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## Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases

Victoria J. Palacios

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# Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases

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Victoria J. Palacios

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*Despite unprecedented advances in constitutional protections for criminal defendants by the Warren and Burger Courts, commutation is essential to achieving justice in administration of the death penalty. Wrongful or unjust convictions and sentences, maldistribution of the death penalty, and the growing belief that fair administration of capital punishment is an impossible human enterprise give commutation continued importance.*

*Historically, the commutation power has been viewed as a fail-safe measure against injustice. The Court and supreme court jurisprudence reflects an abiding faith that commutation will respond to eliminate injustice, particularly where the Court denies relief. Instead, popular support for the death penalty, concern over crime, and the erroneous belief that criminal convictions are error-free have virtually eliminated the use of commutation. By closing its eyes to the reality of commutation practices, the Court adds to the growing evidence that it has abandoned its role as protector of the powerless.*

# Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases

*Victoria J. Palacios\**

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## I. INTRODUCTION

Since scarcely a decade after *Furman v. Georgia*,<sup>1</sup> the Supreme Court has struggled to avoid review of death penalty cases by narrowing the grounds defendants can use to challenge their sentences, as well as the procedures they can use to make those challenges. The Court supports its jurisprudence and the deregulation of death with an important but unexamined assumption: whatever shortcomings exist in the administration of the death penalty, ultimately injustice can and will be avoided by the exercise of the commutation power at the state level.<sup>2</sup> This Article argues that such an assumption is unwarranted. By substituting the fantasy of commutation for meaningful appellate review, the Court has perpetuated a system in which capital convictions and sentences lack integrity, while capital defendants suffer injustice.

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1. 408 U.S. 238 (1972). The challenge in *Furman* was launched by a 26-year-old black man with a sixth-grade education who was diagnosed as having some degree of mental defect. He shot his victim through a closed door while attempting to enter the victim's home at night. *Id.* at 252-53. Mr. Furman's eighth amendment challenge resulted in some 230 pages of separate opinions. Per curiam, the Court held that the imposition and carrying out of the death penalty in the cases before it constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Id.* at 239-40. Five Justices—Douglas, White, Marshall, Brennan, and Stewart—found the penalty to be per se unconstitutional. Justices Blackmun, Powell, Rehnquist, and Burger dissented.

2. See *Herrera v. Collins*, 113 S. Ct. 853, 868, 122 L. Ed. 2d 203 (1993). Public concern about violent crime, see, for example, Bill Rankin and Sandra McIntosh, *Georgians to Air Fears of Violence in TV Town Meeting*, Atlanta Journal-Constitution A4 (Jan. 5, 1994), and overwhelming support for the death penalty play an important role in this jurisprudence. Thomas B. Edsall, *Death Penalty Opposition Seen as Impolitic in '92; Strong Public Backing Frustrates Liberal Foes*, Wash. Post A2 (April 22, 1992).

The Supreme Court's commutation jurisprudence has led to increased deregulation of death penalty decision making. It has delegated those decisions to states that are politically unable to deliver justice in death penalty cases. By doing so, the Court has abdicated its role as protector of powerless minorities. It has also made the imposition of a death penalty more likely. In eschewing constitutional limits and relying on the political process, the Court has sanctioned a process in which many people play a small role in death decisions, no one takes sole, personal responsibility for the decision, and the final decision makers are subject to strong political pressure.

Part II of this Article argues that, under current law, death penalty convictions and sentences are unreliable. The system produces wrongful convictions and maldistribution because it is administered unfairly at every level. Further, there is serious doubt that the penalty can ever be administered fairly. Reduced access to habeas corpus review makes these problems more difficult to correct. All of these factors make commutation essential to achieving justice in the capital punishment system. It is often the only mechanism available to correct unjust results.

Part III examines the potential benefits of a meaningful commutation process and proceeds to analyze the Supreme Court's commutation cases. The Court clearly looks at commutation as if the potential benefits were real and as if commutation actually corrects injustices.

Part IV corrects the Supreme Court's rosy picture by looking at commutation as it operates in reality. The fact is that the commutation power is virtually dead because of the belief that "super due process"<sup>3</sup> has virtually eliminated error and because the political consequences of granting commutations are too great. The Article uses a real commutation petition—that of William Andrews—to demonstrate reality's failure to live up to the commutation ideal.

Part V explores the implications of the Court's death penalty and commutation jurisprudence. The Court's view of commutation advances the deregulation of death by delegating power to non-functioning state commutation systems. Instead of providing meaningful review, the Court fosters a bureaucratic process under which death

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3. Tamar Lewin, *Who Determines Who Will Die?: Even Within States, It Varies*, N.Y. Times B6 (Feb. 23, 1995). The use of the term "super due process" suggests an excessive degree of care in assuring that procedures for determining guilt and imposing capital punishment are fair. Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation, a conservative law and policy group, suggests that laws protecting capital defendants have gone "overboard" in making it difficult for prosecutors to obtain death sentences. *Id.*

decisions cannot be attributed to any decision maker. By doing so, the Court has failed to protect the powerless on death row.

This Article's focus is the commutation of death sentences.<sup>4</sup> "Commutation" is used to denote a reduction of a sentence to a lesser one.<sup>5</sup> In the capital punishment context, it means reducing a death sentence to life imprisonment. "Clemency," on the other hand, denotes "leniency or mercy in the exercise of authority or power."<sup>6</sup> Commutation is a more limited form of clemency<sup>7</sup> but shares many attributes of its parent power.<sup>8</sup> The terms "commutation" and "clemency" are used interchangeably in this Article to mean a reduction of sentence, unless otherwise noted.

## II. THE CONTINUING IMPORTANCE OF DEATH PENALTY COMMUTATION

Despite improved crime detection technology and due process protection afforded to criminal defendants,<sup>9</sup> evidence of wrongful convictions unfolds with disturbing frequency. Soon after the Supreme Court reinstated the constitutionality of the death penalty, it stated that because of the qualitative difference between imprisonment and death, there is a "corresponding difference in the need for

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4. Commutation of other kinds of sentences is outside the scope of this Article; however, commutation of non-death sentences is becoming increasingly important because of the strain that mandatory and determinate sentencing is placing on the control of prison populations. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 Tex. L. Rev. 569, 611-13 (1991). On a purely practical level, commutation of prison sentences may be the last resort to deal with two unpleasant realities: aging, infirm, no-longer-dangerous offenders and prison crowding. Derral Cheatwood, *The Life-Without-Parole Sanction: Its Current Status and a Research Agenda*, 34 Crime & Delinq. 43, 50 (1988). See generally Susan Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29 Crime & Delinq. 593 (1983) (examining state commutation practices).

5. Elkan Abramowitz and David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. Rev. 136, 138 (1964); U.S. Dept. of Justice, 3 *The Attorney General's Survey of Release Procedures* 209 (1939) ("DOJ Survey").

6. Kobil, 69 Tex. L. Rev. at 575 (cited in note 4). See Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Richmond L. Rev. 289, 289-90 (1993) (defining clemency as a broad power resting in the executive branch of government, consisting of pardons (invalidating both guilt and punishment), reprieves (temporarily postponing punishment), and commutations (reducing the severity of the punishment)).

7. Kobil, 69 Tex. L. Rev. at 577 (cited in note 4).

8. Other types of clemency include pardoning, which is the forgiveness of moral guilt and dispensation of punishment for an offense, and amnesty, which does not forgive a crime but causes it to be overlooked in the best interests of society. *Id.* at 576. Amnesty is usually granted to groups of people. *Id.*

9. Some maintain that our criminal justice system "can boast of more elaborate mechanisms to protect defendants than any other system in the world." Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 L. & Human Beh. 283, 284 (1988).

reliability<sup>10</sup> in the determination that death is the appropriate punishment in a specific case."<sup>11</sup> Notwithstanding efforts to ameliorate arbitrariness and to provide juries with sufficient guidance to impose death sentences evenhandedly, it remains as true today as it was when *Furman v. Georgia*<sup>12</sup> was decided that a poor African-American tried for the capital murder of a white victim in the South is far more likely to be sentenced to death than is his middle-class, Northern counterpart whose victim was black, regardless of the aggravating or mitigating factors present in each case.<sup>13</sup> In what has been described as a "rush to judgment," members of the Supreme Court, notably Chief Justice Rehnquist and Justice Scalia, have vowed to expedite the imposition of death penalties by, among other things, curtailing habeas corpus review.<sup>14</sup> The emergence of the death penalty as a campaign issue and abundant public support for capital punishment create an atmosphere that subordinates reliability and fairness to political posturing and expedience. The combination of these forces makes it increasingly difficult for a condemned inmate to correct problems that survive post-conviction review.

#### A. Wrongful Convictions

Commutation should remain a vital component of American criminal justice because errors occur at every point in the conviction and sentencing process.<sup>15</sup> These errors are simply part of the risk

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10. "Reliability" is that quality which makes the outcome of the criminal justice system trustworthy. See *Black's Law Dictionary* 1291 (West, 6th ed. 1990). If a conviction and a sentence are reliable, they are demonstrably sound and we can depend on them as bases for carrying out sanctions. The Supreme Court has insisted that the death penalty be imposed "fairly and with reasonable consistency or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

11. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The language quoted is the genesis for the term "heightened reliability" which has become a term of art in death penalty jurisprudence. See, for example, *Simmons v. South Carolina*, 114 S. Ct. 2187, 2198 (1994) (Souter, J., concurring, joined by Stevens, J.) (arguing that the state, having raised the issue of future dangerousness, erred in refusing to instruct the jury that the alternative sentence of life carried no possibility of parole).

12. 408 U.S. 238 (1972).

13. See generally Brent E. Newton, *A Case Study in System Unfairness: The Texas Death Penalty, 1973-1994*, 1 Tex. Forum on C.L. & C.R. 1 (1994).

14. See generally Hon. Paul H. Roney, *Comments in Support of the Powell Committee Recommendations*, 19 Capital U. L. Rev. 649 (1990) (supporting the adoption of recommendations made by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases for improving the appeals process in capital cases).

