been 48%, which was 101% higher than in states without the death penalty.[34]

Since the death penalty was reinstated in 1978, California has spent over $4 billion sending 1,046 men and women to death row, and has executed 13 of them.[35] That means it has cost the people of California $308 million per execution.[36] A sentence of death costs eighteen times more than life in prison without possibility of parole ("LWOP").[37] California's independent, non-partisan Legislative Analyst officially estimates it would save taxpayers $150 million annually if the death penalty were replaced.[38]

Research by the American Bar Association and the American Civil Liberties Union has revealed that defendants' odds of receiving a death sentence depend more on their race, the quality of their legal representation, and where they go to trial than on the specific evidence of the case.[39] Texas

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29. *Death Penalty 2015: Facts and Figures*, AMNESTY INT'L (Apr. 6, 2016, 6:05 PM), https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures.

30. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 9, 2016), http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

31. AMNESTY INT'L, *supra* note 29.

32. Raymond Bonner & Ford Fessenden, *States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A22.

33. *Id.*

34. *Id.*

35. J. 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, 224 (2012).

36. *Id.*

37. *Id.* at 224.

38. *A Costly Failure: Why it's Time to End the Death Penalty System*, DEATH PENALTY FOCUS, http://deathpenalty.org/facts/death-penalty-is-broken-beyond-repair-costly-failure (last visited Nov. 6, 2016).

39. *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, AM. BAR ASS'N (Sept. 2006), http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf; *The Case Against the Death Penalty*, Am. C.L. UNION, https://www.aclu.org/other/case-against-death-penalty (last visited March. 20, 2017).

alone accounts for a third of all executions since 1976.[40] Add Virginia and Oklahoma and it's more than half.[41] In other words, the death penalty is just as arbitrary, capricious, and discriminatory now as it was when the Supreme Court deemed it unconstitutional in 1972.

It took Justice Harry A. Blackmun almost two decades to agree with fellow Justices Brennan and Marshall, but he was still way ahead of his time. In 1994, in *Callins v. Collins*, he wrote,

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[42]
>
> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored . . . 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. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.[43]
>
> Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all.[44]

Justice Blackmun died in 1999.[45] But the power of his condemnation of the death penalty lives on. It is high time that the United States join every civilized society and puts capital punishment to rest once and for all.

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40. *See Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (Oct. 6, 2016), http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.

41. *See id.*

42. Callins v. Collins, 510 U.S. 1141, 1143-44 (1994) (Blackmun, J., dissenting) (citation omitted).

43. *Id.* at 1145.

44. *Id.* at 1159 (citation omitted).

45. *Biographical Directory of Federal Judges: Blackmun, Harry Andrew*, FED. JUDICIARY CTR., http://www.fjc.gov/servlet/nGetInfo?jid=187&cid=999&ctype=na&instate=na (last visited Oct. 13, 2016).

Death Penalty Focus has been the center of my efforts to abolish the death penalty for almost thirty years. The board members and staff of DPF have been some of the most visionary, dedicated, compassionate, and tireless people I have ever met in my social justice and civil liberties work over the years. At the outset, I was deeply inspired by the founding president of DPF, Bishop Joe Morris Doss. I will never forget how he passionately condemned capital punishment as a dark place where all the evils of society come together with such dreadful consequences: racism, prejudice, poverty, injustice, overzealous police, ambitious prosecutors, craven politicians, and more.

Joe was succeeded by Mike Farrell, the well-known actor and dedicated human rights activist, who served as President of DPF until 2015 when he took a leave of absence to become the official proponent of the Justice That Works Act, Prop 62 on the ballot in California 2016.[46] Mike became one of the most powerful voices for abolition in the nation, traveling around the country speaking out against capital punishment, meeting with the families of inmates on death row, and pleading with governors and prosecutors to spare the lives of men and woman facing execution.

In 1998, Mike and I flew to San Jose, Costa Rica to represent DPF before the Inter-American Court on Human Rights at a hearing convened to consider a petition filed by Mexico seeking to hold the United States accountable for persistently violating the Vienna Convention on Consular Relations. The Vienna Convention requires all signatory countries to affirmatively advise foreign nationals arrested within their territories that they had the right to contact their consulates to seek assistance in their defense. The record showed that the United States had consistently failed to provide this advice to foreign nationals facing execution. Mike and I both testified before this august international court emphasizing how important the court's ruling against the United States would be to supporting the movement for criminal justice back home. While only advisory without enforcement powers, we were thrilled when the court ruled in favor of Mexico and admonished the U.S. to abide by the Vienna Convention.[47] It strengthened our hand when we argued that, as implemented, the death penalty violated fundamental human rights.

Death Penalty Focus spent decades educating people about the flaws in the death penalty system, organizing a campaign calling for a moratorium on executions, and advocating in the state legislature and with the general public

46. Mike resumed his position as President of DPF after the November 2016 election.

47. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Art. 36(1)(b) and 14(3)(b) Vienna Convention on Consular Relations), Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Oct. 1, 1999).

to abolish the death penalty.[48] It proved very effective in organizing various communities, including law enforcement, murder victims' families, people of faith, and exonerees.[49] DPF was building the foundation of a movement to end state killing.

IN THE TRENCHES

Until 1994, I had put all my efforts to end the death penalty into organizing, advocacy, public speaking, and writing. I was a civil lawyer, not a criminal lawyer. I wasn't qualified to represent a defendant charged with a capital crime in a criminal trial. Hell, I wasn't qualified to represent a defendant charged with jaywalking.

But in 1994, I read an article in a legal publication by Ed Medvene, pleading with civil litigators to get involved in death penalty cases. I took note because I was acquainted with Ed and knew him to be a courageous human rights lawyer who often took on unpopular causes. Ed's article pointed out that after all direct appeals are exhausted, a death row inmate had the right to file a petition for writ of habeas corpus, first in state court and then in federal court. Habeas corpus—known as the Great Writ—had been borrowed from English law and written into the U.S. Constitution.[50] Habeas corpus guaranteed that even after a person was convicted and had lost all appeals, he or she could come back into court to introduce new evidence or show that their lawyer at the original trial had made grave mistakes, which is known as ineffective assistance of counsel, or IAC.[51]

Ed's article opened my eyes to the fact that, in addition to opposing the death penalty as an activist, I could actually use my legal skills in court to fight capital punishment. He pointed out that habeas corpus is essentially a civil, not a criminal, proceeding which begins with the filing of a petition (much like a complaint in a civil action), discovery of documents from the government and legal motions (as in a civil case), and eventually an evidentiary hearing with testimony and cross-examination (much like a civil trial). I had considerable civil experience doing all these things. I realized that I actually could use my legal training to combat the death penalty.

I took a deep breath and, following Ed's advice, I contacted the California Appellate Project to see if I could volunteer to work on a death

48. *Our Mission*, DEATH PENALTY FOCUS, http://deathpenalty.org/about-death-penalty-focus-our-mission (last visited Nov. 11, 2016).

49. *See id.*

50. Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 904, 923-24 (2012).

51. Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 427 (2011).

penalty case. Eventually, I was assigned to the case of Charlie McDowell and was introduced to his lead attorney, Andrea Asaro. I learned that Andy, as I came to know her, was a very experienced death penalty attorney in private practice in San Francisco. She was brilliant, hardworking, and tenacious. She was conversant with all aspects of death penalty law and habeas corpus proceedings. In short order, I would learn a lot from her.

