8th Amendment Law and Litigation Outline (Bryan Stevenson, Fall 2010)

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# American Punishment in the 21st Century

1. Phenomena of mass incarceration
   1. 1971 – 200k in prisons, today, 2.3m, with another 5.5m on probation or parole
   2. US has 25% of the world’s incarcerated population.
   3. Collateral consequences
      1. 34% of black men in AL have permanently lost the right to vote. By 2016, the level may rival that at the time of the Voting Rights Act.
   4. 1996 – AEDPA, Prisoner Litigation Reform Act.
   5. Prisoners with no hope of parole or release, they don’t care, are harder to manage. Harder to get guards, guard are now less trained and less prepared.
2. Welfare Reform Act – 1996
   1. Bans people with drug convictions from public benefits. Simple possession can bar you from food stamps, public housing, possibly even medical services.
      1. States can exempt out, about 31 have.
      2. But don’t deny these services to people with murder or rape convictions.
3. 4 stages/institutions in US influencing lives of African Americans
   1. (1) Slavery
      1. Narratives of inferiority and human worth. Still struggling to overcome this legacy
   2. (2) Reign of Terror
      1. 1870 after Reconstruction through first half of 20th Century.
      2. Racial violence and terror used to sustain racial hierarchy.
      3. Criminality became a way of exercising the same control over people that slavery had.
         1. High death rates – didn’t have to pay to replace them, not same loss as if they were a slave.
   3. (3) Segregation
      1. Use of legal dominance and racial hierarchy
      2. Gave rise to Civil Rights Movement.
      3. AL – still has segregated education language in const – 2004, 52% voted to keep it.
         1. Our continuing inability to talk about race.
         2. New injury/trauma that AL can’t pass the referendum?
   4. (4) Mass Incarceration
      1. Unbelievable impact on communities of color
         1. 1 in 3 black men between 18-30 in jail or parole
      2. Incarceration policy becomes the defining institutional intervention
         1. THE defining threat – more than int’l terrorism, economic recession.
      3. Expectation of prison becomes a defining feature – question of when.
4. Theories behind punishment
   1. Retribution
   2. Utilitarian
      1. Deterrent, keep people safe
   3. Majoritarian
      1. Most people think it’s right. Should we allow this to shape our policy?
      2. Isn’t 8A meant to be anti-majoritarian? Protect those that are hated, at risk.

# The Modern Death Penalty

1. NAACP going after DP
   1. Security was primary – education and segregation also important, but not primary.
   2. Lynchings and DP about par – one just happened outside.
   3. Focus on DP for rape by black men of white women.
      1. Was an extension of the CRM.
      2. Saw ending DP as a civil rights issue, in part because because used so disproportionately against black people, in communities where it had all the aspects of lynching – anger and violence.
   4. Warren court in the 60s reforming criminal rights/procedures
      1. Gideon, Miranda.
      2. Changes also happening globally, Europe getting rid of DP.
   5. Went after DP through procedures – McCaullaugh, Witherspoon (can people opposed to DP be excluded from jury), but court said not so substantial to abolish DP. So went for more systemic change.

### *Furman*

* 1. Does NOT say DP is C&U punishment
  2. Data – 87% executed for rape were black men raping white women, almost all with white victims – evidence of racial bias.
  3. Struck DP because it was arbitrary as applied – can’t be arbitrary
     1. DP is unpredictable, “like being struck by lightning”
     2. **It was the arbitrariness that made it violative of 8A**.
  4. Look to other outline for dissents and concurrences, though not assigned.
  5. All people on death row prior to 1972 had their sentences vacated. Thought would be end of DP. But nope.

1. What should the court have been thinking about in Furman?
   1. The possibility that we could be wrong and the significance of a wrong decision is just too much to tolerate 🡪 C&U.
      1. 140 exonerations over next 30 years, almost sure innocent people have been executed.
   2. DP doesn’t do anything more than LWOP does
      1. Punishment needs a penological rationale that is legit, and if lesser punishment serves same end goal, more severe one is illegit.
   3. “Unusual”
      1. Implicates majority beliefs. How to balance that with anti-majoritarian nature of 8A/Const?
   4. State shouldn’t have this kind of power.
      1. Doesn’t have right to kill. Does have right to punish, but killing is just too much.

### *Gregg v. Georgia* (1976)

* 1. DP const bc jury has guided discretion.
  2. After Furman, new DP statutes that are less arbitrary.
     1. Trying to avoid racial bias
     2. Mandatory proportionality review, mandatory opp for review.
     3. Introduction of aggravation and mitigation.
        1. Results in bifurcation
           1. Guilt phase (BS – “innocence phase”)
           2. Penalty phase.
  3. Context
     1. State responses to Furman
     2. Civil rights backlash
     3. Roe resulted in unprecedented controversy.
     4. Fears of institutional legitimacy for court.
  4. Can’t have DP for every murder – must be the worst.

### *Coker* (1977)

* 1. **DP for rape of an adult woman isn’t Const**
     1. Motivated by racial disparity around rape.

### *Woodson v. NC* (1976)

* 1. **Mandatory DP is unconst**
  2. If mandatory, juries may be less likely to convict, puts all the discretion in the prosecutors hands (doesn’t eliminate the discretion)
     1. This argument is applicable to any mandatory sentence.
     2. Mandatory sentences – you only see the crime, not the person.

### *Sunner v. Shuman* (1987)

* 1. Strikes down mandatory DP for people serving life in prison and kill someone in prison.
     1. Argue must be mandatory, otherwise no meaningful deterrent.
        1. DP can be available, but not mandatory.
        2. **Notion of individualized sentencing is core to the modern DP**.
           1. Though, not required for LWOP or other sentences.