15. Daniel Shavero, *Statistical-Probability Evidence and the Appearance of Justice*, 103 Harv. L. Rev. 530, 530 (1989). See Newton, 1 Tex. Forum on C.L. & C.R. at 34 (cited in note 13).

that attends living in a democracy.<sup>16</sup> When errors lead to the conviction of innocent defendants, these cases are designated as wrongful convictions or false positives. It is impossible to eliminate the false positives from the criminal justice system. A system that never caught any innocent people would probably catch few guilty ones.<sup>17</sup> Wrongful convictions occur, of course, in capital cases as well,<sup>18</sup> but imposition of a death sentence removes all opportunity to correct a miscarriage of justice. This fact warrants the often repeated statement, "Death is different."<sup>19</sup>

Various studies have attempted to estimate the frequency of wrongful convictions,<sup>20</sup> but they have revealed no method of accurately measuring this phenomenon.<sup>21</sup> Nonetheless, the literature makes it "unmistakably clear" that some innocent people are or have been on death row.<sup>22</sup> A study by C. Ronald Huff, Arye Rattner, and Edward Sagarin defines a wrongfully convicted person as one who is subsequently found factually innocent.<sup>23</sup> They devised a formula for estimating wrongful convictions.<sup>24</sup> Applying their formula to 1993 data,

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16. "Our system does not guarantee either the conviction of the guilty or the acquittal of the innocent. . . . [A]ll that our system guarantees is a fair trial. It is a price which every member of a civilized community must pay for the erection and maintenance of machinery for administering justice, that he may become the victim of its imperfect functioning." Rattner, 12 L. & Human Beh. at 283 (cited in note 9) (citing G. Louis Joughin and Edmund M. Morgan, *The Legacy of Sacco and Vanzetti* 183-84 (Harcourt Brace, 1948)). See generally Jerome Frank and Barbara Frank, *Not Guilty* (Victor Gollancz, 1957), for a general account of 34 cases of persons who were convicted of crimes they did not commit.

17. Rattner, 12 L. & Human Beh. at 291 (cited in note 9).

18. See generally Charles L. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake* (Norton, 2d ed. 1981).

19. *Id.* at 39.

20. See generally C. Ronald Huff, Arye Rattner, and Edward Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinq. 518 (1986); Hugo Adam Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987); Rattner, 12 L. & Human Beh. at 284 (cited in note 9).

21. Rattner, 12 L. & Human Beh. at 284 (cited in note 9).

22. Ronald J. Tabak and J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 Loyola L.A. L. Rev. 59, 98 (1989). A study by the Death Penalty Information Center indicates that 58% of people surveyed expressed concern over the prospect of executing the innocent. Jason Berry, *Is Justice Forgiving?; Governors Shy Away from Death Row Pardons*, Dallas Morn. News 1J (Aug. 15, 1993). See James C. Harrington, *Executing the Innocent By Supreme Court Order*, Tex. Lawyer 13 (Feb. 8, 1993).

23. Huff, Rattner, and Sagarin, 32 Crime & Delinq. at 519 (cited in note 20).

24. The researchers "confidently estimate" that less than one percent of convictions are wrongful. This figure is based on an anonymous survey by the researchers of more than 350 federal and state judges and prosecutors, as well as state public defenders and law enforcement, soliciting their estimates of the magnitude of wrongful convictions. *Id.* at 520-23. They also discuss Radin's unnamed, "highly respected judge" who reported an estimated 5% wrongful convictions in his experience. *Id.* at 520-21 (citing Edward D. Radin, *The Innocents* (Wellman Monroe, 1964)). They note that conviction rates for serious crimes range between one-half and three-quarters of arrests, and elect to use a conservative conviction rate of 50%. Their method of arriving at the number of wrongful convictions can be summarized by the following formula:



Huff, Rattner, and Sagarin estimated that of the 22,510 arrests made for murder and non-neghgent manslaughter,<sup>25</sup> fifty-six were wrongfully convicted. Some of those innocent people may have been sentenced to death.

The reasons errors of justice take place are disconcerting. Huff and his associates believe that these wrongful convictions are attributable to eyewitness mistake,<sup>26</sup> errors or misconduct by police and prosecutors, plea bargaining,<sup>27</sup> community pressure for a conviction, inadequacy of counsel, false accusations, and the fact finder's knowledge of the defendant's criminal record.<sup>28</sup> According to a survey conducted by Rattner, major sources of error in wrongful convictions were eyewitness misidentification, police and prosecutorial zeal and bad faith, community pressure for conviction, false accusation, and plea bargaining.<sup>29</sup>

There are additional reasons for doubting the reliability of criminal convictions. Investigation and prosecution of criminal activity rely increasingly on new scientific methods, interpreted by experts who often cannot agree on the methods employed or the conclusions

( $A \times C$ )  $\times R = Y$ . See *id.* at 523.  $A$  represents the number of arrests for murder and non-neghgent manslaughter.  $C$  is the rate of conviction, .5, and  $R$  is the rate of wrongful conviction, .005, and  $Y$  is the number of people who were wrongfully convicted in that period.

25. Kathleen Maguire and Ann L. Pastore, eds., *Sourcebook Of Criminal Justice Statistics 1993* at 418 (U.S. Dept. of Justice, Bureau of Justice Statistics, 1994) ("Sourcebook").

26. Mistaken eyewitness identification due to the influence of improper suggestion is a major cause of miscarriages of justice. *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (citing Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 26 (Charles C. Thomas, 1965)). Nevertheless, criticism has been leveled that eyewitness identification is accepted "uncritical[ly]" in the legal system. Frederick E. Chemay, Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 La. L. Rev. 721, 729 (1985) (quoting Robert Buckhout, *Eyewitness Identification and Psychology in the Courtroom*, *Crim. Defense* 3 (Sept.-Oct. 1977)).

27. See W. Larry Gregory, John C. Mowen, and Darwyn E. Linder, *Social Psychology of Plea Bargaining: Applications, Methodology, and Theory*, 36 J. Personality & Soc. Psych. 1521, 1521-25 (1978) (concluding that data suggests that the "use of both overcharging and announcing an intent to seek the maximum penalty might increase the number of innocent defendants who plea bargain").

28. Huff, Rattner, and Sagarin, 32 *Crime & Delinq.* at 524-33 (cited in note 20).

29. Rattner, 12 L. & Human Beh. at 285-86 (cited in note 9). In another study of wrongful convictions by researchers Ronald J. Tabak and J. Mark Lane, the catalogue of circumstances that result in wrongful convictions is daunting: "[T]he prosecution had knowingly withheld evidence;" "the blood type of the sperm . . . differed from [the defendant's];" "new evidence proved [the defendant's] alibi to be true;" "perjured testimony [was] given under police pressure;" "five witnesses testified that [another] had confessed to the crime;" "[the defendant's] alibi was proven to be true, and . . . his conviction had rested on perjured testimony;" "the prosecutor . . . finally came forward and revealed that the state's key witness had told him that [another] had killed the victim;" "pubic hairs and semen samples taken from the scene did not match [the defendant's];" and "the prosecutors had withheld evidence which would have led to an acquittal." Tabak and Lane, 23 *Loyola L.A. L. Rev.* at 99-105 (cited in note 22).

reached.<sup>30</sup> The use of scientific evidence presents hazards that can lead to erroneous convictions. Experts can and have given misleading and inaccurate testimony with very little opportunity for attorneys or the jury to detect the deception.<sup>31</sup> In the controversy over the standard for admitting expert scientific testimony in the federal courts, the Supreme Court recently held that Rule 702 of the Federal Rules of Evidence<sup>32</sup> superseded the general acceptance test enunciated in *Frye v. United States*.<sup>33</sup> This holding will expand the use of scientific expert testimony in future federal cases.<sup>34</sup> Though not binding on the states, the decision may affect state rules.<sup>35</sup> Advances in the art of jury influence and manipulation also contribute to erroneous convictions.<sup>36</sup> Skillful use of peremptory challenges based on advice from jury experts may determine the outcome of a criminal trial and may ultimately undermine the reliability of the verdict, as well as public confidence in the jury system.<sup>37</sup> Though one might expect that super due process would reduce the incidence of wrongful convictions in capital cases, mistakes are perpetuated with some frequency because of plea bargaining, police misconduct, and the poor quality of counsel.

Wrongful convictions include not only those that are inaccurate, but also those that are inequitable. For example, plea bargaining for a co-defendant's testimony can lead to the conviction of

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30. See generally Vicki S. Menard, Comment, *Admission of Computer Generated Visual Evidence: Should There Be Clear Standards?*, 6 Software L. J. 325 (1993).

31. Dr. James P. Grigson, a psychiatrist known as Dr. Death, is noted for his ability to persuade jurors that a defendant he may never have examined is going to commit another offense as a matter of medical certainty. Ron Rosenbaum, *Travels with Dr. Death and Other Unusual Investigations* 210 (Penguin, 1991). For a list of cases in which Dr. Grigson has so testified, see *Schneider v. Lynaugh*, 835 F.2d 570, 573 (5th Cir. 1988).

32. F.R.E. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise").

33. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794 (1993).

34. In *Frye v. United States*, 293 F. 1013, 1014 (1923), it had been held that expert testimony was inadmissible unless it was based on a scientific technique "generally accepted" as reliable in the scientific community. In *Daubert*, the Court liberalized the standard. The Court held that expert testimony is admissible under F.R.E. 702 if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining the facts at issue. 113 S. Ct. at 2794-96.

35. Many states model their rules of evidence on the Federal Rules. See, for example, *State v. Streich*, 658 A.2d 38, 46 (Vt. 1995).

36. See generally Frederick L. Brown, Frank T. McGuire, and Mary S. Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 New England L. Rev. 192 (1978); Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 Georgetown J. L. Ethics 1 (1994).

37. See *Simpson Jury: "Media Pollution,"* L.A. Times B6 (Oct. 10, 1994).

an innocent or less culpable person. To induce a co-defendant to testify against his partner, the prosecutor may offer a reduced sentence or not ask for the death penalty in a capital case. If the more culpable party agrees to testify, the result is that the defendant who is less blameworthy receives the greater sentence.<sup>38</sup>

Police misconduct accounts for a number of wrongful convictions. While *Brady v. Maryland*<sup>39</sup> condemns the prosecution's suppression of exculpatory evidence requested by the defendant, the rule in that decision does not protect the defendant from deceptive police reports.<sup>40</sup> In fact, the discretion of the police to fail to report exculpatory evidence has not been subjected to the same scrutiny as the prosecutor's duty to disclose such evidence.<sup>41</sup> The potential to mislead is limited only by the imagination of the officer wishing to do so. Police reports may deliberately mislead by failing to collect or record evidence, failing to pursue leads, or by fabricating evidence.<sup>42</sup> Even a direct request for police reports may not result in full disclosure. Some police departments employ a dual filing system. The official file is produced in response to a subpoena, but the unofficial file (sometimes called a "street file") is not.<sup>43</sup> Finally, the problem of police deception is exacerbated by the fact that the police have substantial disincentives to report exculpatory facts.<sup>44</sup>

The poor quality of legal representation given to indigents at state trials and sentencing hearings, particularly in the South, accounts for some wrongful convictions and inappropriate death sentences. Supreme Court Justice Harry Blackmun is convinced that "the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial

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38. See Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 Iowa L. Rev. 719, 736 (1988). See generally Jamie Marie Billotte, *Is It Justified?—The Death Penalty and Mental Retardation*, 8 Notre Dame J. L. Ethics & Pub. Pol. 333 (1994).