Charlie McDowell had been convicted in 1984 of committing one count of murder and one count of attempted murder in Los Angeles two years earlier.[52] In 1988, his conviction was affirmed by the California Supreme Court, and his subsequent state habeas corpus petition was denied.[53] Next, he filed his federal habeas corpus petition in U.S. District Court in Los Angeles.[54] That's when Andy got involved. At about the time I was looking for a case to work on, the attorney who was assisting her left the McDowell case, and I took over what we call the "second chair."

I had a steep learning curve to familiarize myself with all aspects of the McDowell case and complex habeas corpus procedures. Andy was a great teacher, and I studied the major legal and constitutional issues she was raising on Charlie's behalf. Early on, I decided I needed to meet my client. I flew to San Francisco and met with Andy and Charlie at San Quentin Prison. It was a very disturbing experience. We went through heavy security and entered the inmate meeting room. I was surprised it was a large, open space with a bunch of tables rather than the series of glass enclosed cubicles I had expected. Inmates were sitting and chatting with family and friends. A baby was playing on a blanket on the floor with her father. One wall was lined with vending machines. I had been warned to bring a pocketful of quarters since it was a special treat for inmates to load up on candy and snacks.

A few minutes later, Charlie arrived and Andy introduced us. We sat around a table and Charlie asked me a few questions about myself. He was very pleasant and I enjoyed talking to him. He was grateful every time I made a visit to the vending machines. Eventually, we got around to his case and Andy brought him up to date on the most recent developments. It was apparent that Charlie had great respect for Andy and trusted her judgment and advice. Soon our time was up and we said goodbye. I watched Charlie walk back to the door headed to his cell, his arms full of candy and snacks.

Andy and I exited the prison and as I drove back to the airport, looking out at the clear blue Bay Area sky, I experienced a deep and selfish feeling of personal freedom and safety. Charlie and those other death row inmates

52. People v. McDowell, 279 P. 3d 547, 555, 557 (Cal. 2012).
53. *Id.* at 555.
54. *Id.*

had no freedom and, worse yet, were facing execution at the hands of the State of California. While prosecutors routinely describe these men and women as "monsters" for what they were convicted of doing at the worst moment in their lives, I had had the chance to witness the simple humanity of these inmates as I watched them engaging with their family and friends. The obscenity of the death penalty is that the state kills people to show that killing is wrong. Before anyone in California, as a juror or a voter, takes it upon themselves to condemn another inmate to death, they need to visit the meeting room at San Quentin and meet the people they are condemning to death.

Meeting Charlie redoubled my desire to save his life. I worked even harder on his case. On August 7, 1993, I joined Andy at an important half-day habeas corpus seminar at Loyola Law School taught by a prominent death penalty lawyer, David Evans. When the seminar ended, Andy greeted her close friend, Wendy Herzog, a family law attorney, with whom she was staying in Santa Monica. The three of us went out to lunch together at Junior's Deli in Westwood. Why would I remember the exact date and restaurant? Because six years to the day—August 7, 1999—Wendy and I were married. The death penalty brought us together, and ending it continues to be an important goal for both of us.

In July, 1994, the evidentiary hearing on McDowell's federal habeas corpus petition was held before U.S. District Judge Mariana Pfaelzer.[55] I had been assigned the issue of Ineffective Assistance of Counsel. We were arguing that Charlie's trial lawyer had made serious mistakes that violated Charlie's right to counsel under the Sixth Amendment to the U.S. Constitution. In particular, we claimed that the manner in which he had handled an expert witness for the defense was seriously flawed and deprived Charlie of his right to a fair trial and due process.

In many capital cases where IAC is raised, the trial lawyer does not cooperate with the defense. After all, they are being accused of making serious mistakes which have led to their client's conviction and sentence of death. But in Charlie's case, the trial lawyer "fell on his sword." On reflection, he realized that he had made mistakes. To prepare, I spent weeks going over his files and his trial notes. I spent more time preparing for this hearing than I could recall preparing for any hearing in my civil cases. Those cases usually involved money or contractual rights. But in the McDowell case, a man's life was at stake. This is why I have such respect for the public defenders and private lawyers who do death penalty trials and appeals full

55. McDowell v. Vasquez, Docket No. 2:90-cv-04009, *Evidentiary Hearing: July 14, 1994* (C.D. Cal. Jul 30, 1990).

time. All of those I have met, and with rare exception those I have read about, are conscientious, hard-working lawyers who do their best to defend their clients, hamstrung by limited resources and overwhelming caseloads.

At the hearing, I examined Charlie's trial lawyer intensely, essentially treating him as a hostile witness in order to bring out evidence to help establish IAC. Outwardly, I think I displayed a lot of confidence as I built a case showing the serious mistakes he had made. Inwardly, I was much more conflicted. No lawyer is perfect. We're all human. We all make mistakes. But that's one of the most serious problems with the death penalty. Sometimes defense lawyers make mistakes. So do the police. So do prosecutors, and witnesses, and judges and jurors. It happens in civil cases and in criminal cases. But death penalty cases are different. Every participant in a death penalty case has the life of a human being in their hands. If any of them make a mistake it could lead to the execution of an innocent person. That is too great a burden to place on any person. And it's one of the prime reasons we should abolish the death penalty.

In November, 1997, the Ninth Circuit Court of Appeals reversed McDowell's death sentence—not on the basis of IAC, but because the trial court judge failed to clear up the jury's confusion over what constituted mitigating circumstances in violation of the Fourteenth Amendment guarantee of due process.[56] In a 7-4 vote, the federal en banc panel focused on a note sent out by the jury during the penalty phase of the trial, which disclosed that eleven of the jurors did not consider "daily extreme mental and physical abuse" by Charlie's father and several other similar factors to be mitigating circumstances, which would justify a punishment other than death.[57] Judge Stephen Trott, author of the majority opinion, wrote that "everyone in the courtroom understood that the defendant's mitigating evidence must be considered by the jury; everyone, that is, *except eleven of the jurors*—the most important participants at that stage of the proceedings."[58] When the trial judge failed to "give the jury the required guidance by a lucid statement of the relevant legal criteria," the jury returned a death verdict.[59] The Ninth Circuit ordered a new trial in state court on the penalty phase.[60]

I was thrilled with the decision. We had saved Charlie's life—at least for now. In early 1999, the prosecutors went ahead with a retrial of the

56. McDowell v. Calderon, 130 F.3d 833, 842 (9th Cir. 1997).
57. *Id.* at 835.
58. *Id.* (emphasis in original).
59. *Id.* at 838.
60. *Id.* at 835.

penalty phase, but there was a hung jury.[61] It would require a unanimous jury to sentence Charlie to death.[62] But at least some of the jurors were not prepared to vote for death. Surprisingly, the prosecutors refused to leave it there, letting Charlie spend the rest of his life in prison.[63] Instead, they went ahead with a second retrial of the penalty phase.[64] But this time, the trial judge excluded Dr. Arlene Andrews, a social worker, who had testified at the two previous trials about how the conditions of Charlie's abusive upbringing and the subsequent failures of public institutions to provide him with the medical and psychological diagnosis and treatment had impaired his judgment and should be considered by the jury in mitigation of a death sentence.[65] Without the benefit of Dr. Andrews's expert testimony, the third jury voted unanimously for death.[66]

In June 2012, the California Supreme Court affirmed Charlie's death sentence.[67] That ended his direct appeal. In September 2012, a petition for habeas corpus was filed on his behalf in state court.[68] It was a "shell" petition simply to meet certain time limits,[69] but it did not set forth all of his legal and constitutional claims. That would await the appointment of a specially trained habeas corpus attorney who could examine the entire record to identify each and every claim which Charlie was entitled to raise. It has now been over four years and the California Supreme Court has yet to appoint a habeas corpus attorney for Charlie. He's not alone. Nearly 350 inmates on California's death row are without lawyers to represent them in their state habeas corpus proceedings.[70] This is a little known scandal which is yet one more flaw in our dysfunctional death penalty system.