## Aggravation

1. Hard to define. Can make subjective determination from a narrative, but how to write rules/laws that define?
   1. Many states take shortcut – murder plus another felony.
      1. But it’s really hard to commit murder w/o committing another crime.
   2. In most states, Robbery/Murder accounts for 2/3 of DP prosecutions.
      1. Some states have defined kidnapping so broadly that it’s almost impossible to commit a murder w/o also kidnapping (just say you want to leave)
2. Juries relate to suffering, and the state of mind of the victim
   1. But legislatures have a hard time projecting what that state of mind is going to be.
3. Hierarchy of whose life matters.
   1. **Status categories**
      1. Police officers, state troopers
      2. Status of offender (under sentence of life imprisonment)
      3. Some statuses are transient (age)
   2. Youth category (14 or below)
      1. Bc juveniles most likely to kill their peers has created a new juvenile death row.
      2. Also women – 65% of women with DP were for deaths of their infants. Almost always family.
   3. Drive bys – shoot from car
      1. Fear of drive bys in the 90s – show’s influence of society’s fears.
      2. Over-inclusive – domestic homicide can move to the car and suddenly be a DP case.
      3. Case of guy stabbing boss in “gay panic” while in truck – only thing that made it a DP case.
4. Does aggravation accept that DP has a deterrent effect – trying to protect those that more most vulnerable?
   1. But none of us can *really* protect ourselves. Also, the population most at risk of homicide are poor black boys. Can’t be all about the victims.
5. Or, is this about culpability? More culpable if you kill a trooper.
6. Differing views on what is bad/aggravating
   1. Execution style murder
      1. Some say not heinous – quick.
      2. Some say is – ritual, you know it’s coming.
7. List of factors has expanded over the years
8. Non-statutory aggravation
   1. Some states prohibit, some don’t.
   2. Victim testimony is one.
   3. All the cops sitting in the courtroom is another – creating an atmosphere.
   4. This is what the court was concerned about in Furman – non-stat aggravation (race) led to the disparity of black ∆’s getting DP in rape cases.
9. ***Lowenfeld v. Phelps*** (1988)
   1. **If the thing that makes the crime eligible for DP (like robbery) also is what supports the aggravation, that’s fine**.
      1. Conviction phase – capital bc robbery murder
      2. Penalty – see the robbery as aggravating.
10. AL § 13 A-5-49
    1. Aggravating
       1. Creating great risk of death to many persons
       2. Pecuniary gain (really broad)
11. ***Maynard v. Cartwright***
    1. “especially heinous, atrocious, or cruel” is too vague for an aggravating factor – need more definition.

## Mitigation

1. List hasn’t changed much over the years.
2. You can put on:
   1. (1) What qualifies as mitigating evidence **is anything that relates to the character of the offender**
   2. (2) **Anything that relates to the circumstances of the offense**.
3. Trying to show that your ∆ isn’t eligible for DP is usually futile – not really that debatable. Many lawyers skip to the next step, trying to show that they should get life instead, even though eligible for DP.
   1. Discussion on the importance of the **narrative**.

### *Lockett v. Ohio* (1978)

* 1. OH statute said that when found at least 1 of 7 aggravating circumstances, DP must be imposed unless at least 1 of 3 mitigating circumstances are found.
  2. Held:
     1. Statute did not permit the type of individualized consideration of mitigating factors required by 8A and 14A in capital cases.
        1. **Can’t limit the range of mitigation that can be considered**
     2. 8A and 14 require that sentencer, in all but rarest kind of capital case, not be precluded from considering as mitigating factor any aspects of ∆’s character or record and any circumstances of offense that ∆ proffers as basis for lesser sentence
  3. Also said that the exclusion of potential jurors bc of their opposition to DP was ok – concern they can’t abide by existing law.

### *Eddings v. Oklahoma* (1982)

* 1. Death sentence vacated because state courts refused to consider as a mitigating circumstance ∆’s unhappy upbringing and emotional disturbance, including evidence of turbulent family history and beatings by harsh father.
     1. Sentence imposed without type of individualized consideration of mitigating factors required by 8th and 14th As
  2. **Accused must have a right to present mitigating evidence**.

1. Most every state that has capital penalty statute has statutory mitigating circumstances.
   1. However, they are in no way a limitation on evidence ∆ may present.
   2. Any statute that does not direct jury to consider any non-statutory mitigating factors violates the 8th and 14th As.

### Victim Impact statements

* 1. Push back against mitigation
  2. Booth (1986) – victim impact is per se unconst (arbitrary evidence)
  3. 1990s – big victim’s rights movement
  4. ***Payne v. TN*** 
     1. Reverses
     2. **Who you are as a victim is relevant**
     3. Now rewarding those who have the capability of standing up for their loved ones (the victims)
  5. Has changed receptivity to mitigation.

