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THE DEATH PENALTY IN AMERICA: CAN JUSTICE BE DONE?

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Appointed to the United States Court of Appeals for the Ninth Circuit in 1979, Betty B. Fletcher has had an influential and distinguished career as an advocate and a judge. In this Madison Lecture, Judge Fletcher provides an insightful examination of capital punishment in America. After beginning with a description of the evolution of capital punishment in the United States, Judge Fletcher addresses the narrowing availability of habeas corpus review and the always present danger of executing innocent people. Judge Fletcher then outlines the significant obligations federal judges face as they seek to ensure the constitutional application of the death penalty. Judge Fletcher concludes that the "system has it backwards" by expending immense effort and resources during appellate review, but too often failing to provide adequate representation at trial.

INTRODUCTION

James Madison might be surprised to hear the topic I have chosen for the lecture that bears his name. Madison neither championed nor deplored the death penalty. He apparently gave it little thought, for there is almost no reference to it in his voluminous writings. It is not discussed in *The Federalist Papers*.¹ The Constitution mentions it only by implication in the Fifth Amendment, forbidding the deprivation of life without due process of law.²

Madison did promote Thomas Jefferson's legal reforms for Virginia, which included a provision to restrict capital crimes to murder

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¹ See *The Federalist* Nos. 1-85 (Alexander Hamilton, John Jay, James Madison).

² U.S. Const. amend. V.

and treason.³ But Madison criticized this provision because he felt that it would unduly "tie the hands of Government."⁴ Still, we cannot be sure that Madison's views, and the principles he espoused, are consistent with capital punishment as it exists today. In one of his few recorded statements on the subject, Madison—himself not a lawyer—suggested that juries could not impose capital punishment fairly, and that safeguards were needed to ensure that only the deserving were executed. Discussing a proposal to eliminate executive pardons for those sentenced to death, Madison wrote that such a change

would have practical consequences which render it inadmissible. A single instance is a sufficient proof. The crime of treason is generally shared by a number, and often a very great number. It would be politically if not morally wrong to take away the lives of all even if every individual were equally guilty. What name would be given to a severity which made no distinction between the legal and the moral offence—between the deluded multitude and their wicked leaders. A second trial would not avoid the difficulty; because the oaths of the jury would not permit them to hearken to any voice but the inexorable voice of the law.⁵

The characteristics of the jury and the executive are not necessarily the same today as Madison thought them to be. Madison contemplated the jury as an infallible instrument of legal will, inevitably "hearkening" to the "inexorable voice of the law"; today, we see a jury as sometimes susceptible to the call of prejudice and caprice. Madison saw the executive as an instrument of fairness and moral discrimination; today, we see the executive as a political actor, often pressured by the electorate to deny clemency in all but the cases of blatantly obvious injustice. But the general problem Madison identified—finding a reliable means of distinguishing those who deserve the death penalty from those who do not—remains the central dilemma of capital punishment in our time, as it was in Madison's.

Justice Blackmun was a supporter of capital punishment for twenty years on the Supreme Court. Near the end of his long and distinguished career, he announced that "I no longer shall tinker with the machinery of death."⁶ He saw an irreconcilable conflict between

³ Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, at 62 (1989); see James Madison, *Observations on the Draught of a Constitution for Virginia*, in 5 *The Writings of James Madison, 1787-1790*, at 284, 288-89 (Gaillard Hunt ed., 1904) (commenting on Jefferson's draft constitution for Virginia).

⁴ Madison, *supra* note 3, at 288.

⁵ *Id.*

⁶ *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting) (denial of certiorari).

the exercise of individual judgment and discretion, on the one hand, and the application of legal rules designed to ensure fairness and uniformity, on the other.⁷ "It seems," he wrote, "that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices and passions—that it inevitably defies the rationality and consistency required by the Constitution."⁸

Justice Blackmun's experience and conclusion after twenty years are troubling, but I will not revisit the arguments for and against the existence of capital punishment. I accept the political judgment of the electorate and the constitutional judgment of the Supreme Court that capital punishment is permissible. My concern is more practical. I sit as an appellate judge on the United States Court of Appeals for the Ninth Circuit, which has one of the heaviest death penalty caseloads in the country. I want to address how judges on the lower courts, trial and appellate, are to fulfill the obligation of ensuring that the death penalty is imposed in a constitutional manner. Specifically, I want to speak about the obligation to provide habeas corpus review in capital cases, to ensure that the death penalty is imposed in as fair a manner as possible, and to prevent the execution of innocent people.

I

THE EVOLUTION OF CAPITAL PUNISHMENT IN AMERICA

Before discussing habeas corpus in detail, it may be useful to review briefly the history of capital punishment in the United States. We inherited capital punishment from England.⁹ In eighteenth-century England, capital punishment was imposed for more than two hundred crimes, most of them crimes against property and crimes that today we would consider petty.¹⁰ For those guilty of capital crimes but spared the death penalty, the alternative was usually exile,¹¹ first (and to a limited extent) to the American colonies, and later (to a much greater extent) to Australia. In the American colonies, people could be executed for many offenses, some that are not even con-

⁷ *Id.* at 1132.

⁸ *Id.* at 1134-35.

⁹ *The Death Penalty in America* 6 (Hugo A. Bedau ed., 3d ed. 1982) (1964).