IGNORING THE POWER OF REDEMPTION AND REHABILITATION

In 2005, I ventured into my second death penalty case. I joined the team of lawyers who were seeking clemency for Stanley Tookie Williams III. In

61. People v. McDowell, 279 P. 3d 547, 555 (Cal. 2012).

62. *See* CAL. PENAL CODE § 190.4(b) (West 2014).

63. *See McDowell*, 279 P.3d at 555.

64. *Id.*

65. *Id*. at 570.

66. *Id*. at 555.

67. *Id*. at 584.

68. *See Appellate Courts Case Information, McDowell (Charles) on H.C., No. S205238*, CAL. CTS., http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2024545&doc_no=S205238 (last visited Mar. 20, 2017).

69. *See generally In re* Morgan, 50 Cal 4th 932, 941 (Cal. 2010) (defining a shell petition as a petition filed solely to avoid the statute of limitations from running out).

70. *See Ninth Circuit Hears Arguments on Constitutionality of California Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 31, 2015), http://www.deathpenaltyinfo.org/node/6234.

1981, Williams, a founder of the notorious West Side Crips gang, had been convicted of multiple murders.[71] He steadfastly maintained his innocence of these crimes although he admitted to having led a wretched life.[72] In fact, while in prison, he began counseling young people not to join gangs and he co-wrote a series of anti-gang, anti-violence books for elementary schoolchildren entitled *Tookie Speaks Out*.[73]

His appeals had raised serious issues regarding the exclusion of exculpatory evidence that would have tended to prove his innocence, the systematic removal of three black jurors, misuse of jailhouse and government informants, the use of bogus expert witnesses who relied on junk science, and—perhaps worst of all—prosecutorial misconduct based, among other things, on the prosecutor in closing argument shamefully calling Williams, an African American, "a Bengal tiger in captivity in a zoo."[74]

Despite these crucial issues that put his conviction and death sentence in serious doubt, Williams lost all his appeals, and by 2005, he was facing execution.[75] Williams's last resort was to seek gubernatorial clemency from Governor Arnold Schwarzenegger. Having publicly spoken out on the death penalty, I was contacted by his supporters and asked to join his clemency team, which was led by Jonathan Harris, Esq., an attorney with the New York law firm of Curtis, Mallet-Prevost, Colt, & Mosie LLP. The petition did not attempt to retry Williams's guilt or innocence. We felt if we relied on that approach, the governor would simply rubberstamp what the jury and appellate courts had done. Instead, we invoked a deeper spirit of clemency: that even assuming Williams' guilt (solely for purposes of the petition), Williams had so transformed his life that he was entitled to mercy and leniency, as an act of redemption and rehabilitation. We argued that true justice would be served by sparing Williams' life so that he could continue to devote his remaining years in prison to his anti-gang and anti-violence efforts helping young people avoid gangs.

Meanwhile, Williams' lawyers asked the California Supreme Court to reopen his case, but by the narrowest of margins, 4-3, the court refused. Three members of the court had found enough merit to stay the execution and

71. *See* Stacy Finz et al., *Williams Executed; Last Hours; Gang Co-Founder Put to Death for 1979 Murders of 4 In L.A. Area*, S.F. CHRON., Dec. 13, 2005, at A1.

72. *Id.*

73. *Id.*

74. Bob Egelko, *A Question of Evidence: Stanley Tookie Williams' Best Hope for Clemency May Depend More on Raising Doubt About His Guilt Than on His Redemption*, S.F. CHRON., Dec. 7, 2005, at A1.

75. *See* Finz et al., *supra* note 71.

reopen the case. The ACLU of Northern California submitted a petition signed by 175,000 people seeking a stay from the Governor.[76]

On December 8, 2005, Governor Schwarzenegger held a clemency hearing. He had previously said that it was "the toughest thing when you are governor, dealing with someone's life."[77] Tough or not, four days later Governor Schwarzenegger denied clemency. The next day, December 13, 2005, Williams was executed.[78] CNN reported that the officials had trouble inserting needles in Williams's arm and the usually short process took almost twenty minutes.[79] Shortly before he was killed, Williams told a radio station, "I just stand strong and continue to tell you, your audience, and the world that I am innocent."[80]

Following Williams's execution, the NAACP said, "We believe this is a serious blow to our efforts to fight gangs," emphasizing that his death was a loss for far more than Williams himself.[81] When the governor took office, he changed the name of the Department of Corrections to the Department of Corrections and Rehabilitation.[82] Governor Schwarzenegger's failure to see how the concept of rehabilitation would have been served by granting Williams clemency, suggests that his change was in name only.

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

In February 2008, I sat there marveling that this historic event was actually taking place. The vast chamber of the Los Angeles Board of Supervisors had been turned over to the Commission on the Fair Administration of Justice for the sole purpose of examining the death penalty in California. Chaired by the late John Van de Kamp, former Attorney General of California, this blue-ribbon, independent, non-partisan

76. *See* Press Release, American Civ. Liberties Union of N. Cal., Events Planned in Twelve California Cities as part of an International Day of Action Calling for a Halt to All Executions and Urging Clemency for Stanley Williams (Nov. 29, 2005).

77. Henry Weinstein, *Killer's Fate Rests with Governor*, L.A. TIMES (Nov. 18, 2005), http://articles.latimes.com/2005/nov/18/local/me-williams18.

78. *See* Finz et al., *supra* note 71.

79. *See* Jenifer Warren, *Witness to a Slow, Messy Execution*, TORONTO STAR, Dec. 15, 2005 at A26.

80. Amy Goodman, *Stanley Tookie Williams: I Want the World to Remember Me for My "Redemptive Transition,"* DEMOCRACY NOW (Dec. 13, 2005), http://www.democracynow.org/2005/12/13/stanley_tookie_williams_i_want_the.

81. Tim Harper, *Tookie Williams Loses Pleas for Clemency*, TORONTO STAR, Dec. 13, 2005, at A11.

82. Joe Garofoli, *Californians Soul-Searching in Countdown to Execution; Two-Thirds in State Support the Death Penalty, but Polls Haven't Asked Questions About Redemption*, S.F. CHRON., Dec. 11, 2005, at A1.

commission spent the day hearing testimony from experts and comments from the public.