## The Boxes

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 1: Trial (bifurcated) | 2: Direct Appeal | 3: Cert to SCOTUS | 4: State post- convict. | 5: Post- convict. appeals | 6: US SC appeal | 7: Fed habeas | 8: Fed appeal | 9:  SC |
| Direct Appeal | | |  |  |  |  |  |  |

1. **Box 1: Trial**
   1. Bifurcated in liability and sentencing
   2. Right to counsel
   3. Must raise any const claims here.
   4. Contemporaneous objection if want to bring it up on appeal
      1. WHILE prosecutor is speaking. Have to object and give specific basis (and can add extra). Also ask for jury instruction – not enough to say judge was wrong, but that you asked for a remedy.
   5. Any claims that you could bring here and don’t, you lose.
2. **Box 2: Direct Appeal**
   1. Generally to the state’s highest court w/criminal jx
   2. SC has said that appellate review is mandatory.
   3. Right to counsel
3. **Box 3: Cert review in SCOTUS**
   1. Is discretionary
   2. Once you exit box 3, your conviction is considered final. After Teague, you won’t get the benefit of any new rule (unless meets certain exceptions to be fully retroactive).
      1. Rationale: finality.
   3. Claims preserved if brought in 1 and 2 but not here.
4. **Box 4: State post-conviction**
   1. Usually known by a rule – AL, Rule 32, or as state habeas
   2. No right to counsel.
   3. First opp to raise ineffective assistance of counsel
   4. New evidence of innocence (DNA, witnesses)
   5. *Brady* violations
      1. Prosecutors have an obligation to turn over evidence that would have been exculpatory.
   6. Illegal sentences if it as jurisdictional (?)
      1. Any jx issue
   7. Juror misconduct
   8. Competency to stand trial
      1. Exception to the timely and specific req.
   9. Factual innocence if the rule permits it.
5. **Box 5: Post-conviction claims on appeal**
6. **Box 6: SCOTUS appeal**
   1. Very rarely accepted
7. **Box 7: Federal habeas petition**
   1. US District Court – first time encountering judges with life tenure
   2. Huge DP battleground.
   3. Federal courts can only review claims that have first been presented to state courts.
   4. Can’t bring up anything that hasn’t been brought up before – fed court can only look at things that have been exhausted at the state level.
8. **Box 8: Federal appeal**
9. **Box 9: Final SCOTUS appeal/petition**
   1. Throughout DP, where critical constitutional questions have been presented.

# Categorical Exemptions

1. Is DP unconst if it hasn’t been presented such that the sentencer has a reasonable alternative?
   1. TX – long time, no LWOP, so choice was DP or life with parole. Made it easier to get DP.
   2. New aggravating factor that isn’t statutory – unreasonable threat of release.
   3. Court – ok if the other option is life w/parole.
      1. GA – parole eligible in 7 yrs. So prosecuting narrative talks about how he could be back on your street w/in 7 years.
2. Coker (above) – no DP for rape of adult.
   1. Introduces notion of categorical exceptions for DP.

### *Penry v. Lynaugh* (1989) [O’Connor]

* 1. Court says DP for ∆’s with mental retardation is ok.

### *Atkins v. Virginia* (2002)

* 1. **No DP for MR**
  2. What changed since *Penry*?
     1. Trend among the states to eliminate DP for MR.
        1. *Penry* – only 1 state banned it, Atkins, only 21 states permitted it. (how to count the 12 states that don’t have DP?)
     2. But do we want maj norms shaping what the Const dictates?
     3. New factor – of the MR people sentenced to death, how many have *actually* been executed? If not many, indicative of our hesitation and moral wavering.
     4. Also – can a country only trend in one direction? What if it went back in the other direction.
  3. MR aren’t as able to defend themselves in a capital trial – can’t present mitigating evidence as much/as well.
  4. Huge backlash after a MR man was executed, powerful narrative.
  5. Int’l influence.
  6. No backlash like Furman, but now, pushing to say people aren’t MR.
     1. Some states, no one has been spared execution due to MR.

1. **Requirements for a MR diagnosis**
   1. (1) Onset during adolescence (not actual diagnosis, but signs)
   2. (2) Test – have to fall within some of the MR norms
   3. (3) your adapative skills are not such that you would be disqualified from getting the benefit we give to the people who have MR.
      1. Category w/discretion.
      2. Atkins – guards saw him playing basketball and setting a pick – shows complex thinking.
      3. Now, advocate has to also have a huge narrative around MR. Appearance of MR matters just as much as the diagnosis.
2. Juveniles
3. *Wilkins v. Kentucky*/Stanford v. Kentucky (1980s)
   1. Court says it isn’t unconst to execute juveniles.

### *Thompson v. OK* (1998)

* 1. 15 yr old sentenced to death.
  2. Four justices saying shouldn’t execute 15 and younger, four justices saying age is irrelevant, O’Connor somewhere in between.
  3. Stevens – unconst. Youth as a mitigating factor in capital cases.
     1. Not maj. But did prevent DP.
  4. O’Connor concur – not unconst to execute juveniles, but state statute at issue didn’t expressly provide for DP for juveniles, so can’t execute.
     1. You’re allowing these kids to be tried as adults, and so now they’re eligible for DP – but unless you expressly tell me that’s what you meant, I’m going to assume you didn’t mean that.
  5. Second categorical exception – advocates jump on the categorical bandwagon.
  6. (2 yrs later, similar case for 16 yr olds. O’Connor not having it. Unless saying you don’t want to execute them, we’ll presume that you do want to)

### *Roper v. Simmons* (2005)

* 1. **No DP for juveniles**.
  2. Handful of jx’s have abolished juvenile DP, but not as many as had MR at time of Atkins. Enough to show a trend though.
     1. Not as much evidence of trend or societal rejection, SCOTUS hesitating.
  3. MO SC forces SCOTUS hand – takes 2nd habeas of Simmons, says juvenile DP violative of 8A.
  4. Kennedy feels need to say why **kids are different**
     1. Brain science - not as developed, biologically incapable of functioning as adults.
  5. Also looks to int’l law – US only country in the western world that executes kids.
     1. Huge backlash based on this – theory of looking to int’l law.