¹⁰ William J. Bowers, *Legal Homicide: Death as Punishment in America, 1864-1982*, at 136 (1984); Douglas Hay, *Property, Authority, and the Criminal Law*, in Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* 17, 17-18, 20-21 (1975).

¹¹ Hay, *supra* note 10, at 22.

sidered crimes today, including adultery, idolatry, witchcraft, and blasphemy.¹²

An execution was a major public event in both England and America.¹³ It was announced in London by the ringing of church bells and was accompanied by hawkers selling execution ballads and copies of "last dying speeches."¹⁴ Execution day was sometimes called a "hanging match."¹⁵ The crowds behaved like spectators at today's soccer matches, drinking and carousing to such an extent that executions were finally moved inside the prison walls in the mid-nineteenth century to preserve public order.¹⁶

Pain was not a concern in early executions. In fact, it was the primary goal of some punishments imposed for noncapital crimes and included pillorying, branding, and cropping and nailing of the ears.¹⁷ In the United States, prisoners were usually executed by hanging until the late 1800s, when the electric chair was invented.¹⁸ The gas chamber followed in the 1920s,¹⁹ and lethal injection, now the mechanism of choice in most states,²⁰ in the 1970s.²¹

Since colonial times, there have been sporadic efforts to abolish the death penalty in the United States, and many individual states

¹² Bowers, *supra* note 10, at 133-34; *The Death Penalty in America*, *supra* note 9, at 7. Only some of these sentences were actually invoked. For example, while 19 people were executed as a result of the Salem Witch Trials in the late-seventeenth century, no one was executed under a Massachusetts law permitting capital punishment for a "stubborn or rebellious son" aged 16 or older "which will not obey the voice of his Father, or the Voice of his Mother" and committed "sundry notorious crimes." Lawrence M. Friedman, *Crime and Punishment in American History* 41, 46 (1993).

¹³ Bowers, *supra* note 10, at 4, 43 (noting large and unruly crowds at early American executions); Masur, *supra* note 3, at 25-39 (describing execution as important civil and religious ceremony in early American republic).

¹⁴ Peter Linebaugh, *The Tyburn Riot Against the Surgeons*, in *Albion's Fatal Tree*, *supra* note 10, at 65, 67.

¹⁵ *Id.* at 66.

¹⁶ Bowers, *supra* note 10, at 8, 43 (describing reasons that states ended public executions); Masur, *supra* note 3, at 5, 93-116 (detailing origins of private executions in America); Linebaugh, *supra* note 14, at 67 (citing seizure of bodies of executed for medical research and training as a cause of disorder at public executions). The last public execution in America occurred in Galena, Missouri, on May 21, 1937. *The Death Penalty in America*, *supra* note 9, at 13.

¹⁷ *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) (noting evolution of cruel and unusual punishment concept). As late as the eighteenth century, criminals were executed in England and America by being pressed, drawn and quartered, or burned at the stake. *The Death Penalty in America*, *supra* note 9, at 14.

¹⁸ Bowers, *supra* note 10, at 12.

¹⁹ *Id.*

²⁰ Harriet Chiang, *Gas Chamber's Effects Debated*, *S.F. Chron.*, Jan. 27, 1994, at A13.

²¹ *The Death Penalty in America*, *supra* note 9, at 15.

have repealed capital statutes.²² Many European countries abandoned capital punishment after World War II,²³ but abolition has never taken hold on a national scale here as it did in Europe. The United States is now the only Western industrialized country that retains the death penalty.²⁴

There was a brief period of de facto abolition, and a still briefer period of de jure abolition. The number of executions plummeted from a high of 199 in 1935 to zero in the five years between 1967 and 1972.²⁵ There were many reasons for the drop in executions. Habeas corpus petitions for state prisoners, rare before World War II, had become more common as the federal courts became more concerned with the federal rights of state criminal defendants.²⁶ The Civil Rights movement focused attention on capital trials in the South.²⁷ In 1972, when the Supreme Court declared capital punishment unconstitutional in *Furman v. Georgia*,²⁸ there were about six hundred people on death row around the country²⁹ and about 250 capital-punishment statutes on the books for crimes such as murder, rape, bombing, burglary, arson, and treason.³⁰ But only about half of the public supported capital punishment.³¹

Things are far different today. Capital punishment is imposed in thirty-eight states.³² Two more states are actively considering restoring it.³³ A majority of the Supreme Court believes it to be constitu-

²² Bowers, supra note 10, at 6-24; The Death Penalty in America, supra note 9, at 21; Masur, supra note 3, at 50-70.

²³ Bowers, supra note 10, at 145, 146 tbl. 5-3.

²⁴ Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (Jan. 1994) (reporting that United States is only Western industrialized country that retains and uses death penalty for ordinary crimes, i.e., crimes not committed under military law or in exceptional circumstances such as wartime). South Africa eliminated capital punishment in 1995. Howard W. French, *South Africa's Supreme Court Abolishes Death Penalty*, N.Y. Times, June 7, 1995, at A3.

²⁵ Bowers, supra note 10, at 25-26 tbl. 1-4.

²⁶ See id. at 15 (stating "this was the time when the United States Supreme Court became sensitive to defendants' rights in capital cases and responsive to appeals under the 'due process' clause of the Fourteenth Amendment").

²⁷ See id. at 16, 31 (discussing efforts of NAACP Legal Defense and Educational Fund and ACLU).