39. 373 U.S. 83 (1963).

40. *Id.* at 87.

41. Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 New England L. Rev. 1, 5 (1993).

42. *Id.* at 7.

43. *Id.* at 36-37.

44. *Id.* at 9. Various reasons have been noted for police officers' lying and deception: (1) to satisfy bureaucratic regulations, (2) to protect themselves and fellow officers, (3) to convince the public that the department is "doing something" about crime, and (4) to promote values (for example, maintaining order and punishing offenders) that they perceive to be superior to truth-telling. *Id.* at 12-17.

and the unavailability of counsel in state post-conviction proceedings."<sup>45</sup>

The National Law Journal conducted a six-month, six-state study of defenses of capital murders that resulted in some alarming revelations.<sup>46</sup> The study disclosed that whether a defendant is sentenced to death depends more on his attorney than his crime.<sup>47</sup> Trial lawyers who represented capital defendants in the "Death Belt"<sup>48</sup> have been disbarred or disciplined at a rate three to forty-six times the overall discipline rate for the same state.<sup>49</sup> Too often attorneys in the Death Belt try a capital case in one or two days, whereas lawyers in other parts of the country where sophisticated indigent defense systems exist would spend two weeks to two months.<sup>50</sup> Death Belt lawyers make little effort to present mitigating evidence—in one case, the penalty phase lasted only fifteen minutes.<sup>51</sup> The few states that have standards for appointed counsel in capital cases tolerate frequent violations of those standards.<sup>52</sup> Furthermore, other studies reveal that one-third of the convicts on the nation's death rows have no representation for their appeals.<sup>53</sup>

The impact of errors inherent in the criminal justice system is amplified and ratified by other factors. Some suspect that public

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45. *McFarland v. Scott*, 114 S. Ct. 2785, 2785 (1994) (Blackmun, J., dissenting) (quoting Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus*, 40 Am. U. L. Rev. 1, 16 (1990)).

46. Marcia Coyle, Fred Strasser, and Marianne Lavelle, *Fatal Defense: Trial and Error in the Nation's Death Belt*, Natl. L. J. 30, 30-44 (June 11, 1990).

47. *Id.* at 30.

48. This term has been used to denote the six to nine Southern states that account for the vast majority of this nation's executions. The states include Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. See Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv. L. Rev. 1923, 1924 (1994); Coyle, Strasser, and Lavelle, Natl. L. J. at 30 (cited in note 46).

49. Coyle, Strasser, and Lavelle, Natl. L. J. at 44 (cited in note 46).

50. *Id.* at 30.

51. *Id.*

52. *Id.*

53. Sam Howe Verhovek, *Executions Are Neither Swift Nor Cheap*, N.Y. Times A1 (Feb. 22, 1995). Sister Helen Prejean, an advocate for condemned prisoners, testified before the Louisiana Parole Board to urge the commutation of the death sentence of Robert Willie. She said, "[I]f we are honest, we must admit that . . . there are two systems of justice—one for the rich, who can afford expert counsel, and one for people like Robert Willie—and that is why only poor people will ever appear before this board." Sister Prejean, C.S.J., *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* 166 (Vintage, 1993). Ohio Governor Michael V. DiSalle has also noted that the disadvantaged are disproportionately represented among petitioners for clemency. Michael V. DiSalle, *Comments on Capital Punishment and Clemency*, 25 Ohio St. L. J. 71, 72 (1964).

opinion and the fear of crime raise our tolerance for wrongful convictions.<sup>54</sup> Furthermore, it is likely that as a case reaches higher levels of review, there is less chance that an error will be discovered and corrected.<sup>55</sup> This ratification of error has led one commentator to describe our criminal justice system with the metaphor of a manufacturing line without quality control.<sup>56</sup>

### B. Death Penalty Administration Is Not Fair

In *Furman v. Georgia*, the Supreme Court declared that the manner in which the death penalty had been imposed in prior cases was arbitrary and capricious in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>57</sup> Since the Supreme Court reinstated capital punishment in 1976,<sup>58</sup> its death penalty jurisprudence suggests that the Court has concluded that death penalty practice is free from unconstitutional race discrimination and arbitrariness.<sup>59</sup> Social scientists conducting research in this area have declared that it is not.<sup>60</sup> The continuing unfair distribution of the death sentence belies the Court's claim that post-*Furman* death penalty practice is no longer arbitrary and capricious. In fact, the composition of our death row population today—especially

54. Rattner, 12 L. & Human Beh. at 291-92 (cited in note 9).

55. Id. at 292.

56. Hebert L. Packer, *The Limits Of The Criminal Sanction* 159-60, 292 (Stanford U., 1968).

57. "[T]hese discretionary statutes . . . are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring). "I simply conclude that 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." Id. at 310 (Stewart, J., concurring). "In my judgment what was done in these cases violated the Eighth Amendment." Id. at 314 (White, J., concurring). Justices Brennan and Marshall found that the death penalty violated the Eighth Amendment in all cases. Id. at 305 (Brennan, J., concurring); id. at 370 (Marshall, J., concurring).

58. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

59. See Jonathan Sorensen and James W. Marquardt, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 743, 746 & nn.26-30 (1990-91) (citing cases in which the Supreme Court upheld statutes guiding the discretion of jurors in imposing the death penalty). See also *Graham v. Collins*, 113 S. Ct. 892, 915-16 (1993) (Stevens, J., dissenting). In a discussion regarding the impact of *Penry v. Lynaugh*, 492 U.S. 302 (1989), Justice Stevens referred to the "progress we have made in eliminating racial discrimination and other arbitrary considerations from the capital sentencing determination." *Graham*, 113 S. Ct. at 915 (Stevens, J., dissenting).

60. See, for example, Sorensen and Marquardt, 18 N.Y.U. Rev. L. & Soc. Change at 751-56 (cited in note 59) (arguing that a Texas capital punishment statute is racially discriminatory and arbitrary, and citing numerous studies supporting that finding).

that of the nation's leader in executions, Texas<sup>61</sup>—is not very different from the pre-*Furman* population.<sup>62</sup>

The race of the offender is sometimes a factor in this maldistribution. Minority offenders may not be tried before a fair jury if members of their group are excluded from juries and from jury venires.<sup>63</sup> Race discrimination in jury selection is unconstitutional,<sup>64</sup> but such discrimination is difficult to prove.<sup>65</sup> Furthermore, the rules against race discrimination in jury selection are of relatively recent origin. For example, many of the Hispanics and African-Americans on death row in Texas were convicted in Dallas County during a period in which the manual for prosecutors read:

You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree. . . . You are not looking for any member of a minority group which may subject him to suppression—they almost always empathize with the accused. . . . Minority races almost always empathize with the Defendant. . . . Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.<sup>66</sup>

At the trial of James Russell in Fort Bend County, Texas, the prosecutor referred to an African-American adult male as a "boy" and used the phrase "you people" in reference to blacks.<sup>67</sup>

The death penalty is not evenly applied to offenders of different races, and "this inequity has made the need for mercy all the more

61. Newton, 1 Tex. Forum on C.L. & C.R. at 3 (cited in note 13).

62. *Id.* at 31.

63. In *Georgia v. McCollum*, 505 U.S. 42 (1992), Justice O'Connor wrote:

It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.

*Id.* at 68 (O'Connor, J., dissenting).

64. In cases spanning over a hundred years, the Court has condemned such discrimination. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (holding that the state's exclusion of Negroes from juries violated the Equal Protection Clause); *McCollum*, 505 U.S. at 55 (holding that a criminal defendant cannot engage in race discrimination in exercising peremptory challenges).

65. *McCollum*, 505 U.S. at 68 (O'Connor, J., dissenting). Justice O'Connor wrote:

The ability to use peremptory challenges to exclude majority race jurors may be crucial to impaneling a fair jury. In many cases an African-American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.

*Id.* (quoting Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae 9-10).

66. Newton, 1 Tex. Forum on C.L. & C.R. at 14 (cited in note 13) (quoting from *Dallas County Prosecution Manual: Jury Selection in Criminal Cases*).

67. *Id.* at 15.

acute.<sup>768</sup> Since the Supreme Court held in *McCleskey v. Kemp*<sup>69</sup> that evidence of structural racial disparity does not invalidate capital sentences, however, it appears that the discretion to grant relief from systemic racial discrimination lies with a sentencing authority independent of the court system.<sup>70</sup>

Maldistribution based on the race of the victim is even more striking. On the national level, the NAACP Legal Defense Fund indicates that only three white people have been executed for killing a black victim since executions resumed in 1977.<sup>71</sup> The United States Accounting Office validated statistical studies finding that a defendant is more likely to receive the death penalty if the victim is white than if the victim is black.<sup>72</sup> Reporters at the Dallas Times Herald conducted a nationwide study and concluded that in the states where the death penalty has been imposed, defendants with white victims are almost three times more likely to be sentenced to death than defendants with black victims.<sup>73</sup> The study revealed that in Maryland, defendants with white victims were eight times more likely to receive the death penalty than defendants with black victims; in Arkansas, the defendant was six times more likely; and in Texas, the defendant was five times more likely.<sup>74</sup> A later study found significant disparities in sentencing relating to the victim's race in Georgia, Florida, Illinois, Oklahoma, North Carolina, and Mississippi.<sup>75</sup> This study indicated that the likelihood that defendants with white victims would be executed was almost ten

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68. Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 Yale L. J. 389, 403 (1989).

69. 481 U.S. 279 (1987).

70. Cobb, 99 Yale L. J. at 403 (cited in note 68).

71. NAACP Legal Defense and Educational Fund, Inc., *Death Row, U.S.A.: Reporter 773*, 775 (William S. Hein, 1995) ("*Death Row Reporter*").

72. Ronald J. Tabak, *Is Racism Irrelevant?: Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?* 18 N.Y.U. Rev. L. & Soc. Change 777, 778 (1990-91) (citing U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990), reprinted in 136 Cong. Rec. S6889-90 (May 24, 1990)).

73. Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. Rev. L. & Soc. Change 797, 826 (1986) (citing Jim Henderson and Jack Taylor, *Killers of Dallas Blacks Escape Death Penalty*, Dallas Times Herald 1 (Nov. 17, 1986)).

74. Tabak, 18 N.Y.U. Rev. L. & Soc. Change at 780-81 n.10 (cited in note 72). Another study by Jonathan Sorensen and James Marquart agrees that a person who is accused of the capital murder of a white victim in Texas is more than five times more likely to be convicted than one who is accused of killing an African-American. Sorensen and Marquart, 18 N.Y.U. Rev. L. & Soc. Change at 771 (cited in note 59).

75. Samuel R. Gross and Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing*, 43-87, 88-94 (Northeastern U., 1989).

times greater in Georgia, nearly eight times greater in Florida, and about six times greater in Illinois than if the defendant's victims were black.<sup>76</sup> The data, nationwide or state-by-state, yields consistent conclusions that the race of the victim is a significant factor in determining the likelihood that a defendant will be sentenced to death.

Maldistribution also results from economic status,<sup>77</sup> membership in other vulnerable groups, and geography. Studies have reported "harsher treatment of persons with fewer resources."<sup>78</sup> Even in systems redesigned to promote equal treatment, socioeconomic bias remains, though in a more subtle form.<sup>79</sup> The mentally impaired and juveniles are among the more vulnerable groups represented on death row.<sup>80</sup> One observer estimates that as many as half of the inmates on death row in Texas have "significant histories of mental illness or brain damage."<sup>81</sup> The same writer reports that one hundred teens have been sentenced to death in Texas alone in the past twenty years.<sup>82</sup> Geographical maldistribution results from differences among death penalty states, as well as from differences between states that have the death penalty and those that do not. Offenders in the second group of states never have to worry about facing the death penalty, although their crimes may be death-eligible elsewhere.

Finally, one would hope that this most terrible of punishments would be assigned only to the worst offenders. Yet there is no basis for the assumption that those who commit the most heinous murders are sentenced to death.<sup>83</sup> Nor are those condemned to die more likely to pose a risk to public safety.<sup>84</sup>

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76. *Id.* at 44. Regression analysis resulted in somewhat lower, but still highly significant, figures. The likelihood that defendants with white victims would be executed was seven times greater in Georgia, five times greater in Florida, and four times greater in Illinois. *Id.* at 69.

77. See generally Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison* (Macmillan, 3rd ed. 1990).

78. Martha A. Myers, *Economic Inequality and Discrimination in Sentencing*, 65 *Social Forces* 746, 761 (1987).

79. Terance D. Miethe and Charles A. Moore, *Socioeconomic Disparities Under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota*, 23 *Criminology* 337, 358 (1985). For example, the quality of appointed counsel may be improved, but a characteristically uneducated, indigent client would still be limited in his ability to understand and assert his defense. *Id.*

80. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (concluding that the execution of juvenile offenders does not constitute cruel and unusual punishment under the Eighth Amendment); *Penry*, 492 U.S. at 340 (ruling that the Eighth Amendment does not bar per se the execution of mentally retarded offenders).

81. Newton, 1 *Tex. Forum on C.L. & C.R.* at 29 (cited in note 13).

82. *Id.* at 30-31.

83. Tabak and Lane, 23 *Loyola L.A. L. Rev.* at 62 (cited in note 22).

84. James W. Marquart and Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 *Loyola L.A. L.*



### C. Death Penalty Administration Can Never Be Fair

The previous Section outlined ways in which the distribution of death sentences is unfair. While it is possible that maldistribution is a temporary, remediable phenomenon, there is growing evidence that the death penalty can *never* be administered fairly.<sup>85</sup> One indicator of this characteristic unfairness is the fact that the Supreme Court's decisions in death penalty cases typically lack solidarity. The Court was badly fragmented in *Furman* and has commonly decided capital cases in five-to-four opinions.<sup>86</sup> Over time, some justices have been consistent in their denunciation of the death penalty,<sup>87</sup> while others have been adamant in their defense of it.<sup>88</sup> Those with moderate views have borne the burden of delineating the parameters of a constitutional death penalty regime. Recently two of these moderate justices have questioned their own rationale in previous capital punishment cases.

In a nondescript Texas case, *Callins v. Collins*,<sup>89</sup> Justice Harry Blackmun culminated a two-decade struggle with death penalty jurisprudence by explicitly abandoning what he now sees as a futile effort to administer capital punishment fairly. Justice Blackmun's journey began with his dissent in *Furman* when he wrote, "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds."<sup>90</sup> Despite his misgivings at that time, he could not find the death

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Rev. 5, 27-28 (1989) (reporting that a study of *Furman*-commuted inmates indicates over-prediction of future dangerousness for that group).

85. The doubt regarding the ability of finite humans to make capital punishment judgments has been part of death penalty discourse for a long time. On this point, Justice Marshall once wrote, "The [state] court's inability to administer its capital punishment statute in an evenhanded fashion is . . . , I believe, symptomatic of a deeper problem that is proving to be intractable." *Godfrey v. Georgia*, 446 U.S. 420, 441 (1980) (Marshall, J., concurring, joined by Brennan, J.).

86. See, for example, *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Tison v. Arizona*, 481 U.S. 137 (1987); *Penry*, 492 U.S. at 302; *Stanford*, 492 U.S. at 361.

87. See, for example, *Coker v. Georgia*, 433 U.S. 584, 600-01 (1977) (Marshall, J., concurring); *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (Brennan, J., concurring); *Tison*, 481 U.S. at 185 (Brennan, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 1027 (1991) (Marshall, J., concurring). See generally Alan I. Bigel, *Justices William J. Brennan, Jr., and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 Notre Dame J. L. Ethics & Pub. Pol. 11 (1994).

88. See, for example, *Woodson v. North Carolina*, 428 U.S. 280, 308-09 (1976) (Rehnquist, J., dissenting); *Callins v. Collins*, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994) (Scalia, J., concurring).

89. 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994).

90. 408 U.S. at 405 (Blackmun, J., dissenting).

penalty unconstitutional. Justice Blackmun subsequently voted to uphold the constitutionality of the death penalty in *Gregg v. Georgia*<sup>91</sup> because he believed the matter to be within the purview of state legislatures<sup>92</sup> and because at that time the Supreme Court was exercising oversight of state capital practices.<sup>93</sup>

Today Justice Blackmun is convinced that the mandate of *Furman* remains correct, but that “[d]elivering on the *Furman* promise” turned out to be hopeless.<sup>94</sup> He maintains that “[e]xperience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.”<sup>95</sup> Despite attempts by courts and legislatures to devise substantive and procedural rules to meet the “daunting challenge” of *Furman*, capital practice “remains fraught with arbitrariness, discrimination, caprice, and mistake.”<sup>96</sup> Furthermore, Justice Blackmun notes that race “continues to play a major role”<sup>97</sup> in death penalty decisions. Nevertheless, he notes that the Supreme Court appears to have chosen to “deregulate the entire enterprise” and abdicate its important role in death penalty jurisprudence.<sup>98</sup> He concludes:

From this day forward, I no longer shall tinker with the machinery of death. . . . Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.<sup>99</sup>

Reactions to Justice Blackmun’s change of position have been mixed.<sup>100</sup> It has been dismissed by Justice Scalia as the product of “intellectual, moral and personal perceptions,” rather than stemming

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91. 428 U.S. 153, 227 (1976).

92. See *Furman*, 408 U.S. at 410-11 (Blackmun, J., dissenting).

93. See *Callins*, 114 S. Ct. at 1138 (Blackmun, J., dissenting). See also Part II.C.

94. *Callins*, 114 S. Ct. at 1131 (Blackmun, J., dissenting).

95. *Id.* at 1132 (Blackmun, J., dissenting).

96. *Id.* at 1129 (Blackmun, J., dissenting).

97. *Id.* at 1135 (Blackmun, J., dissenting).

98. *Id.* at 1129 (Blackmun, J., dissenting).

99. *Id.* at 1130 (Blackmun, J., dissenting).

100. See, for example, Bruce Fein, *What Benchmarks for the Next Justice?*, Wash. Times A16 (April 11, 1994) (speculating on Justice Blackmun’s replacement, and criticizing his “anti-death penalty views operatically voiced in *Callins v. Collins*”); Nat Hentoff, “*I Shall Not Tinker with the Machinery of Death*,” Village Voice 22 (Jan. 24, 1995) (noting that, if the official killing ever stops, Justice Blackmun’s views will have provided grist for the mill).

from an interpretation of the "text and tradition of the Constitution."<sup>101</sup>

Months after Justice Blackmun's conversion, it was reported that Justice Lewis F. Powell had had a similar change of heart. In a 1991 interview, Justice Powell was asked if he would change any of his votes if he could.<sup>102</sup> He answered in the affirmative and cited *McCleskey v. Kemp*,<sup>103</sup> which upheld Georgia's death penalty against a broad-based race discrimination attack and launched a spate of controversy. Some heralded *McCleskey* as the savior of the death penalty,<sup>104</sup> while others condemned it for preserving extant racism.<sup>105</sup> These characterizations accurately reflect the importance of *McCleskey* in death penalty jurisprudence.<sup>106</sup>

The story of how Justice Powell came to regret his support of the death penalty began over twenty years ago. At the start of his death penalty jurisprudence, Justice Powell objected to the death penalty's emergence as a constitutional issue.<sup>107</sup> In 1976, he accepted that the task of the Court was to craft a new death penalty practice to meet the objections voiced in *Furman*.<sup>108</sup> While he realized that a perfect system was not attainable, at least in the beginning, he believed that it was enough to require the capital punishment system to be as nearly perfect as possible.<sup>109</sup> Though described as a centrist, Justice Powell agreed with the result in capital cases more often than other justices during his tenure on the Court.<sup>110</sup>

When *McCleskey* petitioned for certiorari, Justice Powell objected to hearing the case. He was unfamiliar with statistical analysis. He did not know what constitutional weight should be given to

101. *Collins*, 114 S. Ct. at 1127 (Scalia, J., concurring). But see Justice Blackmun's response in *McCullum v. North Carolina*, 114 S. Ct. 2784, 2784-85, 129 L. Ed. 2d 895 (1994) (Blackmun, J., dissenting) (responding to Justice Scalia's challenge, he argues that the death penalty is inappropriate for Henry Lee "Buddy" McCollum because of mental retardation).

102. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 451 (Charles Scribner's Sons, 1994).

103. 481 U.S. 279 (1987).

104. See, for example, George F. Will, *The Death Penalty by One Vote*, Wash. Post A19 (April 30, 1987); *Death Penalty*, Miami Herald 2C (April 26, 1987).

105. See, for example, Hugo Adam Bedau, *Someday McCleskey will be Death Penalty's Dred Scott*, L.A. Times 5 (May 1, 1987); Anthony Lewis, *Racism: A Matter of Life and Death*, Detroit Free Press 11A (April 29, 1987); *Punishment Still Capricious*, Boston Globe 16 (April 24, 1987).

106. The entire course of death penalty jurisprudence may have been changed had Justice Powell joined the four dissenters in *McCleskey*. Mark A. Graber, *Judicial Recantation*, 45 Syracuse L. Rev. 807, 807 (1994) ("Had Justice Powell seen the light while on the bench, the Supreme Court would have dealt a crippling blow to the death penalty in *McCleskey*").

107. Jeffries, *Powell* at 453 (cited in note 102).

108. *Id.*

109. *Id.* at 442.

110. *Id.* at 435.

the statistical impact of the victim's race and thought the data supported rather than condemned Georgia's system.<sup>111</sup> As it turned out, Justice Powell cast the fifth vote upholding Georgia's statute and wrote the opinion of the Court. He wrote that the statistical evidence presented in the Baldus study<sup>112</sup> did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."<sup>113</sup> Four years later, Justice Powell would tell his former clerk and biographer John C. Jeffries, Jr., that he regretted his vote in this case and said, "I would [now] vote the other way in any capital case."<sup>114</sup> Jeffries surmises that Justice Powell abandoned his belief that the death penalty could be fairly administered because the new system turned out to be fraught with opportunities for litigation and because delay became the primary objective of capital punishment advocacy.<sup>115</sup>

The most telling aspect of these twin sagas is that, at the outset, both Justice Blackmun and Justice Powell had faith in the Court's ability to fashion a system that was constitutionally acceptable, though imperfect. After assiduously applying themselves to the task for over two decades, each concluded that it is not within the finite abilities of human beings to make these judgments fairly and that it is better to forsake the effort than to continue to pretend otherwise. Justices Blackmun and Powell are not alone in this viewpoint. Arthur England, former chief justice of the Florida Supreme Court, now believes that the rationality and consistency required of capital punishment was actually a chimera. He concludes, "I thought the Supreme Court of Florida would be able to set standards that made sense that we could enforce. . . . My experience . . . was that it's impossible to set standards and adhere to them."<sup>116</sup>

It is pointless to speculate about how the latter-day views of Justices Blackmun and Powell might have changed the force of *Furman*,<sup>117</sup> but this much is certain: the constitutionality of the death

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111. *Id.* at 439.

112. This study was conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth. It is comprised of two statistical studies of over 2,000 murder cases in Georgia during the 1970s. McCleskey argued that the study demonstrated a "disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant." *McCleskey*, 481 U.S. at 286.

113. *Id.* at 313.

114. Jeffries, *Powell* at 451 (cited in note 102).

115. *Id.* at 442-43.

116. David von Drehle, *When Harry Met Scalia: Why the Death Penalty is Dying*, Wash. Post C3 (March 6, 1994).

117. The changes of opinion by the two justices, particularly Justice Blackmun, have generated significant comment. See generally Justice William J. Brennan, Jr., *A Tribute to*

penalty and the many nuances of its jurisprudence rest to a great extent on the opinions of two justices who have since changed their minds. It has been pointed out that "decisions rendered by the Justices of the Supreme Court have a very special moral meaning."<sup>118</sup> Others have observed that the Court's power rests in part on "moral suasion."<sup>119</sup> The disclosures by Justices Blackmun and Powell have seriously undercut the moral legitimacy of the death penalty and leave us facing the prospect that the entire death penalty enterprise is unworkable.<sup>120</sup>

#### D. Habeas Corpus Review

Curtailling habeas corpus review reduces opportunities to remedy wrongful convictions and other injustices. At one time some members of the Supreme Court saw habeas corpus as a safety valve for innocent or unfairly convicted or sentenced capital defendants.<sup>121</sup> But concern over wasteful delay and repetition, the lack of qualified representation for capital defendants, and a pattern of last-minute filings have caused the Court, legislators, and commentators to re-examine the role of habeas corpus.<sup>122</sup> The result of this effort is an accumulation of Byzantine restrictions imposed by federal courts on habeas corpus review.<sup>123</sup>

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*Justice Harry A. Blackmun*, 108 Harv. L. Rev. 1 (1994); Tara L. Swafford, *Responding to Herrera v. Collins: Ensuring That Innocents Are Not Executed*, 45 Case W. Res. L. Rev. 603 (1995); Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 Colum. J. L. & Soc. Probs. 47 (1994); Linda Greenhouse, *A Capacity to Change As Well As to Challenge*, N.Y. Times § 4 at 4 (Feb. 27, 1994); David von Drehle, *Retired Justice Changes Stand on the Death Penalty; Powell Is Said to Favor Ending Executions*, Wash. Post A1 (June 10, 1994); Jeffries, *Powell* (cited in note 102).

118. Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1440 (1988).

119. David A. Kaplan, *Death Be Not Proud at the Court*, Newsweek 52 (March 7, 1994).

120. Not all jurists agree with the assessment that post-*Furman* death penalty practice is unworkable. California Supreme Court Justice Stanley Mosk had overturned death sentences but eventually came to uphold most because he believed the bugs of earlier death penalty law had been eliminated. John T. Wold and John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 Judicature 348, 349 (1987).

121. Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. Rev. L. & Soc. Change 415, 415-16 (1990-91).

122. Steven M. Goldstein, *Expediting the Federal Habeas Corpus Review Process in Capital Cases: An Examination of Recent Proposals*, 19 Capital U. L. Rev. 599, 604 (1990).

123. *McFarland v. Scott*, 114 S. Ct. 2785, 2790, 129 L. Ed. 2d 896 (1994) (Blackmun, J., dissenting) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). For additional cases discussing restrictions on habeas corpus review, see *Butler v. McKellar*, 494 U.S. 407 (1990); *McCleskey v. Zant*, 449 U.S. 467 (1991); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Sawyer v. Whitley*, 112 S. Ct. 2514, 120 L. Ed. 2d 948 (1992). The most

A recent major case, *Herrera v. Collins*,<sup>124</sup> held that habeas corpus relief is not available for a claim of innocence based on newly found evidence.<sup>125</sup> *Herrera* illustrates the controversial nature of these restrictions, and has been said to "epitomize all that has gone wrong" with the Court's efforts to reform habeas corpus.<sup>126</sup> Some decry the decision for cutting off the habeas corpus avenue of relief, absent constitutional error, while at the same time insisting that a convincingly innocent person would obtain relief.<sup>127</sup> Others praised the Court's decision for promoting the states' interests in final judgments and in federal state comity.<sup>128</sup> The ever-changing law governing habeas corpus review of death sentences has inspired prolific commentary.<sup>129</sup> What has been written will not be repeated here. It is sufficient to say there is agreement that the Court has substantially abbreviated the reach of the writ and will continue to do so, leaving claims of factual innocence and unfair trials without redress in the courts.<sup>130</sup>

Wrongful convictions, the inherent difficulty of fairly administering the death penalty, and diminished habeas corpus review argue in favor of a contingency mechanism to prevent injustice. Unfairness in the administration of the death penalty has been an important component of an argument for its abolition.<sup>131</sup> Even the death penalty

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unwieldy of these rules came from *Teague*, 489 U.S. at 288, which held that if a constitutional ruling was not "dictated by precedent" existing at the time a prisoner's conviction became final, it constituted a "new rule" which could not be given effect in a post-conviction habeas corpus proceeding. *Id.* at 310.

124. 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

125. *Id.* at 857.

126. Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 Cal. L. Rev. 485, 503 (1995). Professor Friedman has identified the Court's objectives as the promotion of comity and finality. He concludes that, even eschewing a normative comparative yardstick in favor of the Court's own goals, its efforts to reform habeas corpus have failed. *Id.* at 486-88.

127. See generally Vernon E. Googe III, *Herrera v. Collins: Federal Habeas Corpus Review and Claims of Actual Innocence*, 27 Ga. L. Rev. 971 (1993).

128. Kevin M. Godbout, Comment, *Herrera v. Collins: Federal Habeas Relief for State Prisoners for Free-standing Claims of Actual Innocence Based on Newly Discovered Evidence? Not Yet*, 13 Bridgeport L. Rev. 725, 746 (1993).

129. See, for example, Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 Albany L. Rev. 225 (1992) (examining the penalty phase in capital cases); Jordan Steiker, *Innocence and Federal Habeas Corpus*, 41 U.C.L.A. L. Rev. 303 (1993) (evaluating the status of bare innocence claims within the habeas corpus model).

130. Legislatures, too, are seeking to speed up executions. A bill introduced in the Texas legislature would reduce the 8.1-year-average stay on death row by two years. Critics point to the seven wrongfully convicted death row inmates released since 1987, six of whom would have been executed had the new law been in effect. Supporters argue that the bill's expansion of post-conviction legal representation will eliminate errors on appeal. Christy Hoppe, *Death Row Appeal Bill Advances*, Dallas Morn. News A1, A11 (April 11, 1995).

131. Newton, 1 Tex. Forum on C.L. & C.R. at 1 (cited in note 13) (arguing that even one who favors capital punishment in theory will oppose it when he learns that unfairness pervades

proponent who is satisfied that the benefits derived from the penalty (whatever they are perceived to be) outweigh the cost of wrongful executions should want to maximize the reliability of the imposition of death sentences. Therefore, the question is important to both groups. Can commutation remedy some miscarriages of justice? The following Sections pursue the answer to this question.

### III. THE SUPREME COURT'S FLAWED BELIEF THAT COMMUTATION REMEDIES INJUSTICE

This Part investigates the assumptions that underlie the Supreme Court's jurisprudence on commutations and the death penalty. Section A pursues the potential of the commutation power, exploring the broadest definition of commutation to establish that, ideally, commutation can correct injustices that survive post-conviction review. Section B examines supreme court decisions relating to commutation and concludes that the Court relies on commutation as a fail-safe measure to ensure fairness.