### *Kennedy v. Louisiana* (2008) [Kennedy]

* 1. Strikes down DP for child rape
     1. Essentially holding that DP for non-homicide is impermissible.
  2. Data a bit more persuasive – 44 jx have not authorized DP for child rape (though, some have for other non-homicide crimes)

# Juvenile LWOP

1. **AEDPA**
   1. **If you want to challenge a sentence that you are arguing is unconst based on a new const rule, you have 1 year to do so**.
      1. Otherwise, time barred.
   2. So if you want to challenge LWOP for juveniles based on Roper, you have one year to do that.
2. **Challenging Juvenile LWOP as a category**
   1. About 2300 juveniles with LWOP
      1. Thompson – less than 20
      2. Coker – less than 20
      3. Atkins – not exact number, but probably around 80
      4. Roper – 72 juveniles on DR.
   2. Fear that something won’t be considered “unusual” if applied frequently – here a general rule of about 100 or less.
      1. 13 yr olds LWOP – about 8 or 9
      2. 13 & 14 yr olds – about 72
      3. 13-15 yr olds – about 300
      4. Non-homicides – about 105
      5. Mandatory LWOP – 1900
         1. This is the biggest reason why the population is so big.
3. **Child Super Predators**
   1. Late 1980’s, narrative about the new breed of child – kids that aren’t really kids, are meaner, more destructive, can’t be rehabilitated 🡪 we need to protect our communities from them.
   2. Lowered age for trying juveniles as adults.
      1. Juv system – out at 21, not adequate. They’ll rape and murder once out
   3. Some states abolished the min age for trying as adults.

## Graham and Sullivan lit strategies.

* 1. Chose 13-14 yr olds. Only 19 states (compared to 30 and 20 in Roper and Atkins). Trying to educate people. Language of “death in prison”
     1. If you win, what is the remedy? If say eligible for parole – most kids have terrible disciplinary records in prison – they are sexually assaulted, so out of place in adult environment, lash out. Unlikely to ever be paroled.
  2. Want to create a notion that there is not a deterrent effect for children
     1. Aren’t aware of crim statutes, don’t look to the future
  3. US really only one that does this
     1. Extra-legal shame.
  4. Note the race element – almost all kids of color. All the 13-14 yr olds given LWOP for non-homicides are black, 90% of the 15 yr olds are black or latino.
  5. Amicus strategies
     1. APA – mental health
     2. Former juvenile offenders
        1. Emphasize people change
        2. Really conservative senator – his crimes today would have garnered LWOP.
     3. Studies on trauma
        1. Matters for how we think about culpability.

### *Graham v. Florida* (2010)

* 1. **Juvenile LWOP is unconst for non-homicide crimes**.
     1. 6 justices say shouldn’t be applied, 5 say C&U.
     2. Expands on analysis in Roper of how kids are different.
     3. 129 kids – meets numerical requirement to be unusual.
  2. **Must have a meaningful opportunity for relief**.
     1. Kennedy clearly thinking of parole – is that meaningful?
  3. Roberts – Not C&U, but would overturn on narrow proportionality analysis.
     1. Plus – can imagine cases, even involving homicide, that might offend the grand principle
     2. Downside – would only incorporate youth as a mitigating factor, too discretionary.
        1. Youth almost exacerbates at time, bc that much more shocking – seems that much more dangerous. Seen as incorrigible.
  4. Note – Graham was on direct appeal, in box 3.

### *Sullivan*

* 1. **LWOP is unconst for crimes commited by 13-14 yr olds**.
  2. Was convicted of sexual battery – average adult sentence at time for that crime was 5 yrs.

1. Note – not arguing proportionality in Graham and Sullivan
   1. These arguments typically fail
      1. Arguing that the punishment is *always* disproportionate to the crime – trying to help too many people at once.
   2. Harmelin – LWOP for first time drug crime (a lot of cocaine) was not unconst for disproportionality.
      1. Argument for the “first time offender” as a category?
   3. Weems
   4. Ewing v. CA
      1. CA 3 strikes law – many getting life for non-violent offenses, not unconst.
   5. Also, proportionality not as sweeping in these cases as categorical (Graham got LWOP for violating his parole)
      1. Though, end result – does look at offense a bit – not JUST about the offender.

### Post-Graham

* 1. People coming out of the woodwork
     1. 240 fall under Graham alone, more than originally thought.
     2. Thousands got really long sentences or consecutive sentences that essentially amount to LWOP.
  2. Note that victories can be only symbolic (Furman), but need to have a strategic plan about how to make it meaningful.
  3. **Relief**? **What is the constitutionally acceptable alternative to LWOP**?
     1. Resentencing? – judge can still say 60 years, not that different.
        1. Can’t do all of that within 1 yr.
     2. Legislatures? – bad idea.
     3. Juvenile parole system?
        1. Become eligible after so many years, have to be reviewed every so many years
        2. But parole is so arbitrary and discretionary, hardly ever granted
           1. FL – half of one percent in last 15 yrs.
           2. LA – governor has to agree. Jintner hasn’t paroled a one.
     4. In 1975, the max sentence if not life was 20 yrs – argue that should be the sentence for those convicted before then – immediate release.
        1. Relevant for about 25 cases in LA and FL.
        2. Analogize this argument to the post 1975 cases?
     5. Statutory analysis
        1. If crime has a lesser charge also, can argue the statutory maximum for the lesser version.
     6. What if consecutive sentences? Can’t argue that 20 yrs is unconst, but can we argue that 80 (four consecutive) is?
     7. Presumption of parole unless you do something to lose it?
        1. But disciplinaries are so easy to get, juveniles more likely to have disciplinary infractions.
     8. **Think about where you’re pushing the discretion and the power**.
  4. Note that 50 years is not the same from state to state, nor is life.
     1. Good time, gain time, etc.