²⁸ 408 U.S. 238, 239-40 (1972).

²⁹ John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 407 (1994).

³⁰ Bowers, supra note 10, at 33 tbl. 1-7, 36-37 tbl. 1-8, 39.

³¹ See *The Death Penalty in America*, supra note 9, at 65 (describing the mid-1960s as "the high point of abolition sentiment, when the pros and cons [in the public debate] were about equally divided"); Jeffries, supra note 29, at 406 (Gallup polls showing about 50% support).

³² *Crime: Executions in America*, L.A. Times, May 11, 1994, at A5.

³³ See *Elections and Electric Chairs*, Wash. Post, Nov. 25, 1994, at A30 (stating that Iowa and Wisconsin are considering enacting death penalty legislation).

tional, and opinion polls show that a huge percentage of the public favors it.³⁴ Roughly 295 people have been executed in the eighteen years since the Court reinstated the death penalty in *Gregg v. Georgia*³⁵ in 1976.³⁶ Over three thousand people currently are on death row awaiting execution.³⁷

The death penalty is still imposed very selectively, if selectivity means imposing it only on a small portion of those eligible to receive it. No one has been executed for a crime other than murder or felony murder since capital punishment for rape was held unconstitutional in 1977 in *Coker v. Georgia*.³⁸ The twenty thousand homicides committed each year in the United States result in only about 250 death sentences.³⁹ Almost half of the death sentences that receive habeas review are eventually overturned,⁴⁰ and a few more lucky prisoners receive executive clemency.⁴¹

The procedures of executions have been dramatically altered. No longer public rituals, modern executions are generally conducted in the middle of the night inside a prison before a small number of official witnesses. We insist that executions be neither disfiguring, nor, within limits, painful. These are very recent developments. Justice Brennan argued that inhumane punishments "are unconstitutional because they are inconsistent with the fundamental premise of the Eighth Amendment that 'even the vilest criminal remains a human being possessed of common human dignity.'"⁴² No one would have

³⁴ See Yale Kamisar, This Judge Was Not for Hanging, *N.Y. Times*, July 17, 1994, § 7, at 12, 17 ("more than four out of five Americans are in favor of the death penalty").

³⁵ 428 U.S. 153 (1976).

³⁶ Death Row, U.S.A. (NAACP Legal Defense & Educ. Fund, Inc., New York, N.Y.), Summer 1995, at 3.

³⁷ *Id.* at 1 (setting figure at 3028 as of August 31, 1995).

³⁸ 433 U.S. 584, 592 (1977).

³⁹ 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, 1841 (1994). In the early part of this century, the murder to execution ratio was estimated as 70:1 and 85:1. By the 1960s, the ratio fell to 504:1. *The Death Penalty in America*, supra note 9, at 31.

⁴⁰ See William J. Brennan, Jr., Foreword: Neither Victims nor Executioners, 8 *Notre Dame J.L. Ethics & Pub. Pol'y* 1, 3-4 & nn.18-20 (1994) ("Even conservative estimates place the total reversal rate at an astounding 45%; some commentators believe the figure may be as high as 60% or more."); see also Terry Pristin, More in New York Bar Avoid Capital Appeals, *N.Y. Times*, Dec. 30, 1994, at B6 (citing 1992 study showing 42% of federal habeas corpus petitions filed in state capital cases between 1976 and 1991 resulted in reversal).

⁴¹ Executive clemency can be quite rare. In Florida, for example, no death row inmate has received clemency in 12 years. Rick Barry, Go Slow Legal Processes Create Jam on Death Row, *Tampa Trib.*, Apr. 10, 1995, at 1.

⁴² William J. Brennan, Jr., Constitutional Adjudication and the Death Penalty: A View from the Court, 100 *Harv. L. Rev.* 313, 329-30 (1986) (quoting *Furman v. Georgia*, 408 U.S. 238, 273 (1971)).

made such a statement in the eighteenth century, when more than a dozen American slaves were burned at the stake,⁴³ and heads were placed on pikes and paraded through the streets of Paris.⁴⁴ As late as 1849, suggestions that the condemned be chloroformed before hanging were rejected with little debate.⁴⁵

A federal district judge recently held the gas chamber unconstitutional because California could not prove that there were not several minutes of pain before death.⁴⁶ Another district judge refused to allow an obese man to be hanged because of the possibility of decapitation.⁴⁷ Soon, the only acceptable method of execution may be lethal injection.

While these developments have made methods of execution more humane, we must be clear that these are still executions. The Fifth and Fourteenth Amendments forbid the federal and state governments from taking a life without due process of law. The Eighth Amendment, as interpreted by the court in *Furman*, tells us that the death penalty is prohibited as cruel and unusual punishment if the process of selecting those who must die is not fair and reliable.⁴⁸

While the imposition of the death penalty in the states is initially controlled by local police, prosecutors, and judges, operating under state law, the federal courts are ultimately responsible for ensuring compliance with the federal Constitution. Direct review of state court

⁴³ Thirteen slaves were burned at the stake in New York in 1741 for their role in an alleged plot to rise up, pillage, and burn. Friedman, *supra* note 12, at 46. Perhaps the most gruesome American punishment was *peine forte et dure*, or pressing to death under rocks, a punishment imposed upon a man who refused to plead or testify at the Salem Witch Trials. *Id.* at 46.