#### A. *The Purposes of Commutation*

There was a time when the need for commutations was fairly well accepted, though not entirely unquestioned.<sup>132</sup> Today, however, discussions of clemency are frequently prefaced with an apologia.<sup>133</sup> The controversy is invited perhaps by the very nature of the commutation power—it operates in derogation of the law.<sup>134</sup> It is the antithesis of the rule of law because it is called upon when legal rules have failed to do justice. It is inherently paradoxical because it enhances

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the practice). One commentator has observed that "the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures of both arbitrariness and of mistake." Black, *Capital Punishment* at 32 (cited in note 18).

132. In *United States v. Wilson*, 32 U.S. (7 Peters) 150, 160-61 (1833), Justice John Marshall wrote of the clemency power as something akin to a divine gift. Although the power continues to be interpreted broadly, that view was eschewed in *Biddle v. Perovich*, 274 U.S. 480 (1927). Those who criticized the clemency power include strange bedfellows Immanuel Kant and Jeremy Bentham. Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* 23-45 (Oxford U., 1989).

133. Lawmakers in a number of states have either proposed or threatened to propose measures that would limit the exercise of commutation in their states. See, for example, Joan I. Duffy, *Senators Spar, Reject Broader Civil Rights Bill*, Commercial Appeal A8 (March 26, 1993); Joe Mahoney, *DA Set to Fight Parole*, Times Union B1 (March 24, 1986); Martin van Der Werf, *Mofford's Teflon Coat is Peeling—Inmate Fiasco Stirs Questions*, Ariz. Republic A1 (Dec. 17, 1989).

134. *DOJ Survey* at 295 (cited in note 5).

justice in general by overriding the justice system in a specific case.<sup>135</sup> Of course, the ultimate critiques are that commutation is discretionary<sup>136</sup> and operates largely without standards or review.<sup>137</sup>

Because certain historic applications of commutation are no longer necessary,<sup>138</sup> because the power's roots are ancient, and because capital defendants under the Warren and Burger Courts came to enjoy "super due process,"<sup>139</sup> many have come to view commutation as redundant, outdated, and unsuitable in light of the nation's concern over violent crime. This Section examines the purposes that support clemency.

Reasons supporting grants of clemency have varied with the executive and with the times.<sup>140</sup> A review of the literature on the history of the clemency power<sup>141</sup> suggests that the reasons that authorities grant commutations are widely varied, but fall into three categories relevant to this Article: (1) to promote justice where the reliability of the conviction is in question, (2) to promote justice where the reliability of the sentence<sup>142</sup> is in question, and (3) to promote justice where neither the reliability of the conviction nor the sentence is implicated.<sup>143</sup> Commutations may be granted for justice-neutral

135. Kobil, 69 Tex. L. Rev. at 572 (cited in note 4).

136. Tamar Lewin, *Vast Discretion for Governors In Decisions on Death Penalty*, N.Y. Times A14 (May 20, 1992).

137. Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255, 257 (1990-91).

138. To observe the common law prohibition against executing the insane, death sentences were commuted to life sentences when prisoners were determined to be insane. See Michael L. Redalet and George W. Barnard, *Ethics and the Psychiatric Determination of Competency to be Executed*, 14 Bulletin Am. Acad. Psych. & L. 37, 38-39 (1986); J.D. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Melbourne U. L. Rev. 434, 475 (1964).

139. See note 3 and accompanying text.

140. Kobil, 69 Tex. L. Rev. at 601-02 (cited in note 4) (citing Willard Harrison Humbert, *The Pardoning Power of the President* 126 (American Council on Public Affairs, 1941)).

141. See Abramowitz and Paget, 39 N.Y.U. L. Rev. at 137-41 (cited in note 5) (tracing the history of clemency in several cultures); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 Am. J. Legal Hist. 51 (1963) (considering various historical aspects of the pardon in England prior to the eighteenth century, with emphasis on its relation to the Crown); Kobil, 69 Tex. L. Rev. at 571-73 (cited in note 4) (examining the historical origins and the theoretical underpinnings of the clemency power); Natl. Governors' Assn., *Guide to Executive Clemency Among the American States* (Center for Policy Research, 1988) ("*Governors' Guide*") (listing the types of clemency available in each state); *DOJ Survey* at 1-55 (cited in note 5); *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1226-31 (D.D.C. 1974) (commenting on the adoption of the Pardons and Reprieves Clause by the Constitutional Convention of 1787).

142. See note 10 and accompanying text (discussing the need for reliability in the determination that death is the appropriate punishment in a specific case).

143. The categories used in this Article generally correlate to those labeled by Professor Kobil as "justice enhancing" and "justice neutral." Kobil, 69 Tex. L. Rev. at 579 (cited in note 4). I subdivide the justice-enhancing commutations into three subgroups. Kobil's definition of justice is helpful. He defines it in a retributive sense as denoting "fairness under the law so that each person is rendered her due." *Id.* This is the way in which it is used in this Article.



reasons as well, such as administrative expedience.<sup>144</sup> Grants of clemency may be said to fall into at least one and sometimes more than one of these categories.

### 1. Justice-Promoting Commutations that Implicate the Reliability of the Conviction

This category consists of commutations granted to promote justice in an individual case where the reliability of the conviction is questionable.<sup>145</sup> Examples include wrongful convictions brought to light by new evidence and convictions that are unreliable because of technical errors, doubt as to guilt, or an unfair trial.<sup>146</sup> Sometimes a dissenting judge provides particularly strong doubt about guilt.<sup>147</sup> Commutations granted in anticipation of rights not yet recognized<sup>148</sup> are appropriately included in this group, as are those granted because of the diminished mental capacity of the offender or his status as a juvenile at the time of the crime.<sup>149</sup>

### 2. Justice-Promoting Commutations that Implicate the Reliability of the Sentence

In this category are commutations granted to promote justice in an individual case where the reliability of the sentence is in doubt. This group includes unfair sentences remitted because the punish-

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144. Of seventy post-*Furman* state commutations, forty-one were based on "judicial expediency" to avoid the time and expense of new sentencing proceedings where courts had vacated or were likely to vacate a death sentence. Five were Virginia sentences imposed under a mandatory statute after the U.S. Supreme Court invalidated such statutes in *Roberts v. Louisiana*, 431 U.S. 633 (1977), and *Woodson*, 428 U.S. at 280. Thirty-six were Texas cases in which commutations were granted to avoid judicial waste that would otherwise result because of a peculiarity in Texas law. The state's highest criminal court, the Texas Court of Criminal Appeals, has held that it may not decrease a "punishment assessed by the jury." *Ocker v. State*, 477 S.W.2d 288, 290 (Tex. Crim. App. 1972). When a death sentence is found to have been erroneously imposed, the sentence alone may not be readjudicated. Tex. Code Crim. Proc. Ann. § 37.07(3)(c) (West, 1993). Rather, the entire proceeding is treated as a mistrial. To avoid retrial in these cases, the Governor simply commutes the death sentence to life. Radelet and Zsembik, 27 U. Richmond L. Rev. at 293 (cited in note 6).

145. See Part II.A.

146. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 138 (cited in note 5) (citing Robert J. Bonner and Gortrude Smith, 2 *The Administration of Justice from Homer to Aristotle* 253-56 (Greenwood, 1968)).

147. *Id.* at 170.

148. See Grupp, 7 Am. J. Legal Hist. at 60 (cited in note 141) (noting that a right that did not exist at the time of a defendant's trial may be the basis for commutation if it later came into existence but was not applied retroactively).

149. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 166 (cited in note 5).

ment outweighs the seriousness of the offense<sup>150</sup> or because sentences among co-defendants are disparate in light of their relative culpability.<sup>151</sup> When mitigating factors have not been given appropriate weight by the sentencer,<sup>152</sup> reductions of such sentences would fall into this classification. This category also includes commutations that promote equalization of sentences within a jurisdiction and those that recognize and reward rehabilitation efforts.<sup>153</sup> Finally, commutations may be granted for sentences that result from an unfair trial and for sentences about which the presiding trial judge recommends leniency to the clemency authority.

### 3. Justice-Promoting Commutations that Do Not Implicate Reliability

Not all justice-promoting clemency relates to the reliability of an offender's conviction or sentence. Justice may be promoted by a grant of commutation that rewards an offender's testimony against his co-defendant<sup>154</sup> or because of the post-conviction mental condition of the offender.<sup>155</sup> Commutations of sentences to ameliorate the affects of maldistribution<sup>156</sup> or to give sway to the recommendations of judges and prosecutors may promote justice by improving the system rather than individual results.<sup>157</sup> Retributivists might argue that in a case in which public and political pressure favor commutation, granting it preserves the value of fairness that underpins the popular conception of justice.<sup>158</sup> A grant of clemency made in keeping with the clemency authority's past practices promotes justice to the extent that uniform classifications mete out like punishment for like crimes.<sup>159</sup>

The wide range of purposes for commutation strongly suggest that we would be well served to employ it for at least some of these reasons. Commutation provides a unique opportunity to assess the fairness of a given death sentence and the process that produced it.

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150. *Id.* at 159-60.

151. *Id.* at 163-64.

152. *Id.* at 165-68; Kobil, 69 *Tex. L. Rev.* at 571 (cited in note 4).

153. Abramowitz and Paget, 39 *N.Y.U. L. Rev.* at 168 (cited in note 5).

154. Kobil, 69 *Tex. L. Rev.* at 589 (cited in note 4) (citing Leslie Sebba, *Clemency in Perspective*, in Simha F. Landau and Leslie Sebba, eds., *Criminology in Perspective: Essays in Honor of Isreal Drapkin* 221, 225 (Lexington, 1977)).

155. Abramowitz and Paget, 39 *N.Y.U. L. Rev.* at 168-70 (cited in note 5).

156. See Moore, *Pardons* at 33 (cited in note 132). See also Abramowitz and Paget, 39 *N.Y.U. L. Rev.* at 164-65 (cited in note 5).

157. Abramowitz and Paget, 39 *N.Y.U. L. Rev.* at 171-72 (cited in note 5).

158. *Id.* at 172-75.

159. *Id.* at 176-77.

The following Section shows that the Supreme Court views commutation as providing such a safety net.