For years, abolitionists in California had dreamed of the day when the system of state killing would be subjected to a searching and comprehensive investigation comparable to the 2002 Illinois commission appointed by former governor George Ryan.[83] That commission found eighty-five serious flaws in Illinois's death penalty.[84] A subsequent study by death penalty attorney Robert Sanger found that California suffers from over 90% of the very same flaws and has many additional serious flaws of its own.[85]

So here I was, participating in the culmination of all the efforts to force California to scrutinize its own capital punishment system. Witness after witness gave devastating testimony of how the system is stacked against a defendant, the government possessing extraordinary resources and the defense scrambling to catch up. Of course, prosecutors also attended in order to defend the system and reassure the Commission that they would welcome what they called "reforms" so long as they could go on executing people.

As it happened, I was the first person to speak during the public comment period. I came with one purpose in mind: to urge the Commission not merely to recommend "reforms" (which may never be enacted) but to step up and acknowledge that even if all those reforms were implemented, the system, deeply infected by human error at every stage, posed the grave risk of executing innocent people.

I reminded the Commission of Justice Harry Blackmun's haunting words in *Callins v. Collins* (1994) that "from this day forward, I no longer shall tinker with the machinery of death." And I quoted the Illinois commission, which, in 2002, unanimously concluded that "no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."[86]

In June 2008, I was thrilled when the Commission issued its report, finding that California's death penalty system is "dysfunctional" and "close to collapse."[87] For decades, opponents of capital punishment had been saying

83. *See* Robert M. Sanger, *Fourteen Years Later: The Capital Punishment System in California*, SPECIAL LAW REPORT, SANTA BARBARA AND VENTURA COLLEGES OF LAW, Sept. 2016, at 1, 5-6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830677.

84. *Id.* at 6.

85. *Id.* at 1.

86. Thomas P. Sullivan, *The Luxury of Capital Punishment*, CHI. TRIB. (May 15, 2002), http://articles.chicagotribune.com/2002-05-15/news/0205150217_1_capital-punishment-sentences-capital-cases.

87. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REP. AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA, at 2-3 (Cal. 2008).

just that: The death penalty doesn't work, it risks executing innocent people, it's riddled with (literally) fatal errors, and it costs far more that the alternative of permanent incarceration. Finally, an independent, nonpartisan commission, following a comprehensive four-year study, agreed with us.

The Commission included prosecutors, public defenders, law enforcement officials, academics, and others. It concluded that the "system is plagued with excessive delay in the appointments of counsel for direct appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court. Ineffective assistance of counsel and other claims of constitutional violations are succeeding in federal courts at a very high rate."[88]

Those of us who oppose the death penalty had been decrying the extent to which California's system fails to produce reliable results. Now the Commission had found that federal courts in fifty-four habeas corpus challenges to California death penalty judgments granted relief in the form of a new guilt trial or a new penalty hearing in thirty-eight of the cases, or an alarming 70%.[89]

Even California's then-Chief Justice Ronald George told the Commission that if nothing is done, the backlogs in post-conviction proceedings will continue to grow "until the system falls of its own weight."[90]

The Commission pointed out what abolitionists had been saying for years, that the "failures in the administration of California's death penalty law create cynicism and disrespect for the rule of law, increase the duration and costs of confining death row inmates, weaken any possible deterrent benefits of capital punishment, increase the emotional trauma experienced by murder victims' families, and delay the resolution of meritorious capital appeals."[91]

Supporters of capital punishment had dismissed such criticisms as biased, ill-informed, and lacking in evidence. But the Commission's report was based on three public hearings (in Sacramento, Los Angeles and Santa Clara) where seventy-two witnesses testified, including judges, prosecutors, and defense lawyers actively engaged in the administration and operation of California's death penalty law—as well as academics, victims of crime, concerned citizens and representatives of advocacy organizations.[92] The

88. *Id*. at 3-4.
89. *Id.*
90. *Id.* at 4.
91. *Id.*
92. *Id.* at 2-3.

Commission also conducted independent research and received sixty-six written submissions.[93]

While abolitionists often speak out against the death penalty on deeply moral grounds, we rarely rely on pragmatic reasons. But for the wider community, the astronomical cost of capital punishment may prove to be its undoing. The Commission found that "by conservative estimates, well over $100 million" is spent on capital punishment annually.[94] "The strain placed by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is heavy."[95]

Yet, to reduce the average lapse of time from sentence to execution by half, to the national average of twelve years, the Commission estimated that taxpayers would have to spend nearly twice what we are spending now.[96]

Critics of the death penalty had warned for decades that we are sending innocent people to death row. Although the Commission stated that it had learned of no credible evidence that the state of California has actually executed an innocent person, it could not conclude "with confidence that the administration of the death penalty in California eliminates the risk that innocent persons might be convicted and sentenced to death."[97]

While nationally, there had been 205 exonerations of defendants convicted of murder from 1989 through 2003 (74 of whom were sentenced to death), 14 of the 205 murder cases took place in California.[98] Since 1979, six defendants sentenced to death in California whose convictions were reversed and remanded, were subsequently acquitted, or had their murder charges dismissed for lack of evidence.[99]

Two of the most dangerous flaws in the criminal justice system are erroneous eye-witness identifications (which the Commission found had been identified as a factor nationwide in 80% of exonerations) and false confessions (where it is a factor in 15% of exonerations).[100] California State Public Defender Michael Hersek reported to the Commission that of the 117 death penalty appeals then pending in his office, seventeen featured

93. *Id.* at 3.
94. *Id.* at 6. Today, that figure is over $150 million. *Id.* at 32.
95. *Id.* at 7.
96. *Id.*
97. *Id.* at 30.
98. *Id.*
99. *Id.* at 30-31.
100. *Id*. at 31.

testimony by in-custody informants, and another six included testimony by informants who were in constructive custody.[101]

Yet over the previous two years, during which the Commission had made interim recommendations to reduce the risks of wrongful convictions resulting from erroneous eye-witness identifications, false confessions, and testimony by in-custody informants, bills to redress these flaws that were passed by the Legislature were all vetoed by Governor Arnold Schwarzenegger.[102] If there is no political will to heed the recommendations of the Commission to "fix" the system, the only way to eliminate the risk of executing innocent inmates is to eliminate capital punishment itself.

The Commission concluded that the "time has come to address death penalty reform in a frank and honest way. To function effectively, the death penalty must be carried out with reasonable dispatch, but at the same time in a manner that assures fairness, accuracy and non-discrimination."[103] Accordingly, first and foremost, the Commission unanimously recommended a series of reforms to address ineffective assistance of counsel, which it estimated would cost at least $95 million *more* per year, including that:

> The California Legislature immediately address the unavailability of qualified, competent attorneys to accept appointments to handle direct appeals and habeas corpus proceedings in California death penalty cases by expanding the Office of the State Public Defender to an authorized strength of 78 lawyers, a 33 percent increase in the OSPD budget, to be phased in over a three-year period, by expanding the California Habeas Corpus Resource Center to an authorized strength of 150 lawyers, a 500 percent increase to its current budget, to be phased in over a five-year period; that the staffing of the offices of the attorney general, which handle death penalty appeals and habeas corpus proceedings be increased as needed; and that funds be made available to the California Supreme Court to ensure that all appointments of private counsel to represent death row inmates on direct appeals and habeas corpus proceedings comply with ABA Guidelines, and are fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary responsibilities in death penalty representation.[104]

The Commission also recommended that funds be appropriated to fully reimburse counties for payments for defense services and reexamine the current limitations on reimbursement to counties for the expenses of

101. *Id.* at 31-32.