⁴⁴ See Simon Schama, *Citizens: A Chronicle of the French Revolution* 405 (1989) (“[t]he heads were stuck on pikes that bobbed and dipped above cheering, laughing and singing crowds that filled the streets”).

⁴⁵ Masur, *supra* note 3, at 20-22. Nor was there any analog to our modern animal rights movement. Professor Lawrence Friedman notes that both perpetrators and victims of bestiality were often executed in the seventeenth century. After Thomas Granger of Plymouth, Massachusetts, was required to identify a sheep that he victimized, both he and the sheep were executed. Friedman, *supra* note 12, at 34-35. Another Massachusetts man, Benjamin Goad, who committed bestiality on a mare, was forced to watch that mare “be knocked on the head” before his execution. *Id.* at 35.

⁴⁶ See *Fierro v. Gomez*, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994) (“[t]he evidence presented concerning California’s method of execution by administration of lethal gas strongly suggests that the pain experienced by those executed is unconstitutionally cruel and unusual”).

⁴⁷ See *Rupe v. Wood*, 863 F. Supp. 1307, 1314 (W.D. Wash. 1994) (“A hanging that is likely to result in decapitation is contrary to ‘public perceptions of standards of decency.’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))).

⁴⁸ *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (concluding “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed”).

convictions by the Supreme Court on certiorari theoretically is available, but in practice is almost nonexistent. The Court is not equipped to deal with justice at retail. The case-by-case supervision of the imposition of the death penalty by federal courts must be accomplished, if at all, by the lower federal courts on habeas corpus review. Preserving the reliability and integrity of habeas review should be a priority for all federal judges. As Justice Frankfurter wrote: "Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism."⁴⁹

Inadequacies of habeas review are not only a problem for criminal defendants. They also threaten the credibility of the federal courts as an institution. While some may view the courts as obstructions when appeals drag on for years, the federal courts are surely not doing their duty if they fail to protect the constitutional rights of capital defendants and if they tolerate execution of innocent people. The task of the federal courts has become increasingly difficult as the pace of capital convictions has increased, focusing attention both on the dispatch with which we make our decisions and on the ultimate decisions on the merits.

II

LIMITING THE AVAILABILITY OF HABEAS REVIEW

The restrictions imposed by the Supreme Court on the availability of review by habeas corpus during the past twenty years contribute to the difficulty. First, the Supreme Court has altogether exempted from habeas review certain categories of state court judgments. Fourth Amendment claims of unlawful search and seizure are not cognizable in habeas, so long as there was an opportunity for full and fair litigation of the claim in state court.⁵⁰ Further, under a well-established principle of federalism, state court judgments that rest on clearly stated, independent, and adequate state grounds are immune from federal review.⁵¹ Furthermore in 1991, the Court held in *Coleman v. Thompson*⁵² that ambiguous state decisions are presumed to be based on state rather than federal law and that the federal court must ferret out any plausible state ground.

Second, since its decision in *Wainwright v. Sykes*,⁵³ the Court has barred from federal review the claims of petitioners who have defaulted under state procedural rules, unless both adequate cause for

⁴⁹ Felix Frankfurter, *The Case of Sacco and Vanzetti* 108 (1927).

⁵⁰ *Stone v. Powell*, 428 U.S. 465, 482 (1976).

⁵¹ *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

⁵² 501 U.S. 722, 733 (1991).

⁵³ 433 U.S. at 86-87.

the default can be shown and actual prejudice demonstrated. Similarly, a defendant seeking to bring new exculpatory evidence before a habeas court must show cause and prejudice before he is entitled to an evidentiary hearing.⁵⁴

The test for determining whether adequate cause and actual prejudice have been shown is formidable, tightened in the vice grip of *Murray v. Carrier*⁵⁵ on one side and *Strickland v. Washington*⁵⁶ on the other. *Murray* requires the cause for the default to emanate from external circumstances, unless counsel's performance is unconstitutionally deficient,⁵⁷ and *Strickland* defines constitutionally ineffective assistance of counsel as professional performance so poor that it can be demonstrated that the result probably would have been different but for the lawyer's mistakes.⁵⁸

The one important exception to the cause and prejudice standard of *Wainwright*, significantly tempering its harshness, was that a claim of innocence was thought always to be available.⁵⁹ But that exception has, for practical purposes, almost disappeared. Miscarriage of justice since *Kuhlmann v. Wilson*⁶⁰ can be shown only by a demonstration of actual innocence and, since *Herrera v. Collins*,⁶¹ even actual innocence, by itself, is probably not enough. Under *Herrera* a claim of actual innocence of the crime must be accompanied by a violation of an independent constitutional right, such as a biased jury or a violation of the Confrontation Clause, that resulted in the failure to establish innocence at trial.⁶² Further, for habeas review of the sentencing phase of a death penalty case, *Sawyer v. Whitley*⁶³ requires that no aggravating circumstances exist. The omission of mitigating evidence, even evidence so strong that it would likely capture any jury's sympathies, is not enough to lift the bar.⁶⁴

The third bar to review by federal habeas, the hand-maiden to the bar of cause and prejudice, is the exhaustion requirement of *Rose v.*

⁵⁴ *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1720-21 (1992).

⁵⁵ 477 U.S. 478 (1986).

⁵⁶ 466 U.S. 668 (1984).

⁵⁷ *Murray*, 477 U.S. at 488.

⁵⁸ *Strickland*, 466 U.S. at 694.