### Convention on the Rights of the Child

* 1. US and Somalia only two to not sign it.
  2. **§ 37** State parties shall ensure that no child shall be subjected to torture, cruel and unusual punishment, etc. **No life sentences for people under 18 yrs of age**.

# Jury Selection and Juries

1. **Three big interventions**
   1. (1) Senate cases – **jury pool must be representative of the community**
      1. *Berghuis* – 6A (fair cross section) and 14A (all groups) protect against the underrepresentation of cognizable groups.
      2. **Three requirements to show a violation**
         1. **(1) Exclusion of a cognizable group**
            1. How to define cognizable group?
         2. **(2) Statistically significant underrepresentation**
            1. Compare percentage in community to percentage in pool – if the absolute disparity is more than 10%, then statistically significant

Bizarre – if black community is only 10%, then could exclude them all.

* + - * 1. If were comparative disparity – look at two figures and divide (if 20% of community but only 10% of pool, then a 50% disparity)
      1. **(3) Opportunity to discriminate**
         1. Using a computer – it’s not our fault!
         2. Often based off voter lists, which means will be underrepresentation.
  1. Other 2?

### *Lockhart v. McCree* (1986)

* 1. Arguing that jurors excluded bc of their viewpoint (no DP for example) should still be allowed to participate in the “innocence phase” even if not the sentencing.
  2. Const.
     1. **Death qualification does not violate fair cross section requirement of 6A**.
     2. Opposition to DP does not create a cognizable group.

### *Wainwright v. Witt*

* 1. **If opposition to DP will substantially impair the ability of the juror to make a fair/reliable judgment, it would be unconst to let them serve**.
     1. Plays out that if you say opposed to DP, prosecutor says “challenge for cause” and you’re out.
        1. But ∆ lawyer can ask more questions, build a record to show that you can still impartially consider everything.
        2. Have to “rehabilitate” those people.

### *Morgan v. Ill*

* 1. **Can’t have someone whose support for DP is so automatic that it will substantially impair their ability to consider life**. Couldn’t consider mitigation.
  2. But, how do you show someone is an automatic supporter? Really tough.

### *Turner v. Murray* (1986)

* 1. Defense lawyer had asked a judge for a race based voir dire question (∆ is black, victim is white, will this prejudice you?).
  2. **Held unconst to exclude the question because this is a *DP* case AND because it is an *interracial* case**.
     1. **Only gives him penalty phase relief** – doesn’t think it has any bearing on the conviction, only the sentence.
        1. Absurd to think discretion in the penalty phase but not the innocence phase.
        2. Don’t want to open door of looking at racial prejudice among jurors.
  3. Still law today – only allowed to ask race questions if a DP case and was an interracial crime.
     1. But attorneys hardly ever do voir dire on race.

### Race voir dire

* 1. Get them to talk about as much as possible. Avoid things that are overtly about race.
     1. Topics like football, organizations they’re a part of, where they live, TV, actors, rap music, church
     2. Topics tied up with race: safety, Obama, affirmative action, OJ Simpson trial – these topics signal something about your racial temperature.
  2. Do this in the group, identify those who you want to follow up with individually.
  3. Be aware of who you are – if you say things that give them permission to say racist things – if you tolerate it, they’re not wrong or racist
  4. Focus on building a record.

### *Swain v. Alabama*

* 1. Challenge to discriminatory use of peremptory strikes.
  2. **Peremptory strikes** – discretion to exclude people after excluded those for cause. Most states give a set # of strikes.
  3. Showing discrimination
     1. Can’t just look at one case – have to look at period of time, prove prosecutors doing this on a regular basis.
     2. Impossible to meet.

### *Batson v. Kentucky* (1986)

* 1. Away from Swain – **if see evidence of racial discrimination in a single case**
     1. ∆ can object, state can then give race-neutral reason for strike.
  2. Procedure
     1. **Must make a contemporaneous objection**
        1. Must object specifically and precisely, at the time.
        2. Be clear: “*I object. This violates Batson, 6A, 14A*” – throw it all in, even if no legal basis!
     2. State can then give a race neutral reason (note- doesn’t have to be a good one – color of their shirt)
        1. More you can establish pretext, the better, but hard to do.
     3. Law – you can wait until the end.
        1. Did they also strike white people wearing that shirt color?
  3. Not retroactive.

1. Despite this, Batson not that effective. Still mostly white juries.

### *Powers v. Ohio*

* 1. White ∆ objected to state’s use of peremptory strikes against 7 black venire persons from jury.
  2. **Held: under EP (not, not 6A), ∆ can object to race based exclusion of jurors whether or not ∆ and the jurors share the same race**.

1. *Edmonson*
   1. **Batson also applicable in civil context**.
2. ***McCullen***
   1. **Batson also applies to peremptory strikes by the defense attorney**.
   2. ∆ was a member of the KKK, didn’t want black people on the jury
      1. But, Batson is framed as the rights of the JUROR, not the ∆.

# Prosecutorial Discretion, Race, and DP

## *McCleskey v. Kemp* (1987)

* 1. Baldus study. Stunning stats.
  2. **Court accepts the data, but still upholds GA DP**.
     1. What does it mean to say it’s ok to have this kind of racial discrimination?
     2. Says this is inevitable.
        1. Court could have said segregated schools were inevitable.
  3. Argued only under 8A – trying to cabin it to make the court more comfortable – would be even more sweeping otherwise. Still within the death is different rhetoric.
     1. Still, fear that if grant relief, people would return with same arguments for other crimes. Problem just too big for court to solve?
  4. Also couldn’t show that individual decision makers acted in a discrim manner.
  5. Dissent – fear of too much justice. Now ∆ lawyers have to explain that unfortunately race is the greatest predictor of his sentence.
  6. **Ends challenge to DP broadly**.
     1. Third part of the Furman, Gregg series.