102. *Id*. at 32. *See* Robert Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1348 (2011).

103. MICHAEL DOW BURKHEAD, A LIFE FOR A LIFE THE AMERICAN DEBATE OVER THE DEATH PENALTY 56 (2009).

104. *Id.* at 156-57.

homicide trials that California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases in full compliance with ABA Guidelines.[105]

Without taking sides, a majority of the Commission presented detailed information on replacing the death penalty with a maximum sentence of lifetime incarceration[106] or narrowing the "special circumstances" justifying the death penalty, to "assure a fully informed debate."[107]

Framing the debate in terms of the total cost of four alternatives, the commissioners estimated that California could annually spend $137.7 million to maintain its current dysfunctional system or $216.8 million to reduce the length of the process to twelve years, or $121 million for a more narrow death penalty or $11.5 million by replacing the death penalty with a policy of terminal confinement.[108]

Leaving no doubt that the report is a stern rebuke to the whole system, five commissioners from the law enforcement community lodged an angry dissent, claiming it will "undermine public confidence in our capital punishment law and procedure," that it failed to adequately discuss arguments in favor of the death penalty, that uniformity among counties in seeking the death penalty for comparable crimes is not mandated, and that capital punishment reflects the will of the people.[109]

But twice as many commissioners took the unprecedented step of filing two supplemental statements calling for an outright repeal of the death penalty based on various factors including its cost, the risk of wrongful executions, the disproportionate impact on communities of color, geographic disparities, disadvantages facing poor defendants, the unjust bias triggered by allowing only "death qualified" jurors, how the death penalty forecloses the possibility of healing and redemption, and the example set by other civilized societies that have abolished the death penalty.[110]

The June 2008 report from this blue-ribbon, bi-partisan, independent commission was a huge boost to the movement to end capital punishment and would play a crucial role in the subsequent efforts in 2012 and 2016 to

105. *Id.* at 157.

106. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REP. AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA, at 10-77 (Cal. 2008).

107. *Id.* at 10-60.

108. *Id.* at 83.

109. DISSENT TO CAL. COMM'N ON THE FAIR ADMINISTRATION OF JUSTICE REP. AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA (June 30, 2008), http://www.cjlf.org/files/CCFAJ_Dissent.pdf.

110. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REP. AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA (Cal. 2008).

repeal capital punishment in California through ballot measures voted on by the people.

THE HEARTBREAKING CASE OF TROY DAVIS

On September 21, 2011, we added the case of Troy Davis to the ever-growing list of injustices in the system of state killing. Every execution is a tragic event, but Troy's case broke my heart.

Davis was sentenced to death for the murder of police officer Mark Allen MacPhail at a Burger King in Savannah, Georgia[111]—a murder he steadfastly maintained he did not commit.[112] There was no physical evidence against him, and the weapon used in the crime was never found. The case against him consisted entirely of witness testimony which contained inconsistencies even at the time of the trial.[113] Subsequently, all but two of the state's non-police witnesses recanted or contradicted their testimony.[114] Many of these witnesses stated in sworn affidavits that they were pressured or coerced by police into testifying or signing statements against Davis.[115]

One of the two witnesses who did not recant his testimony was Sylvester "Red" Coles—the principle alternative suspect, according to the defense, against whom there was new evidence implicating him as the actual gunman.[116] Nine individuals signed affidavits implicating Coles.[117]

Troy himself explained what happened:

> In 1989 I surrendered myself to the police for crimes I knew I was innocent of in an effort to seek justice through the court system in Savannah, Georgia USA. . . . In the past I have had lawyers who refused my input, and would not represent me in the manner that I wanted to be represented. I have had witnesses against me threatened into making false statements to seal my death sentence and witnesses who wanted to tell the truth were vilified in court. . . . Because of the Anti-Terrorism Bill, the blatant racism and bias in the U.S. Court System, I remain on death row in spite of a compelling case of my innocence. Finally I have a private law firm trying to help save my

111. Davis v. State, 426 S.E.2d 844 (Ga. 1993).

112. *Troy Davis Put to Death in Georgia*, CNN (Sept. 22, 2011, 5:37 AM), http://www.cnn.com/2011/09/22/justice/georgia-execution.

113. Donald E. Wilkes Jr., *The Final Chapter of the Troy Davis Case* (U. Ga. L., Oct. 27, 2010), http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1090&context=fac_pm.

114. *See A Travesty of Justice: The Execution of Troy Davis*, CAMPAIGN TO END THE DEATH PENALTY, http://www.nodeathpenalty.org/get-the-facts/travesty-justice-execution-troy-davis (last visited Nov. 11, 2016).

115. *Id.*

116. *See I Am Troy Davis: The Fight for Abolition Continues,* AMNESTYUSA.ORG, http://www.amnestyusa.org/our-work/cases/usa-troy-davis (last visited Oct. 16, 2016).

117. *Id.*

> life in the court system, but it is like no one wants to admit the system made another grave mistake. Am I to be made an example of to save face? Does anyone care about my family who has been victimized by this death sentence for over 16 years? Does anyone care that my family has the fate of knowing the time and manner by which I may be killed by the state of Georgia? . . . Where is the justice for me?[118]

On March 17, 2008 in a narrow 4-3 decision, the Georgia Supreme Court rejected Davis's appeal,[119] finding that the evidence of his innocence came too late despite the fact that he offered "affidavit testimony consisting of four types, recantations by trial witnesses, statements recounting alleged admissions of guilt by Coles, statements that Coles disposed of a handgun following the murder, and an alleged eyewitness account."[120]

As the Chief Justice noted in his dissent:

> I believe that this case illustrates that this Court's approach in extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death.
>
> We have noted that recantations by trial witnesses are inherently suspect, because there is almost always more reason to credit trial testimony over later recantations. However, it is unwise and unnecessary to make a categorical rule that recantations may never be considered in support of an extraordinary motion for new trial. The majority cites case law stating that recantations may be considered only if the recanting witness's trial testimony is shown to be the "purest fabrication." To the extent that this phrase cautions that trial testimony should not be lightly disregarded, it has obvious merit. However, it should not be corrupted into a categorical rule that new evidence in the form of recanted testimony can never be considered, no matter how trustworthy it might appear. If recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically.[121]

Three members of the Georgia Supreme Court believed it "defies all logic and morality" to execute Troy Davis despite immense evidence of his innocence,[122] but that's exactly what the State of Georgia did.

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118. *USA: Where is the Justice for Me?: The Case of Troy Davis, Facing Execution* in Georgia, AMNESTYUSA.ORG, (Feb. 1, 2007), http://www.amnestyusa.org/research/reports/usa-'where-is-the-justice-for-me-the-case-of-troy-davis-facing-execution-in-georgia.

119. Davis v. State, 660 S.E.2d 354, 363 (Ga. 2008).

120. *Id.* at 358.

121. *Id.* at 363-64 (Sears, C.J., dissenting).