⁵⁹ *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977) (recognizing exception to avoid miscarriage of justice).

⁶⁰ 477 U.S. 436, 454 (1986).

⁶¹ 113 S. Ct. 853 (1993).

⁶² *Id.* at 862.

⁶³ 505 U.S. 333 (1992) (holding that "actual innocence" showing requires demonstration by petitioner of clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner eligible for death penalty under state law).

⁶⁴ *Id.* at 346-49.

Lundy.⁶⁵ No habeas petition containing an unexhausted claim may be entertained in federal court, but a petitioner at his peril dismisses unexhausted claims in order to proceed on exhausted claims if he has any thought that he may wish to raise the unexhausted claims in a subsequent petition in federal court.⁶⁶ *McCleskey v. Zant*⁶⁷ acts as a form of claim preclusion in habeas, holding that a second petition is, in almost all circumstances, an abuse of the writ.⁶⁸

The final bars to habeas review that I will note here are those imposed by the "old rule" rule and the "new rule" rule. The Supreme Court in *Wainwright* established that a habeas petitioner could not have the benefit of an existing rule of law at the time of his trial if the claim had not been properly raised to the trial court.⁶⁹ But since *Teague v. Lane*,⁷⁰ new rules announced after a petitioner's trial generally cannot be applied retroactively to benefit a habeas petitioner. Only in the unusual circumstance in which the new rule finds a "bed-rock procedural element[]" wanting, or where it places the criminal penalty beyond the constitutional power of the lawmaking authority to impose, will the new rule be applied retroactively.⁷¹

The petitioner who has successfully negotiated these formidable barriers faces review that is exceedingly deferential to the state courts. Not only is the state court's fact-finding presumptively correct, but under *Brecht v. Abrahamson*,⁷² conceded constitutional errors—for example, even coerced confessions or the prosecution's failure to turn over exculpatory evidence—also require a showing of actual prejudice before relief will be granted. The court in *Brecht* found that the traditional harmless error standard applicable on direct appeal is too burdensome to the state on habeas review and held that a habeas petitioner must show that an error had "substantial and injurious effect or influence" on the jury's verdict.⁷³

⁶⁵ 455 U.S. 509, 520-21 (1982) (concluding that district court must dismiss habeas petitions containing both unexhausted and exhausted claims).

⁶⁶ *Id.* at 520-21.

⁶⁷ 499 U.S. 467 (1991).

⁶⁸ *Id.* at 493-97, 503 (observing, however, that later petition can be made under appropriate circumstances).

⁶⁹ *Wainwright v. Sykes*, 433 U.S. 72, 87-91 (1977).

⁷⁰ 489 U.S. 288, 295-96 (1989) (depriving petitioner benefit of new equal protection rule announced two and a half years after petitioner's conviction became final).

⁷¹ *Id.* at 307, 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring and dissenting)).

⁷² 113 S. Ct. 1710 (1993).

⁷³ *Id.* at 1720-22 (holding that state's improper references to petitioner's post-*Miranda* silence did not "substantially influence" jury).

III

THE CHALLENGE FACING MODERN HABEAS COURTS

For lower federal courts, performing habeas review within these restrictions is an awesome task. We cannot allow ourselves to be lulled by the belief that the crimes for which the death penalty is imposed are uniformly heinous and that the chance of actual innocence in any given case is virtually nonexistent. Unfortunately, that belief is false. The danger of executing innocent people is real, and any clear-eyed assessment of the death penalty must recognize this.

Judge Hand wrote: "Our procedure has been always haunted by the ghost of the innocent man convicted."⁷⁴ And so it is today. A book entitled *In Spite of Innocence*, by Radelet, Bedau, and Putnam,⁷⁵ catalogues the real-life cases of 130 people whom the authors claim have been wrongly convicted and sentenced to death in America in this century because of such things as false testimony, mistaken eyewitness testimony, racism, or police error.

Two unsettling facts emerge from the book. First, our legal system does not prevent innocent people from being wrongly sentenced to death. This is particularly so when law enforcement officers are under great pressure to solve brutal, highly publicized crimes.⁷⁶ Second, it is often a chance event, rather than the safeguards of the justice system, that brings one of these terrible errors to light.⁷⁷ Given the apparent inability of the justice system systematically and uniformly to detect such errors, and given that the discovery of an erroneous conviction often is truly chancy, it necessarily follows that at least some defendants who are innocent will be executed.

The most famous case of mistaken capital sentencing is probably that of the Scottsboro Boys.⁷⁸ They were nine black teenagers condemned to death in 1931 for the rape of two white women on a train in Alabama, a crime later shown never to have occurred. Current examples strike us even more forcibly. Recently, Joe Burrows was released after five years on death row in Illinois when both main

⁷⁴ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

⁷⁵ Michael L. Radelet et al., *In Spite of Innocence: Erroneous Convictions in Capital Cases* (1992).

⁷⁶ See, e.g., case discussed *infra* at text accompanying notes 84-85 (when popular high school student was raped and murdered, parents threatened to keep their children home unless murderer was arrested by the time school registration was complete).

⁷⁷ See, e.g., Radelet et al., *supra* note 75, at 33-39 (describing how death row inmate was set free after career criminal, angry at former partner in crime, notified defense lawyers that his former partner was real murderer, eventually leading to full confession by that partner).