# Judges

1. General
   1. Often elected, often partisan
   2. Campaign financing has played a huge role in the last 20 years.
      1. What does it mean to have a judge who is a majoritarian politician when thinking about sentencing and 8A values?
      2. Does the influence of money and politics corrupt this?
2. Judge Parker in AL SC
   1. Complaining about Roper, complaining that other AL judges aren’t standing up to SCOTUS.
   2. Court of crim appeals – said Graham doesn’t apply to a 14 yr old convicted of murder. Have filed cert in AL SC.
      1. Parker not exactly open. How to challenge?
         1. Can’t just say won’t be fair and impartial – slippery slope
         2. Did he say he wouldn’t follow the law?
            1. This would be the critical part. Everyone says their feelings on issues in campaigns.
         3. Recusal motion? – political consequences, saying we don’t trust you.
3. Graham – were talking about how we didn’t trust legislature to develop sentencing schemes for juveniles.
   1. But do we trust partisan elected judges any more?
   2. Can’t go to federal court – restricted habeas and retroactivity, wouldn’t be applicable.
   3. At least in legislature, no pretense of law and judging – can say what you want to say.

# Counsel, Poverty and Enforcing Constitutional Rights and Remedies

1. **Where do you have a right to counsel**?
   1. At trial
      1. Gideon v. Wainwright
   2. At appeal (for murder)
      1. Douglas
   3. Not at SCOTUS.
   4. Not at Box 4

## Ineffective assistance of counsel

* 1. Can’t raise until box 4
     1. Needs to be at a trial level court – put on evidence and transcripts for IAC.

### *Strickland* – have to show 2 things

* + 1. **(1) Deficient performance** – below objectively reasonable
       1. Often hard to tell what is “strategic” and what is deficient.
    2. **(2) Prejudicial**.
       1. Outcome of the proceeding – either innocence phase or sentencing (for DP).
          1. More IAC at penalty, as it’s harder to say what the jury would have done.
       2. Can you argue procedural prejudice? It’s barring you from later hearings, saying outcome would have been different at appeal (rather than trial) – dispute in law on this.
  1. Case where the lawyer had a book deal with more money if got DP than LWOP, sexually harassed client, didn’t investigate, didn’t present evidence. Said not IAC, even if really bad 🡪 not prejudicial.
  2. Should DP be a situation where we presume prejudice?

### *Herring*

* 1. **State did something inappropriate – prevented closing arguments**.
     1. Structural barrier – result of a state actor.
  2. Held – **violates 6A right**
     1. So, if counsel is planning to give it and state stops, that’s unconst**, no need to show prejudice**.
        1. **Presume prejudice**.
     2. But if client complains that just didn’t give it, have to show prejudice.

1. Structural barrier argument has been argued in **Gitmo cases** – access to the client is so limited and so uncomfortable, that they are barriers to IAC.
2. Argued also that when appointed counsel is paid so little, it is a structural barrier making it impossible for a lawyer to be effective, should presume prejudice.

### *Barbour v. Haley*

* 1. No right to counsel on death row appeals – no right after box 2
  2. Had tried to argue that with all the wrongful convictions and so much unreliability, should be. So many exonerations in boxes 4&5 and 7&9.

# Procedural Defaults

## Rule 32 (AL version?) (post-conviction petition on Box 4)

* 1. **If the claim could have been raised in Box 1 and wasn’t, you’re barred**.
     1. “bad cholesterol” – **can’t raise in federal court either, because hasn’t been exhausted**.
  2. **If you raised it and lost, you’re barred**.
     1. So if you raise a Batson claim at time (lawyer objected) and you raise it on appeal (preserving), you don’t get relief, can you raise it in Box 4?
        1. No, because you already raised it and lost.
        2. But, **can bring it up on federal habeas bc it’s been exhausted**.
     2. “good cholesterol” default – not opening it in box 4, **but not precluded in federal habeas because you haven’t litigated that claim in federal court yet**.

1. If have a Batson claim that is strong and wasn’t raised, you could possibly bring it up as IAC in box 4. But, would be almost impossible to show prejudice, so you lose.
   1. So note that all these crim protections – **Miranda, Batson, etc. are not something that a federal court can review if there is not a contemporaneous objection**.
      1. And IAC is so tough bc prejudice is so attenuated.
      2. Note: must preserve the contemporaneous objection on appeal also!

### *Coleman*

* 1. VA deathrow, Coleman saying innocent. Big law firm took him on pro bono. Hearing (box 4?), arguing IAC, judge ruled against him. Filed his claim/appeal **3 days late 🡪 procedurally barred**.
  2. Go to federal court – can’t help, if a procedural default, we are not going to litigate the merits of that claim. SCOTUS affirms that it won’t reopen. Coleman executed.
  3. **Can’t argue IAC here because you had no right to counsel in box 4**
     1. AEDPA makes this statutory – can’t argue there was IAC in box 4 or beyond.

1. **Notion that the procedures we have created to create finality cannot be compromised**.
   1. *Wainwright* – ANY state court procedural violation means you forfeit the ability of the claim to be adjudicated in federal court.

### Exceptions

* 1. **Cause and prejudice**
     1. If the cause for the default can’t be associated with the client or lawyer, and it’s prejudicial, may get a merits review.
  2. **Might be cause**
     1. If the rule the state is trying to enforce has not been clearly announced and regularly followed.

### *Ford v. Georgia*

* 1. Prosecutor using all these peremptory strikes, lawyer objected too early and too late. Rule is that you object *during* the exercise of strikes. VA SC affirmed
  2. SC – reversed.
     1. Rule about objecting during, but not before or after, is **not clearly announced**.
     2. Can be adjudicated in federal court.