122. *Id.* at 364. Presiding Justice Hunstein and Justice Benham joined Chief Justice Sears's dissent. *Id.* at 365.

DEBATING THE DEATH PENALTY

As my anger over state killing grew, and as I learned more about the flaws in the system that risked executing innocent people, I became more outspoken in my opposition. I accepted every invitation I received to speak before community groups, college classes and religious congregations against the death penalty. And I looked for opportunities to write letters to the editor whenever I spotted a news story or opinion piece that defended the death penalty.

Dennis Prager is a conservative talk show host and columnist for the *Jewish Journal* newspaper.[123] I once called into his radio show to debate the death penalty, but in March 2011, when he wrote a column on the subject, I felt I needed to offer a more comprehensive rebuttal. Since Prager believes that murderers should die,[124] he has the audacity to place state killing on a higher moral plane than those of us who believe that state killing is itself immoral. In my letter to the editor, I argued that in a civilized society, we should not kill to show that killing is wrong.

Prager had claimed that there is almost no issue "for which the gulf between people on opposite sides of an issue is as unbridgeable as on the issue of the death penalty for murderers."[125] Yet he ignored the fact that many have bridged that gulf as the death penalty continues to become less and less popular with Americans. A then-recent July 2010 Field Poll revealed that, when asked which sentence they preferred for a first-degree murderer, 42% of registered voters said they preferred life without parole and only 41% said they preferred the death penalty.[126] (In a September 2016 Field Poll, support for life without parole had risen to 55%.)[127]

Prager, who like me is Jewish, cited the Torah as his single moral compass.[128] But the Torah, among many ancient religious texts, includes rules and prohibitions that few would subscribe to today. According to the Torah, in addition to murder, offenses that merit death include disobedience

123. *Author Page, Dennis Pager*, JEWISH J., http://www.jewishjournal.com/about/author/83 (last visited Nov. 11, 2016).

124. Dennis Prager, *Murderers Should Die*, JEWISH J. (Mar. 15, 2011, 6:41 PM) http://www.jewishjournal.com/dennis_prager/article/murderers_should_die_20110315.

125. *Id.*

126. *Public Opinion: California Poll Shows Increase in Support for Life Without Parole*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/public-opinion-california-poll-shows-increase-support-life-without-parole (last visited Oct 16, 2016).

127. *See* Press Release, Mark DiCamillo, Field Poll & Univ. of Cal. Berkeley, Death Penalty Repeal (Prop. 62) Holds Narrow Lead, but is Receiving Less Than 50% Support. Most Voters Aren't Sure About Prop. 66, A Competing Initiative to Speed Implementation of Death Sentences (Sept. 22, 2016), http://www.field.com/fieldpollonline/subscribers/Rls2547.pdf.

128. Prager, *supra* note 124.

to a parent, contempt of court, blasphemy, sacrificing to another god, false prophecy, necromancy, premarital sex, bestiality, and breaking the Sabbath.[129]

"Many Jewish opponents of the death penalty point to Israel, which has disallowed capital punishment since its establishment," Prager argued, but he dismissed this important fact by claiming that "Israel was founded by Jews who took their values from the European Enlightenment, not from the Torah, and that is why they banned capital punishment in Israel."[130]

But I pointed out that most Americans, including the Founding Fathers who wrote the Declaration of Independence and the Constitution, and presumably most Jews in America, also derive their values from the European Enlightenment, which over time has led to less and less support for the death penalty.[131]

The majority of nations and Western democracies have abolished the death penalty,[132] and the International Criminal Court has barred the use of capital punishment even for war crimes and crimes against humanity.[133]

Prager had engaged in the utter speculation that "more innocents die with no capital punishment than with it."[134] But I responded that if we consider life without parole the natural alternative to the death penalty, the perpetrator is removed from society so the risk to innocent people is negligible.[135] The risk of a murderer escaping from prison and murdering again is less than a fraction of a percent.[136] And Prager callously ignored the fact that there was overwhelming evidence in at least nine cases since 1980 that innocent men were executed in the United States.[137]

I concluded my letter by invoking the late Elie Wiesel.[138] Covering Adolf Eichmann's trial in Jerusalem (the only instance of civil execution in Israel's history), Wiesel called the execution "an example not to be

129. *What Does the Bible Say About Capital Punishment and the Death Penalty?*, http://www.christianbiblereference.org/faq_CapitalPunishment.htm (last visited Oct. 16, 2016).

130. Prager, *supra* note 124.

131. Stephen F. Rohde, *Letters to the Editor: Purim Spoof Cover, "Miral," Itamar Murders, the "Gibson" Scale*, JEWISH J. (Mar. 29, 2011, 5:42 PM), http://www.jewishjournal.com/letters_to_the_editor/article/letters_to_the_editor_purim_spoof_cover_miral_itamar_murders_the_gibson_sca.

132. *Abolitionist and Receptionist Countries*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries (last visited Mar. 20, 2017).

133. JOHN D. BESSLER, CRUEL & UNUSUAL 290 (2012).

134. Prager, *supra* note 124.

135. Rohde, *supra* note 131.

136. *Id.*

137. *Id.*

138. *Id.*

followed."[139] "Society should not be the Angel of Death," he said.[140] He added, "We should not be servants of death. The law should celebrate, glorify, sanctify life, always life."[141] "As between Wiesel and the value of life and Prager and the value of death, I choose life," I concluded.[142]

THE POWER OF DISSENT

As more and more states are ending the death penalty through legislation, ballot measures, and the courts[143] the final end to the death penalty across the country and in the federal government will come when the U.S. Supreme Court categorically declares capital punishment "cruel and unusual punishment" in violation of the Eighth Amendment.

In Supreme Court history, a few dissenting opinions have eventually won over a majority of the court. In *Glossip v. Gross*,[144] Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, wrote a powerful dissenting opinion on the death penalty, presenting compelling reasons why capital punishment violates the Eighth Amendment.[145] With the death of Justice Scalia,[146] depending on the court's makeup after the 2016 election, Breyer's dissent could one day become the law of the land.

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Nineteen states have abolished or overturned their capital punishment statutes. *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 18, 2016), http://www.deathpenaltyinfo.org/states-and-without-death-penalty; MICH. CONST. of 1963, art. IV, § 46 (1964); W. VA. CODE ANN. § 61-11-2 (LexisNexis 2014); Act of Mar. 30, 1957, ch. 132, 1957 Alaska Sess. Laws 262; Act Revising the Penalty for Capital Felonies, Pub. Act No. 12-5, 2012 Conn. Acts 13 (Reg. Sess.); Act 3-307, D.C. Death Penalty Repeal Act of 1980, 27 D.C. Reg. 5624 (Dec. 26, 1980); Act of June 4, 1957, Act 282, 1957 Haw. Sess. Laws 314; Act of Mar. 9, 2011, Pub. Act 96-1543, 2010 Ill. Laws 7778; Act of Feb. 24, 1965, ch. 435, 1965 Iowa Acts 827; Act of May 14, 1965, ch. 436, 1965 Iowa Acts 828; Act of Mar. 17, 1887, ch. 133, 1887 Me. Laws 104; Act of May 2, 2013, ch. 156, 2013 Md. Laws 2298; Act of Apr. 22, 1911, ch. 387, 1911 Minn. Laws 572; Act of Dec. 17, 2007, ch. 204, 2007 N.J. Laws 1427; Act effective July 1, 2009, ch. 11, 2008 N.M. Laws 133; Act of Mar. 15, 1973, ch. 116, sec. 41, 1973 N.D. Laws 215, 300 (1975); Act of May 9, 1984, ch 221, 1984 R.I. Pub. Laws 523; Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 129-130 (Mass. 1984) (holding that Massachusetts's capital punishment law was unconstitutional); People v. Lavalle, 817 N.E.2d 341, 365-68 (N.Y. 2004) (finding that New York's capital punishment statute's failure to provide a jury instruction on the consequences of deadlock in a capital case was unconstitutional); M. H. BOVEE & J. T. LEWIS, REPORT OF THE SELECT COMMITTEE TO ABOLISH THE DEATH PENALTY (1853); Erik Eckholm, *Ruling by Delaware Justices Could Deal Capital Punishment in the State a Final Blow*, N.Y. TIMES, Aug. 3, 2016, at A11.