### *B. The Supreme Court's Commutation Jurisprudence*

Numerous holdings, dicta, and separate opinions express views of the Supreme Court and individual justices on clemency and commutation. These views raise three points relevant to this discussion. First, the Court's vision of clemency is sufficiently broad to allow its use for any of the justice-enhancing purposes outlined above. Each time the court has written of clemency it has employed terms like justice and fairness liberally. Second, the Court has deregulated capital punishment<sup>160</sup> and left formulation of death penalty policy, including the exercise of clemency, to the states. Finally, the Court clearly sees commutation as a real option for authorities who possess the power.<sup>161</sup> The Court uses the availability of commutation to support its denial of remedies and its overall deregulation of death.<sup>162</sup>

#### 1. The Breadth of the Commutation Power

The Court's view of the clemency power has undergone change over time. Early on, the justices saw it as something akin to a divine power.<sup>163</sup> Perhaps the broadest characterization of clemency appears in *Ex Parte Garland*.<sup>164</sup> Upholding the presidential pardon of a confederate legislator, the Court wrote:

The power thus conferred is unlimited, with the exception stated [impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.<sup>165</sup>

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160. The term was coined by Robert Weisberg in his article *Deregulating Death*, 1983 Sup. Ct. Rev. 305. See Part II.B.2.

161. *Harrington, Tex. Lawyer* at 13 (cited in note 22). This authority is generally possessed by state governors. *Id.*

162. See Part III.B.3.

163. See *Wilson*, 32 U.S. (7 Peters) at 160 (looking to English law as the basis of U.S. pardon law).

164. 71 U.S. (4 Wallace) 333 (1866).

165. *Id.* at 380.

Six decades later the Court restricted its view of clemency and eschewed the notion that clemency was an act of grace. In *Biddle v. Perovich*,<sup>166</sup> the Court wrote, "A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme."<sup>167</sup> Thus, the power was not something to be wielded with absolutely unfettered discretion, but rather was somehow tied to the Constitution. Its purpose was broadly construed to better serve the public welfare by "inflicting less than what the judgment fixed."<sup>168</sup> The shift in *Biddle* was barely discernible as the power continued to be interpreted rather generously.<sup>169</sup>

The Supreme Court has characterized clemency as a nearly absolute power and a "solemn responsibility."<sup>170</sup> Indeed, it has designated clemency an indicium of executive power.<sup>171</sup> The Court's jurisprudence instructs that, because it is discretionary,<sup>172</sup> clemency may be granted conditionally,<sup>173</sup> and grants or denials<sup>174</sup> are not subject to judicial review.<sup>175</sup> Though abuses of the clemency power are possible and happen from time to time, the Supreme Court has said that the check for such abuse is impeachment rather than a constrictive judicial interpretation of the executive's clemency power.<sup>176</sup>

The Court interprets the clemency power broadly in other ways. It sees clemency as an indispensable part of the criminal justice system,<sup>177</sup> although offenders usually have no right other than to

166. 274 U.S. 480 (1927).

167. *Id.* at 486. Constitutional authority for the commutation power of the president is found in Article 2, § 2: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U.S. Const., Art. 2, § 2.

168. *Biddle*, 274 U.S. at 486.

169. Kobil, 69 Tex. L. Rev. at 594 (cited in note 4). See, for example, *Schick v. Reed*, 419 U.S. 256 (1974) (holding that the president may commute a sentence upon the condition that the prisoner never be eligible for parole).

170. *Solesbee v. Balkcom*, 339 U.S. 9, 13 (1950).

171. Moore, *Pardons* at 4 (cited in note 132).

172. In *Ex Parte Grossman*, 267 U.S. 87 (1925), the Court observed: "[W]hoever is to make [the clemency power] useful must have full discretion to exercise it." *Id.* at 121.

173. *Schick*, 419 U.S. at 260-64.

174. Both the grant of a commutation as well as its denial are exercises of the commutation power. Hugo Adam Bedau, *A Retributive Theory of the Pardoning Power?*, 27 U. Richmond L. Rev. 185, 188 (1993).

175. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). See also *Solesbee*, 339 U.S. at 12 (citing *Ex Parte United States*, 242 U.S. 27, 42 (1916)).

176. *Grossman*, 267 U.S. at 121. See also, Kobil, 69 Tex. L. Rev. at 598 (cited in note 4) (stating that even abusive use of presidential pardoning is insulated from judicial review).

177. In the first death penalty challenges following *Furman*, death row inmates argued that the discretionary nature of the governor's power to commute death sentences rendered death penalty schemes arbitrary and capricious, and therefore unconstitutional under *Furman*. See *Gregg*, 428 U.S. at 153. The Supreme Court rejected the argument and, in dicta, said that removing all discretion from the state's death penalty practice would require the elimination of

seek commutation.<sup>178</sup> As a general matter, supreme court jurisprudence establishes that clemency is a means to accomplish justice in criminal matters. In *Ex parte Grossman*,<sup>179</sup> the Court stated:

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular government . . . to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.<sup>180</sup>

Finally, the Court has found that clemency's special justice-enhancing character makes it distinct from legal remedies.<sup>181</sup>

The Court's vision is that the clemency power is one with broad discretion, beyond judicial review, and capable of preventing injustice in appropriate cases. The importance of this awesome power in death penalty jurisprudence is compounded by the Court's deregulation of the death penalty. Because the Supreme Court ultimately relies on commutation to insure that justice is done,<sup>182</sup> the tale of deregulation is worth retelling at this point.

## 2. The Deregulation of Death

Early in his tenure on the court, then-Associate Justice Rehnquist advocated a limited role for federal courts in death penalty matters. In *Coleman v. Balkcom*,<sup>183</sup> he departed from the majority in denying a petition for certiorari explaining that the case raised significant issues about the administration of capital punishment and reflected the increasing delay in the enforcement of death penalty statutes.<sup>184</sup> He argued that once the Court had granted certiorari to

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executive clemency and would be "totally alien to our notions of criminal justice [and] . . . unconstitutional." *Id.* at 200.

178. It was argued in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), that the state's history of generous clemency grants resulted in a state-created right that could be deprived only when due process had been given. *Id.* at 465. The Court held that the state had created no such right because it had left the matter of commutations to the unfettered discretion of the board. *Id.* at 466.

179. 267 U.S. 87 (1925).

180. *Id.* at 120-21.

181. In *Brown v. Allen*, 344 U.S. 443 (1953), the Court said: "Discharge from conviction through habeas corpus is not an act of judicial clemency but a protection against illegal custody." *Id.* at 465.

182. See Part III.B.3.

183. 451 U.S. 949, 956 (1971) (Rehnquist, J., dissenting).

184. *Id.*

decide questions involving federal rights, cases should then be returned to state decision makers for execution or commutation. "In any event," he wrote, "the decision would then be in the hands of the State which had initially imposed the death penalty, not in the hands of the federal courts."<sup>185</sup> Justice Rehnquist got his wish just over a decade later. In a "startling" group of cases decided at the close of the 1982 term, the Court went "out of the business of telling the states how to administer the death penalty."<sup>186</sup>

In retrospect, the Court's decision to deregulate death was not surprising. Deregulation may have been foreshadowed even before the Court first undertook regulation of the death penalty in *Furman*.<sup>187</sup> In *McGautha v. California*,<sup>188</sup> Justice Harlan wrote for the majority that it appeared to be beyond present human ability to "identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority."<sup>189</sup> Justice Harlan dismissed the petitioner's attempt to distinguish the guilt phase from the sentencing phase of his trial as "the peculiar poignancy of the position of a man whose life is at stake, coupled with the imponderables of the decision which the jury is called upon to make."<sup>190</sup> In the end, Justice Harlan concluded that the Court "has nothing to teach the states about capital punishment" and so the issue must be left to the states.<sup>191</sup> Justice Brennan dissented.

Though Justice Harlan's Edmund Burke prevailed over Justice Brennan's Thomas Paine<sup>192</sup> in *McGautha*, the plurality in *Furman* struck down the death penalty as practiced a short time later. Unfortunately, it is not clear what *Furman* condemned. It may have overruled *McGautha*, or it may have admonished the states to solve a

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185. *Id.* at 964.

186. Weisberg, 1983 Sup. Ct. Rev. at 305 (cited in note 160).

187. *Id.* at 308-13.

188. 402 U.S. 183 (1971).

189. *Id.* at 204.

190. *Id.* at 216.

191. Weisberg, 1983 Sup. Ct. Rev. at 313 (cited in note 160).

192. Professor Weisberg compared Justice Harlan's skepticism to that of Edmund Burke, and Justice Brennan's idealism to that of Thomas Paine. *Id.* at 311. Edmund Burke, a 19th century statesman and political thinker, had conservative social and political views, which included opposition to democracy and the belief that political expression should allow expression of natural self-interest compatible with the common good. 3 *The New Encyclopedia Britannica* 499-502 (1984). Thomas Paine, on the other hand, was a political journalist and pamphleteer who championed the rights of the common man. His writings reflected sympathy for the poor and unfortunate, and advocated the elimination of poverty, illiteracy, unemployment, and war. 13 *The New Encyclopedia Britannica* at 867-68.

problem the Court was unable to articulate.<sup>193</sup> In any event, two competing interpretations of the plurality decision of *Furman* have been suggested—the “romantic view” and the “classical view.”

The romantic view promotes the ideal of the fair administration of capital punishment. In his skepticism in *McGautha*, Justice Harlan challenged the power of due process—attempting to rectify arbitrary and capricious sentencing—and concluded that arbitrary and capricious sentencing was inevitable. *Furman* took up Justice Harlan’s challenge. Determination and “good old American know-how” would prevail, proving Justice Harlan to be wrong. According to the romantic view, the Court had to formulate national policy in the capital punishment arena.<sup>194</sup>

The classical view, on the other hand, stresses that the Court said much, but did little, in its 1976 pronouncements by accepting the states’ modest attempts to eliminate only the most egregious injustices.<sup>195</sup> The Court telegraphed the message to the states that very little would be required to satisfy the objections of *Furman* and that the states were free to administer the death penalty as they chose.<sup>196</sup>

The absence of a single, unified position in *Furman*, as well as the five cases decided in 1976<sup>197</sup> and others that followed, lead inescapably to one of two interpretations. Either the Court demonstrated commitment to disciplining state death penalty procedures, or it never intended to do more than eradicate the most prejudicial of the states’ procedures, all the time acknowledging that constitutional legal principles cannot make death penalty practice rational.<sup>198</sup>

Whatever one’s interpretation of *McGautha* and *Furman*, it is clear that in 1983 the Court repudiated the romantic account and announced that federal courts should stop regulating the imposition of the death penalty.<sup>199</sup> The decision to deregulate death told capital

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193. Weisberg, 1983 Sup. Ct. Rev. at 314-15 (cited in note 160).