### *Harris v. Reed*

* 1. **If state does not rely on a procedural default when a procedural default claim is presented, then the federal claim is not barred**.
     1. **Rely on = plain statement articulating it relied on procedural default**.
     2. Otherwise, presumed to be on the merits.
        1. If court only says “denied”, not a plain statement that procedurally barred.
  2. So, **worth putting in your claims that might be procedurally barred – if they rule on the merits (rather than clearly rejecting for procedure), then you can get federal review**.

1. SCOTUS just decided a case about a mail room error – situation where we can overcome the procedural bar?
   1. LOOK INTO.

### *Pennsylvania v. Finley*

* 1. **If the appeal is discretionary, there is no right to counsel**.
     1. Only if there is a *right* to appeal is there a right to counsel.
  2. In AL, you MUST appeal to the state’s highest court within 14 days to exhaust the issue to go to the federal boxes, but, because whether or not the court *hears* it is discretionary, there is not right to counsel.
     1. Makes no sense. Will be procedurally barred, but no counsel.

1. ***Bullington***
   1. **Pleas do not trigger double jeopardy**.
      1. If you plea guilty, get LWOP, then file a successful IAC claim and get a new trial and get DP, is const.
      2. Whereas if you had a trial, got life, reopened on IAC – you could not get DP.
2. ***Ate v. OK***
   1. If your lawyer can’t be effective because doesn’t have resources to get witnesses, then you have a right to those funds if it is critical to the defense.
      1. So you can get a psychiatrist or psychologist.

### *Teague*

* 1. **Court announces that any new rules of Const procedure/law will not be applied retroactively unless it meets two exceptions**.
  2. It does apply to those still pending on direct appeal (Boxes 1-3)
  3. Two exceptions
     1. (**1) If it places certain types of private primary individual conduct beyond the power of law enforcement to proscribe**.
        1. i.e. criminalizing sodomy or executing MR or juveniles, LWOP of juveniles.
     2. (**2) Those procedures that are implicit in the concept of liberty**.
        1. Unclear what this means.’
           1. So fundamental that it affects the truth seeking. Hasn’t really identified a rule that qualifies.
        2. Batson didn’t qualify. Unclear if *Ate* would.
        3. Probably means stuff like right to counsel.
  4. **Can’t create a rule in litigation that initiated in Box 4** – already in collateral review.
     1. So have to bring up any new rules you are arguing for in boxes 1-3?
     2. Don’t fully understand this.
  5. *Graham* – arguing retroactive under first exception – we’re now proscribing this behavior.
  6. Note: makes people much less creative – don’t want to seem like you’re arguing for a new rule – try to make it fit into a pre-existing category.

1. **AEDPA**
   1. Habeas Corpus – the great writ.
      1. Unclear if Cong can eliminate (Art 3 of Const), but can definitely regulate.
   2. Really complicated, procedural, nuanced – didn’t get much attention.
   3. Reaction to perception that DP cases were taking too long, wanting to speed things up.
      1. But, there are 2.3m people in jail and only 3000 on death row. If you’re serving a 20 year sentence, you have a large incentive to challenge your conviction as quickly as possible.
         1. Example of how DP shapes and thwarts the whole system. AEDPA operating on the presumption that people are trying to avoid finality.
2. **Prisoner Litigation Reform Act**
   1. Impact on ability to challenge confinement.
      1. Really no oversight, even for really egregious stuff.
3. **Welfare Reform**
   1. Can’t get a lot of benefits post-conviction.

## AEDPA – 6 things that dramatically alter federal HC.

1. **Statute of Limitations**
   1. Used to be unlimited
   2. **Now, one year**.
      1. **Starts when you complete your direct appeal**
         1. You have one year to get to box 7.
         2. But, **tolled during state post-conviction (if you properly filed in state court)**
            1. So, if it takes you 7 months to file in box 4, you have 5 months once out of box 5 to get to box 7.

Box 6 does not toll, so risk to appeal there.

* + 1. **Time starts running once your time runs out to file with SCOTUS in box 3 – so day you get out of box 2 plus 90 days**.
       1. Makes filing with SCOTUS in box 3 almost mandatory, because you need that time (that they take to reject? I think you get the 90 days regardless, but would get more beyond that? )
    2. **If you are untimely with your claims in state court (box 4), then you are not considered to have properly filed, so won’t toll**. Better to just jump to box 7 (even though you’ll lose those claims that you could have had in 4 and have not been federally exhausted).
  1. § 2244(d)(1)
     1. (A) - date on which judgment became final by conclusion of direct review or expiration of time for seeking such review
     2. (B) - state action interfered
     3. (C) - date on which constitutional right asserted was initially recognized by SCOTUS, if right was newly recognized AND made retroactively applicable to cases on collateral review.
  2. This one has been the most profound outside of DP.
     1. So many ways to miss the deadline. Only way can get review is if you have NEW facts when filing habeas, but hard to get new facts from jail.
     2. Puts you on a clock before you know you’re on a clock.