144. 135 S. Ct. 2726 (2015).

145. *Id*. at 2755 (Breyer, J., dissenting).

146. *See Biography of Associate Justice Antonin Scalia*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographyScalia.aspx (last visited Nov. 12, 2016).

According to Carol S. Steiker and Jonathan M. Steiker, who have studied capital punishment, beginning in 1976, the Court "embarked on an extensive—and ultimately failed—effort to reform and rationalize the practice of capital punishment in the United States through top-down, constitutional regulation."[147] But while all other Western democracies have abolished it, "what is truly unique about the American death penalty experience is that the United States has attempted to find a middle position between repealing and retaining capital punishment—by subjecting it to intensive judicial oversight under the federal constitution."[148]

One of the startling facts to emerge is that while at different times seven Supreme Court justices (Brennan, Marshall, Powell, Blackmun, Stevens, Breyer, and Ginsberg) have indicated they think capital punishment should be ruled categorically unconstitutional,[149] and several have renounced their previous rulings upholding capital punishment,[150] no justice has ever moved in the opposite direction from questioning the death penalty to upholding it.

Italian philosopher Cesare Beccaria wrote the seminal work *Dei delitti e dell pene* in 1764, which was translated into English in 1767 as *On Crimes and Punishments*.[151] It was read by George Washington and Thomas Jefferson, and John Adams would passionately quote it while representing British soldiers accused of murder following the 1770 Boston Massacre.[152]

In that era, execution was the punishment for a wide array of crimes, including "idolatry, witchcraft, blasphemy, murder, manslaughter, poisoning, bestiality, sodomy, adultery, man-stealing, false witness in capital cases, conspiracy, and rebellion."[153] Beccaria and his followers argued for proportionality—that the punishment fit the crime—and that no punishment be inflicted unless absolutely necessary—that there were no alternatives.[154]

By the 1820's, toward the end of his life, Jefferson observed that "Beccaria and other writers on crimes and punishment had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death."[155] Contrary to Justice Scalia's view that the constitutionality of the death penalty was for all time dictated by the

147. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 3 (2016).

148. *Id.*

149. *See id*. at 258-59.

150. *See, e.g.*, Linda Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22.

151. STEPHEN BREYER, AGAINST THE DEATH PENALTY 41 (John D. Bessler ed., 2016).

152. *Id*. at 42.

153. *Id*. at 40-41.

154. *Id*. at 42.

155. *Id*. at 52.

Constitution as ratified in 1788,[156] as early as 1885, the Court was judging whether forms of punishment were "infamous," and thereby unlawful, by evolving standards and norms.[157] "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another."[158] "In former times," the Court noted, "being put in the stocks was not considered as necessarily infamous."[159] "But at the present day," the Court observed, "either stocks or whipping might be thought an infamous punishment."[160]

In 1910, in *Weems v. United States*,[161] the Court continued to assess the constitutionality of a particular punishment by whether it is "cruel and unusual" and "repugnant to the Bill of Rights," observing that "crime is repressed by penalties of just, not tormenting, severity."[162]

The modern test which prevails today in determining whether a punishment is "cruel and unusual" in violation of the Eighth Amendment, was articulated in 1958 in *Trop v. Dulles*.[163] In a ruling which has never been reversed, despite the strenuous efforts of Justice Scalia,[164] the Court declared that the Eighth Amendment would be interpreted based on "evolving standards of decency that mark the progress of a maturing society."[165]

Under that standard, the Court has steadily struck down the death penalty for non-capital crimes,[166] juvenile offenders,[167] and the intellectually disabled.[168] It was against all of this history that Justice Breyer set about in his dissent in *Glossip*, for himself and Justice Ginsburg, to offer his most comprehensive views on capital punishment.[169]

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156. *See, e.g.*, CONG. RESEARCH SERV., R44419, JUSTICE ANTONIN SCALIA: HIS JURISPRUDENCE AND HIS IMPACT ON THE COURT 11-12 (2016).

157. Mackin v. United States, 117 U.S. 348 (1886).

158. *Id*. at 351.

159. Ex parte Wilson, 114 U.S. 417, 427 (1885).

160. *Id*. at 428.

161. 217 U.S. 349 (1910).

162. *Id*. at 349.

163. 356 U.S. 86 (1958).

164. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988) (Scalia, J., dissenting).

165. *Trop*, 356 U.S. at 101.

166. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the Eighth Amendment barred imposition of the death penalty for the rape of a child where the victim survived and death was not the intended result).

167. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty for crimes committed when the offenders were under the age of eighteen).

168. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibited executions of the mentally retarded).

169. *See* Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

Breyer began by pointing out that in 1976, the Supreme Court reinstated the death penalty under state statutes that attempted to set forth safeguards to ensure the penalty would be applied reliably and not arbitrarily.[170] But Breyer found that the "circumstances and the evidence of the death penalty's application have changed radically since then."[171]

The court thought that the constitutional infirmities in the death penalty could be healed.[172] But, according to Breyer, "almost 40 years of studies, surveys, and experience strongly indicate . . . that this effort has failed."[173] "Today's administration of the death penalty," Breyer wrote, "involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use."[174]

Cruel: Unreliability. Breyer found "increasing evidence" that the death penalty lacks reliability.[175] Researchers "have found convincing evidence that, in the past three decades, innocent people have been executed."[176] Breyer cited the shameful examples of Carlos DeLuna, Cameron Todd Willingham, Joe Arridy, and William Jackson Marion.[177] As of 2002, there was evidence of approximately 60 exonerations in capital cases.[178] Since then, the number of exonerations in capital cases has risen to 115, and may be as high as 154.[179] In 2014, six death row inmates were exonerated based on actual innocence.[180] All had been imprisoned for over thirty years.[181]

When one includes instances in which courts failed to follow legally required procedures, the numbers soar. Between 1973 and 1995, courts found prejudicial errors in an astounding 68% of the capital cases.[182] For Breyer, the research suggests that "there are too many instances in which courts sentence defendants to death without complying with the necessary