⁷⁸ *Id.* at 116-18.

prosecution witnesses recanted, and one confessed to the murder.⁷⁹ One of the recanting witnesses claimed that prosecutors had pressured him to implicate Burrows, and according to Burrows, the prosecution withheld evidence favorable to him.⁸⁰

In 1988, Randall Adams was saved by a documentary film.⁸¹ Adams had been sentenced to death eleven years earlier for the murder of a Dallas policeman. The Supreme Court had already upheld Adams's conviction when the documentary *The Thin Blue Line* was released.⁸² The film revealed so many holes in the evidence used to convict Adams—perjured testimony, mistakes in eyewitness identification, the use of hypnosis to refresh a key witness's memory—that Adams was granted a hearing at which his chief accuser confessed to the murder Perry Mason-style.⁸³

Clarence Brandley was freed in 1990 after ten years on death row.⁸⁴ Six days after the 1980 rape and murder of a white high school student in Texas, Brandley, a black janitor at the school, was arrested by an investigator who had taken the case just that afternoon. Brandley was convicted on the basis of circumstantial evidence and sentenced to death by an all-white jury. Six years later, a woman asserted that her ex-husband, a white janitor, had confessed to the crime; others then came forward to offer incriminating evidence against him and another white janitor. A state judge reviewing the unfolding information ordered a new trial, accusing prosecutors of ignoring any evidence implicating anyone other than Brandley, and declaring that he had never seen a case in his thirty years on the bench that presented "a more shocking scenario of the effects of racial prejudice."⁸⁵

The Innocence Project, a group of attorneys and law students in New York, recently won the release of a mentally retarded man serving a life sentence in Virginia by showing that his DNA did not match evidence from the crime scene.⁸⁶ It is inevitable that some death row inmates will be freed in the same manner.⁸⁷

⁷⁹ Dirk Johnson, Back to Family from Life on Death Row, N.Y. Times, Sept. 25, 1994, at A22.

⁸⁰ Id.

⁸¹ Radelet et al., supra note 75, at 60-73.

⁸² *The Thin Blue Line* (Miramax 1988).

⁸³ Radelet et al., supra note 75, at 68-70.

⁸⁴ Id. at 119-36.

⁸⁵ Id. at 134.

⁸⁶ DNA Testing Frees a Long-Jailed Man, N.Y. Times, Oct. 22, 1994, at A4.

⁸⁷ Many of the three hundred cases being investigated by the Innocence Project are capital cases. Telephone Interview with Mira Gur-Arie, Professor, Benjamin N. Cardozo School of Law, Yeshiva University (Jan. 3, 1994).

These cases are just a sample.⁸⁸ A root cause of the failures of our system to protect the innocent is inadequacy of representation at trial. There is ample evidence that many defendants are badly represented. A 1990 study by the American Bar Association reached the disturbing conclusion that “[e]ven in cases in which the performances of counsel have passed constitutional muster under the test of *Strickland v. Washington* and executions have been carried out, the representation provided has nevertheless been of very poor quality.”⁸⁹ This is not the voice of an outside critic. It is the legal profession’s evaluation of its own work.

Stephen Bright of the Southern Center for Human Rights described many shocking examples of inadequate capital representation in a recent article in the *Yale Law Journal*:⁹⁰ a woman whose court-appointed attorney was so drunk that the trial was delayed for a day while the lawyer was jailed for contempt;⁹¹ a man whose attorney failed to introduce evidence that his client had an IQ of forty-nine and the intellectual capacity of a seven-year-old;⁹² another whose attorney submitted, on state supreme court appeal, a single page of argument citing one case and failed even to show up for oral argument;⁹³ another whose attorney called him a “nigger” in court.⁹⁴

It should be no surprise that there are too few talented, experienced attorneys willing to represent capital defendants. Capital cases are exceptionally technical, time consuming, and emotionally draining. A lawyer must know how to investigate and try a murder case, and must know well a sizeable and continually evolving body of constitutional law and specialized procedures.⁹⁵ Further, capital trials are typically bifurcated, with a sentencing phase that requires additional extensive investigation into a defendant’s personal history and is governed by different rules of evidence.⁹⁶

⁸⁸ It is disquieting that we tend to hear about only those mistaken convictions that attract media attention. For example, *60 Minutes* publicized the case of Walter McMillan, who was freed after his attorney discovered a tape recording of police instructing witnesses on how to fabricate their testimony. Martha Ezzard, *Hoopla Won't Harm Simpson Trial*, Atlanta J. & Const., Sept. 25, 1994, at D1.

⁸⁹ American Bar Ass’n, *Toward a More Just and Effective System of Review in State Death Penalty Cases* 53 (Ira P. Robbins Project Reporter, Aug. 1990).

⁹⁰ Bright, *supra* note 39.

⁹¹ *Id.* at 1835. The death penalty was imposed a few days after resuming the trial. *Id.*

⁹² *Id.* at 1837 (noting that jury could thus not perform its constitutional obligation to impose sentence after considering defendant’s background, character, and crime).

⁹³ *Id.* at 1860-61 (although counsel’s performance was determined to be deficient, Court of Appeals did not find that deficient performance prejudiced conviction).

⁹⁴ *Id.* at 1843 n.51 (specifically, defense counsel called client “little old nigger boy” in closing argument).

⁹⁵ American Bar Ass’n, *supra* note 89, at 50.