1. **Right to Appeal**
   1. **Won’t let people who lose in box 7 to directly appeal**
   2. Need a certificate of appeal-ability to appeal.
      1. So litigation could end in 7. Starting to see this in DP cases.
      2. 11th Cir has denied certification for the 15th time to a prisoner who has litigated the issues through box 7, not allowed to go to 8.
2. **Exhaustion**
   1. **Must also exhaust all the FACTS for claims, not just all your legal claims**.
      1. Any studies you might have must be presented in boxy 4 or 5.
      2. McCleskey couldn’t have happened after AEDPA, as much of that information was presented in box 7.
   2. Otherwise, deemed unexhausted and not reviewable.
3. **Removal of de novo review**
   1. Before, fed courts exercised de novo review for law, no undue deference to state court, would make own judgment.
   2. **If rule is not clearly established by SC, then the fed judge is not authorized to grant relief** - ***say the state court reviewed the claim in an arbitrary or unreasonable manner contrary to established federal precedent***.
      1. Not enough to say there is clear precedent and the court got it wrong – have to say the state court got it wrong unreasonably.
   3. Also reaffirms *Teague* – unless the precedent is on point, not going to be able to satisfy the “contrary to” language.
4. **Successive petitions**
   1. Once you’ve been through boxes 1-9, you can’t file another habeas (used to be able to file successive habeas petitions in box 7)
   2. Have to get permission from a 3 judge panel to allow your petition – box 8, Court of Appeals.
      1. If denied, nothing you can do. AEDPA has taken jx authority from SCOTUS to review this. Ct of Appeals the only decision maker.
   3. *Lonchar* – SCOTUS says ok, let’s Cong take this power.
   4. Have to show for 2nd petition to move forward
      1. **(1) Show that this could not have been litigated previously, or**
      2. **(2) Have to show by clear and convincing evidence that no reasonable person could have found the person guilty on the facts**.
         1. **Actual innocence** – not that you aren’t guilty of capital murder, but not guilty of murder at all.
         2. **Even if can show actual innocence, not enough – still have to show an additional constitutional violation**.
            1. ***Herrera***. Being innocent does not violate the const.
   5. **Way around- Original Writ**
      1. Really rare, really old notion. Holladay case, Troy Davis case. First ones in the 20th century. Troy Davis currently remanded to district court for fact finding.
      2. Substantive requirements
         1. Have to have no remedy available to you in the lower courts – nowhere else to go.
5. **Special Rules for Death Penalty Cases**
   1. If states provide death row prisoners with lawyers on trial, appeal, and collateral review (box 4?), they can opt out of the requirements of AEDPA and put in more rigorous requirements.
   2. If **OPT IN** (meet requirements)
      1. Then 6 month SOL.
      2. If state court says claim is procedurally barred, fed courts won’t review at all.
         1. State courts would be the final decisionmaker for const requirements.
         2. **That would be IT – all the procedural cases we talked about – Levy, consistently followed rule, clearly stated procedurally barred – would be inapplicable**.
      3. Federal habeas – fed judge has 90 days to give judgment, as does the court of appeals.
   3. No state has met the requirements yet.
   4. Patriot Act 2004
      1. Before, federal court of appeals determined if a state met the requirements.
      2. Now, US Attorney General.
   5. CA and AZ seeking it.

# Mental Illness and Innocence

### Competency to stand trial

* 1. Obligation is on the state to make sure the person IS competent to stand trial
     1. **Because burden is on the state, you can’t forfeit this claim**.
  2. Incompetent to stand trial if they can’t assist their attorney in a defense or understand the proceedings.
  3. Reality is that it’s really hard to show that you aren’t competent to stand trial.
     1. Wildly psychotic, severely mentally ill, belief that you are immune from punishment
        1. Saying immune 🡪 if recognize there is a jury and that they convict and punish you, then you get it. Competent.
     2. Can send you to ‘competency school’ to teach you what the trial is.
     3. Can make you take drugs to be competent.

### *Ford v. Wainwright*

* 1. **Have to also have competency for execution** – have to understand what the execution is about.
  2. Still, really hard to show incompetence.

1. Mental illness is not the same as metal retardation.
   1. Is executing someone, knowing that mental illness was key to their crime, unconst?
      1. Is this more relevant at the conviction stage?
   2. When are we arguing for mitigation and when for exemption?
2. Innocence
   1. 140 exonerated from death row. That’s 1 for every 9 executed.
      1. Only about 15% DNA.

### *Herrera* (1993)

* 1. Argued that if evidence of innocence, a federal judge ought to have the authority to stop the execution and satisfy herself that the person is not innocent before allowing it to go forward.
  2. **Court – habeas is about unconst sentences or unconst convictions.** 
     1. **Just because may be innocent doesn’t mean trial was unconst**.
     2. Court didn’t do anything wrong, it just didn’t work out for you.
  3. Unwilling to say that the 8A prohibits you being executed for a crime you didn’t commit.
     1. So, procedural due process rights, but not substantive?
  4. Court – get relief through clemency.
     1. Ironic, because this argument was made in juvenile and MR context, and court said “absolutely not”, we have a const obligation to enforce these norms and values.
  5. Court resisting because it’s too big, don’t want to open that fan of worms.
     1. FINALITY.
  6. BS – the narrative around this wasn’t nearly as strong as it was for Roper, Atkins, or even Graham. Can’t overtate the importance of the narrative.

1. Elected politics makes everyone avoid progressive change here.
   1. No one calling for more rigorous enforcement of 8A (maybe Feingold, and he just lost).
   2. Example of Sotomayor in Wood v. Alabam – need to get comfortable and see the realities before you can deal with it.
      1. Stevens article, looking back.
      2. **Same problem with clemency – the same insight and courage that it takes to do the right thing doesn’t come with the job, it comes over time**.
      3. Over half the commutations and clemency that have been granted have been granted on the last day in office.
         1. Highlights that they know what the right thing is, but aware fo the political backlash.
2. ***Callins***
   1. Blackmun’s famous anti-DP dissent
   2. Scalia – if saying they’re incompatible, get rid of mitigation.
      1. You know a DP case when you see it.
      2. The crime is powerful enough that we can comfortably execute without knowing more.