170. *Id*.
171. *Id*.
172. *Id*.
173. *Id.*
174. *Id.* at 2755-56.
175. *Id.* at 2756.
176. *Id.*
177. *See id.*
178. *Id.* at 2757.
179. *Id.*
180. *Id.*
181. *Id.* at 2757; National Registry of Exonerations, *Exonerations in 2014*, at 2 (2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014report.pdf.
182. *Glossip*, 135 S. Ct. at 2759 (Breyer, J., dissenting); Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentence in the United States*, 1 J. EMPIRICAL L. STUDIES 209, 217 (2004).

procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime."[183]

Cruel: Arbitrariness. As Breyer puts it, the "arbitrary imposition of punishment is the antithesis of the rule of law."[184] In 1976, the Supreme Court acknowledged that it is unconstitutional if "inflicted in an arbitrary and capricious manner."[185] Despite the court's hope for fair administration of the death penalty, Breyer concludes it has become "increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."[186]

Breyer cites various studies and concludes that "whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as 'egregiousness'—do not determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily."[187] Breyer concludes that the "imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary."[188]

Cruel: Excessive Delays. Breyer found "the problems of reliability and unfairness lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row."[189] In 2014, thirty-five individuals were executed.[190] Those inmates spent an average of eighteen years on death row.[191] At present rates, it would take more than seventy-five years to carry out the death sentences of the 3,000 inmates on death row; thus, the average person on death row would spend an additional 37.5 years there before being executed.[192]

These lengthy delays create two special constitutional difficulties. First, a lengthy delay in and of itself is especially cruel because it "subjects death row inmates to decades of especially severe, dehumanizing conditions of

183. *Glossip*, 135 S. Ct. at 2759 (Breyer, J., dissenting).
184. *Id.* at 2759.
185. Gregg v. Georgia, 428 U.S. 153, 188 (1976).
186. *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting).
187. *Id.* at 2764.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*; *Execution List 2014*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2014 (last visited Nov. 12, 2016).
192. *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting).

confinement."[193] Second, lengthy delay undermines the death penalty's penological rationale.[194]

Breyer explained that the death penalty's penological rationale rests almost exclusively upon deterrence and retribution.[195] But Breyer asks: Does it still seem likely that the death penalty has a significant deterrent effect?[196] He considers what actually happened to the 183 inmates sentenced to death in 1978.[197] As of 2013, 38 (or 21%) had been executed, but 132 (or 72%) had had their convictions or sentences overturned or commuted; 7 (or 4%) had died of other causes.[198] Six (or 3%) remained on death row.[199] Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, but 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row.[200]

To speed up executions, Breyer asks which constitutional protections we willing to eliminate.[201] He poses the dilemma:

> A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place. But a death penalty system that minimizes delays would undermine the legal system's efforts to secure reliability and procedural fairness.[202]

Breyer is clear. "We cannot have both. And that simple fact . . . strongly supports the claim that the death penalty violates the Eighth Amendment."[203]

Unusual: Decline in Use. The Eighth Amendment forbids punishments that are cruel and unusual.[204] Breyer points out that "between 1986 and 1999, 286 persons on average were sentenced to death each year."[205] But approximately fifteen years ago, the numbers began to decline.[206] In 1999,

193. *Id.*
194. *Id.*
195. *Id.* at 2767.
196. *Id.* at 2768.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 2771.
202. *Id.* at 2772 (citation omitted).
203. *Id.*
204. U.S. CONST. amend. VIII.
205. *Glossip*, 135 S. Ct. at 2773 (Breyer, J., dissenting).
206. *Id.*

98 people were executed.[207] In 2014, just 73 people were sentenced to death and 35 were executed.[208] The number of death penalty states has fallen, too. In 1972, the death penalty was lawful in 41 states.[209] As of today, 18 states and the District of Columbia have abolished the death penalty.[210] In 11 other states where the death penalty is on the books, no execution has taken place in over eight years.[211] Of the 20 states that have conducted at least one execution in the past eight years, 9 have conducted fewer than five in that time,[212] making an execution in those states a fairly rare—"unusual" —event.

That leaves 11 states in which it is fair to say that capital punishment is not "unusual."[213] And just three (Texas, Missouri, and Florida) accounted for 80% of executions nationwide (28 of the 35) in 2014.[214] Indeed, in 2014, only seven states conducted an execution.[215] In other words, in 43 states, no one was executed. If we ask how many Americans live in a state that at least occasionally carries out an execution (at least one within the prior three years), the answer two decades ago was 60% to 70%.[216] Today, it's 33%.[217]

Breyer concludes that the "lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. They concern the infliction—indeed the unfair, cruel and unusual infliction—of a serious punishment upon an individual."[218] Consequently, the Supreme Court is "left with a judicial responsibility" and it has made clear that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[219]

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207. *Id.*

208. *Id.*

209. *Id.*

210. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 20, 2017).

211. *See Executions by State and Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/node/5741 (last visited Nov. 12, 2016).

212. *Id.*

213. *See id.*

214. *Id.*

215. *Id.*

216. *See id.*

217. *See id.*

218. Glossip v. Gross, 135 S. Ct. 2726, 2776 (2015) (Breyer, J., dissenting).

219. *Id.*

Can a society devoted to equal justice for all, applying "evolving standards of decency that mark the progress of a maturing society," continue to engage in state killing? Can such a society tolerate the risk of executing innocent people? Can such a society execute those who are without doubt guilty (if such certainty exists), at the risk of torturing them as Brandon Jones was tortured last year?[220]

In a 1994 dissent in *Callins v. Collins*, Breyer's immediate predecessor, Justice Harry Blackmun wrote,

> 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 and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[221]

In courtrooms and voting booths, judges and voters have the power to stop tinkering with the machinery of death and to end the death penalty experiment once and for all.

SAVING MY PEN PAL

I've spent much of my adult life fighting the death penalty. About twenty years ago, it got very personal. By means I have long forgotten, I secured a pen pal on San Quentin's death row named Bill Clark. We have become very close friends over the years. Bill is a bright, generous, funny, and very caring man. We have written each other or spoken every week or so since we met. Bill is a very talented writer. He's written a series of engaging screenplays and stories, and I've been trying to get him an agent in hopes his work will be produced.

Bill spent twenty years on death row until the California Supreme Court finally ruled in his case. On June 27, 2016, the court vacated a portion of his conviction, but otherwise affirmed his death sentence.[222] Bill now joins the over 350 inmates waiting for the appointment of habeas corpus counsel to pursue his rights in state and federal habeas corpus proceedings.[223]

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220. Rhonda Cook, *Georgia Executes Brandon Astor Jones*, ATLANTA JOURNAL-CONSTITUTION (Feb. 3, 2016), http://www.ajc.com/news/local/georgia-executes-brandon-astor-jones/jDioe9hdPGv2oj7mhVehnM.

221. Callins v. Collins, 510 U.S. 1141, 1145 (1994).

222. People v. Clark, 372 P.3d 811, 902 (2016).

223. *See* Finz et al., *supra* note 71.

I intend to continue to be as good a friend to Bill as I can. Meanwhile, undaunted by the defeat of Proposition 62, I will continue to do all I can to end the barbarism of state killing and remove once and for all the risk that Bill Clark and Charlie McDowell and the other 744 men and women on California's death row, and those yet sentenced to death, will ever be killed.