⁹⁶ *Id.*

Compensation is generally inadequate, and is shockingly low in many states. Mississippi pays lawyers no more than \$1000 to defend a death penalty case,⁹⁷ and Texas has paid attorneys as little as \$800 to handle capital trials.⁹⁸ On an hourly basis, fees paid to a conscientious death penalty lawyer in such states drop below the minimum wage. Funds for investigation are sometimes entirely wanting.⁹⁹

IV IMPROVING THE PROCESS

Within the framework I have described, how can the lower federal courts prevent the execution of innocent people? How can they ensure that from among the guilty only the death-worthy are chosen for capital punishment? How can they safeguard constitutional rights that do not go directly to the question of guilt or innocence?

Fortunately, at the federal level, Congress has recognized the importance of adequate representation in death penalty cases. Federal law requires the appointment of counsel and provision of funds for investigation and experts for indigent capital defendants in federal habeas proceedings.¹⁰⁰ These court-appointed attorneys must have at least five years of experience, including three years of trying felonies.¹⁰¹

Although the Supreme Court has restricted mandatory evidentiary hearings,¹⁰² district courts still have discretionary authority to hold such hearings.¹⁰³ Hearings often prove critical in capital cases. Allowing full development of the facts may establish cause and prejudice, or, in some dramatic cases, allow the defendant to offer significant new evidence from witnesses whom trial counsel neglected to interview or exculpatory evidence that the prosecution withheld.

⁹⁷ *Id.* at 61; Bright, *supra* note 39, at 1867.

⁹⁸ Bright, *supra* note 39, at 1846 ("Courts often refuse to authorize funds for investigation and experts by requiring an extensive showing of need that frequently cannot be made without the very expert assistance that is sought.")

⁹⁹ American Bar Ass'n, *supra* note 89, at 65; Bright, *supra* note 39, at 1846-47.

¹⁰⁰ 21 U.S.C. § 848(q)(4), (9) (1988).

¹⁰¹ 21 U.S.C. § 848(q)(5) (1988).

¹⁰² See *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1721 (1992) (holding that "[r]espondent . . . is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from the failure" and adopting "the narrow exception to the cause-and-prejudice requirement: A . . . hearing [will be] mandated if he can show that a fundamental miscarriage of justice would result from failure to hold an evidentiary hearing").

¹⁰³ See *id.* at 1727 (O'Connor, J., dissenting) ("[D]istrict courts . . . still possess the discretion . . . to hold hearings even when they are not mandatory.").

Hearings are particularly significant to determine the adequacy of the sentencing hearing in capital cases,¹⁰⁴ and they can be critically important in cases where the competence of counsel is at issue.¹⁰⁵

In the many cases in which there is no preclusion or bar to review, the federal courts, both district and appellate, review for adherence to the whole panoply of constitutional rights, albeit subject to the *Brecht* requirement of proof of “substantial and injurious effect.”¹⁰⁶ We review for proof of guilt beyond a reasonable doubt.¹⁰⁷ And we review for the observance of the rights to confrontation;¹⁰⁸ to compulsory process;¹⁰⁹ to assistance of counsel;¹¹⁰ to effective assistance of counsel;¹¹¹ to jury trial;¹¹² to disclosure of exculpatory evidence;¹¹³ to an unbiased jury;¹¹⁴ and to instruction free of error.¹¹⁵

Our scrutiny requires review in minute detail of the entire state court record—of the trial and the appeals and the subsequent habeas proceedings. This invariably includes volumes and volumes of material. At the federal appellate level, we have to review, in addition, the overlay of federal district court proceedings. Sometimes a case makes

¹⁰⁴ See, e.g., *Mak v. Blodgett*, 970 F.2d 614, 616 (9th Cir. 1992) (overturning death sentence after district court evidentiary hearing uncovered significant mitigating evidence not offered in sentencing phase).

¹⁰⁵ See, e.g., *Harris v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994) (overturning death sentence, following evidentiary hearing, on grounds including ineffective assistance of counsel).

¹⁰⁶ See *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

¹⁰⁷ See *In re Winship*, 397 U.S. 358, 368 (1970) (holding proof beyond reasonable doubt is constitutionally required in juvenile delinquency adjudications).

¹⁰⁸ See *Coy v. Iowa*, 487 U.S. 1012, 1020-22 (1988) (holding constitutional right to face-to-face confrontation was violated when complaining witnesses testified from behind screen).

¹⁰⁹ See *Taylor v. Illinois*, 484 U.S. 400, 401-02 (1988) (holding Sixth Amendment right to compulsory process not violated when trial judge refused to allow defense witness to testify as sanction for failure to disclose that witness's identity during discovery).

¹¹⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (establishing right to counsel in criminal trials).

¹¹¹ See *Strickland v. Washington*, 466 U.S. 668, 698-700 (1984) (establishing test for ineffective assistance of counsel).

¹¹² See *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (holding appellant entitled to jury trial when charged with crime punishable by two years in prison).

¹¹³ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

¹¹⁴ See *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.”).

¹¹⁵ See *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (“If the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.”).

more than one journey through the state and federal courts. The review we do must be scrupulously thorough. Not only is it time consuming, but it is also a stressful and anxious process.

To the rational mind, it is surely apparent that the system has it backwards. The intense effort and resources are concentrated at the wrong end. We have inadequate representation at the trial level, which erodes the capacity of judges and juries to acquit the innocent and to save from death those who deserve less severe punishment; we have prolonged review processes that more often than not deflect attention from the real issues of fair trial and possible innocence to arcane examinations of technical bars.

The system incurs huge costs in time and money. The toll upon the judges individually and the courts institutionally is immense. In my own already overburdened circuit, the press of death penalty review is increasing steadily as the state courts process these cases. It soon will be crushing. One of my colleagues, a senior judge of a decidedly conservative bent, states flatly that, merit and morality aside, institutionally the death penalty is one punishment we simply cannot afford.

The review process in the federal courts begins long after the critical events, usually after the defendant has spent many, many years on death row, sometimes waiting years for the appointment of counsel to represent him in his state habeas, and then waiting more years for a hearing first before the state courts and then before the federal courts. How much better would everyone be served had there been competent counsel, provided with adequate resources, in the first instance, for the state court trial?

One wonders what benefit those involved—the families of victims, the courts, the penal institutions, and the condemned—receive from delay that ultimately ends in execution. The delay is costly, sapping the confidence of all concerned in the capacity of the system to do justice. I have seen no studies on the views of death row inmates or the psychological cost of uncertainty and prolonged delay. But I suggest that existence on death row is hardly life at all. Few would seek to justify the current system as one that has merit simply because it prolongs life.

What can be done? Congress had before it at one time proposals for statutory reform of federal habeas review linked to the states' obligation to devote adequate resources to providing competent counsel and adequate investigation for trial.¹¹⁶ That approach appears to have

¹¹⁶ See, e.g., Habeas Corpus Reform Act of 1993, S. 1441, 103rd Cong., 1st Sess. §§ 8-9 (1993) (introduced by Sen. Biden at 139 Cong. Rec. S10925-27 (daily ed. Aug. 6, 1993)).

substantial merit. If we, as federal judges, were able to accord or withhold deference to state court determinations depending upon the adequacy of state provision of representation, I suggest that some of the vices of the present system could be eliminated. Not only the federal review, but also the states' appellate and collateral proceedings, could be more confident, competent, and effective. I suggest also that considerable delay would be avoided.

CONCLUSION

I close by circling back to other more intractable problems for which, unfortunately, I have no answers. Perhaps there are none. The death penalty is unconstitutional if imposed arbitrarily, capriciously, unreasonably, discriminatorily, freakishly, or wantonly. *Furman* tells us this.¹¹⁷ Yet every capital defendant has an absolute right to present mitigating evidence arising from the circumstances of his life, the motivation for the crime, or whatever else might sway the sympathies of the jury.¹¹⁸ Although we can determine objectively whether a person has committed the acts that make him eligible for the death penalty, whether actually to impose it is a subjective decision.¹¹⁹ Prosecutor to prosecutor, jury to jury, state to state, judge to judge, caprice is an inevitable ingredient of death sentences. Justice Blackmun who, ironically, was a dissenter in *Furman*,¹²⁰ ultimately concluded that the decision of life or death "defies the rationality and consistency required by the Constitution."¹²¹

Although *Furman* pronounced discriminatory sentences unconstitutional, to date the Court has been unwilling to look at discrimination beyond specific discrimination in a particular case. Justice Powell

¹¹⁷ See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (concluding "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed").

¹¹⁸ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (footnotes and emphasis omitted)).

¹¹⁹ "This Court has previously recognized that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (quoting *Pennsylvania ex rel. Sullivan v. Ash*, 302 U.S. 51, 55 (1937)).

¹²⁰ *Furman*, 408 U.S. at 375 (Burger, C.J., Blackmun, J., Powell, J., and Rehnquist, J., dissenting).

¹²¹ *Callins v. Collins*, 114 S. Ct. 1127, 1135 (1994) (Blackmun, J., dissenting).

now publicly regrets his deciding vote in *McCleskey v. Kemp*,¹²² in which the majority refused to consider evidence of generalized discrimination in capital cases.¹²³

Even the most ardent supporters of the death penalty cannot but subscribe to the view that it should be administered evenhandedly and without bias. Yet a majority of those executed today are society's most disfavored: forty-five percent are people of color,¹²⁴ and virtually all are too poor to hire a lawyer.¹²⁵ This may accurately reflect the population of the most violent criminals, but how can we be sure?

We are a civilized nation. We are a caring people. We value human life. We prize human dignity. The decision deliberately to take a human life is an awesome responsibility. I close with a question: Can justice be done?

¹²² 481 U.S. 279, 319 (1987) ("Despite McCleskey's wide ranging arguments that basically challenge the validity of capital punishment in our multiracial society, the only question before us is whether in this case the law of Georgia was properly applied." (citation omitted)).

¹²³ See Jeffries, *supra* note 29, at 451-52 (1994) (describing conversation in which Powell told Jeffries he had "come to think that capital punishment should be abolished" and would change his vote in *McCleskey v. Kemp*).

¹²⁴ As of August 31, 1995, of the 295 persons executed since the death penalty was restored in 1976, 39.66% were African American, 5.42% were Hispanic, and 0.34% were Native American. Death Row, U.S.A., *supra* note 36, at 3.

¹²⁵ In California, all 384 men and women awaiting execution as of July 1, 1994, qualified for appointed counsel. Bob Egelko, *The Rich Don't Live on Death Row*, *Seattle Times*, Sept. 6, 1994, at A3.