194. *Id.* at 318-19.

195. See, for example, *Woodson*, 428 U.S. at 305 (holding that mandatory death penalties violate the Eighth and Fourteenth Amendments); *Coker*, 433 U.S. at 592 (holding that imposition of the death penalty for rape violates the Eighth Amendment).

196. Weisberg, 1983 Sup. Ct. Rev. at 320-21 (cited in note 160).

197. *Gregg*, 428 U.S. at 153; *Proffitt*, 428 U.S. at 242; *Jurek*, 428 U.S. at 262; *Woodson*, 428 U.S. at 280; *Roberts*, 428 U.S. at 325.

198. Weisberg, 1983 Sup. Ct. Rev. at 313 (cited in note 160).

199. For example, in June 1993 the Court denied certiorari in twenty-nine Texas capital cases, an unprecedented number in the Court’s history. *McFarland v. Scott*, 114 S. Ct 2785, 2789 (1994). It has been suggested that the enterprise of developing legal doctrine has been pursued at great intellectual expense. In other words, the courts strained to maintain the appearance of doctrinal rigor in an area that does not lend itself to rules of law. Weisberg, 1983

defendants to look to the states to administer the death penalty fairly and to provide a remedy for injustices that survive post conviction review. The next Section examines the extent to which the Court or individual justices have expressed faith in commutation as a fail-safe measure to prevent unjust executions.

### 3. The Court's Reliance on Commutation

As the Supreme Court limits its review of death penalty cases, it simultaneously recommends the idealized remedy of commutation to death row inmates. This recommendation appears in majority opinions denying legal relief and in dissents where justices do not agree that a legal remedy is constitutionally required. In either context the message is clear: an injustice the Court does not address can be remedied by commutation.

Dissenters in some cases support their position that relief is inappropriate by arguing that offenders can resort to commutation. In *Fay v. Noia*,<sup>200</sup> for example, the Court held that a state prisoner's failure to appeal his felony murder conviction was not intelligent and knowing and did not justify denying his right to seek federal habeas corpus review. Justice Harlan dissented and, joined by Justices Clark and Stewart, wrote, "I recognize that Noia's predicament may well be thought one that strongly calls for correction. But the proper course to that end lies with the New York Governor's powers of executive clemency, not with the federal courts."<sup>201</sup>

The belief of some members of the Court that clemency is the appropriate remedy for injustice appears elsewhere. In *Thompson v. Oklahoma*,<sup>202</sup> Justice Scalia was joined by Chief Justice Rehnquist and Justice White in dissenting from the plurality's holding that the Constitution forbids the execution of a defendant who was fifteen years old at the time he committed murder. Justice Scalia argued that the plurality overstated the consensus against executing juveniles: "the plurality examines the statistics on capital executions, which are of course substantially lower than those for capital sentences because of various factors, *most notably the exercise of executive clemency*."<sup>203</sup> He continued, "The Governor of Oklahoma,

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Sup. Ct. Rev. at 307 (cited in note 160). See generally Steven G. Gey, *Justice Scalia's Death Penalty*, 20 Fla. St. U. L. Rev. 67 (1992).

200. 372 U.S. 391 (1963).

201. *Id.* at 476 (Harlan, C.J., dissenting, joined by Clark and Stewart, JJ.).

202. 487 U.S. 815 (1988).

203. *Id.* at 869 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.) (emphasis added).



who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily than we, would certainly have used his pardon power if there had been some mistake here."<sup>204</sup>

Dissents in non-capital cases also express the belief that commutation will correct injustice. In *Boyd v. Dutton*,<sup>205</sup> Justice Powell dissented from a per curiam remand for an evidentiary hearing on waiver of the right to counsel. He conceded that "[i]t is true that petitioner is uneducated, and that the sentence imposed seems disproportionate to the crime,"<sup>206</sup> but nonetheless offered a salve. In a footnote, Justice Powell suggested that the petitioner, "having served some eight years, may well merit consideration for parole or executive clemency."<sup>207</sup>

In majority opinions, as well, the Court has announced its reliance on commutation to prevent injustice. *Harmelin v. Michigan*<sup>208</sup> upheld a state statute imposing a mandatory life sentence without the possibility of parole for possession of more than 650 grams of cocaine. The petitioner claimed that the sentence constituted cruel and unusual punishment because it was disproportionate to his culpability and because it was mandatory. Justice Scalia, writing for the majority on this point, acknowledged that it was unique for Michigan to have made the second most severe sentence mandatory for this crime. He further noted that, even though the Michigan statute forecloses the use of "flexible techniques" to later reduce a defendant's sentence, not all means of reducing the sentence were eliminated. Optimistically, he wrote, "[T]here remain the possibilities of retroactive legislative reduction and *executive clemency*."<sup>209</sup>

In the landmark case of *Herrera v. Collins*,<sup>210</sup> the Court made it clear that the federal courts are not ultimately responsible for preventing the execution of arguably innocent people. It held that habeas corpus relief is not available for a claim of innocence based on newly discovered evidence.<sup>211</sup> The petitioner had argued that the Eighth and Fourteenth Amendments prohibit the execution of an innocent man and that he, in fact, was innocent according to evidence

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204. *Id.* at 876 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.). "Mistake" in this context meaning the execution of children against the will of Oklahoma citizens.

205. 405 U.S. 1 (1972).

206. *Id.* at 7 (Powell, J., dissenting). The petitioner was sentenced to twenty-eight years for forging or possessing forged checks totaling \$140. *Id.* at 4.

207. *Id.* at 7 n.1 (Powell, J., dissenting).

208. 501 U.S. 957 (1991).

209. *Id.* at 996 (emphasis added).

210. 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

211. *Id.* at 857.

that had not been heard at his trial. Chief Justice Rehnquist, writing for the majority, pointed out that the presumption of innocence disappears after a fair trial and conviction<sup>212</sup> and that due process does not mandate that all possible precautions be taken to avoid convicting the innocent.<sup>213</sup> Chief Justice Rehnquist noted that the claim of innocence was cognizable in Texas courts but that the time for raising this claim had passed.<sup>214</sup> The thirty-day period Texas provided for raising the claim was not constitutionally objectionable, Justice Rehnquist concluded, noting that fourteen other states had periods of thirty days or shorter for petitioning for a new trial based on new evidence.<sup>215</sup> Therefore, Texas's refusal to hear the new evidence did not transgress a "principle of fundamental fairness 'rooted in the traditions and conscience of our people.'"<sup>216</sup> Chief Justice Rehnquist maintained that, absent an independent constitutional violation, federal habeas corpus relief was not available to Mr. Herrera, all the while insisting that the Court's habeas corpus jurisprudence does not cast "a blind eye towards innocence."<sup>217</sup>

The holding in *Herrera* has been often and soundly criticized.<sup>218</sup> While its primary impact has been to further foreclose review of capital cases, its truly malignant effect may be that the Court has now damned many death row inmates to the fiction of clemency relief. After refusing to place innocence under the umbrella of protection provided by habeas corpus, Chief Justice Rehnquist wrote:

This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for

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212. *Id.* at 860.

213. *Id.*

214. Tex. R. App. Pro. 31(a)(1) allows a defendant to move for a new trial based on newly discovered evidence within 30 days after imposition or suspension of the sentence. The rule has been construed as jurisdictional. *Beathard v. State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989).

215. *Herrera*, 113 S. Ct. at 865 n.8.

216. *Id.* at 866 (citing *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

217. *Id.* at 862.

218. "*Herrera* ranks as one of those infamous Supreme Court opinions, like *Lochner* and *Plessy*, that is utterly repugnant to any basic sense of fairness. Indeed, it prompted one of the harshest dissents in the history of the Court." Newton, Tex. Forum on C.L. & C.R. at 34 (cited in note 13). See Stephen Reinhardt, *The Supreme Court as a Partially Political Institution*, 17 Harv. J. L. & Pub. Pol. 149 (1994); Kathleen Cava Boyd, Note, *The Paradox of "Actual Innocence" in Federal Habeas Corpus After Herrera v. Collins*, 72 N.C. L. Rev. 479 (1994); Jill Hanson Reinmuth, Comment, *When Actual Innocence is Irrelevant: Federal Habeas Relief for State Prisoners After Herrera v. Collins*, 69 Wash. L. Rev. 279 (1994); Recent Development, *Herrera v. Collins: The Right of Innocence: An Unrecognized Constitutional Privilege*, 20 J. Contemp. L. 258 (1994); Jordan Steiker, *Innocence and Federal Habeas*, 41 U.C.L.A. L. Rev. 303 (1993); Charles R. Morse, Recent Development, *Habeas Corpus and "Actual Innocence:" Herrera v. Collins*, 113 S. Ct. 853 (1993), 16 Harv. J. L. & Pub. Pol. 848 (1993); Harrington, Tex. Lawyer at 13 (cited in note 22).

executive clemency.<sup>219</sup> Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.<sup>220</sup>

The Chief Justice quoted Blackstone for the proposition that in exercising clemency the monarch holds a "court of equity in his own breast, to soften the rigour of . . . law."<sup>221</sup> Justice Rehnquist noted that, while the Constitution does not require it, all thirty-six jurisdictions that authorize the death penalty have a constitutional or statutory provision for clemency. He concluded that Texas had a clemency process in place that would allow Herrera an opportunity to avoid execution if he were in fact innocent.<sup>222</sup>

The commutation ideal envisions relief for condemned prisoners whose guilt is in doubt, for those whose trials were flawed, and for those whose trials may have resulted in different outcomes had today's rules been in place. In short, it can be employed to ensure that the end product of the criminal justice system is just. The Court's jurisprudence affirms this ideal. The next Part asks whether the Court's faith in the states' commutation processes is justified.

#### IV. THE REALITY OF COMMUTATION PRACTICE

This Part describes the operation of state commutation practices generally. It notes a decline in the number of commutations granted and explores reasons that may account for this decline. It culminates with a case study—the commutation petition of William Andrews.

##### A. *The Operation of State Commutation Practices*

Describing the "typical" state commutation process is challenging. Diversity is a hallmark of statutes that govern clemency throughout the states. Nevertheless, the statutes have these features in common: procedures are largely standardless, decisions are discretionary, and results are unreviewable.<sup>223</sup>

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219. *Herrera*, 113 S. Ct. at 866 (citing Tex. Const., Art. IV., § 11; Tex. Crim. Proc. Code Ann., § 48.01 (Vernon, 1979)).

220. *Id.*

221. *Id.* at 867 (citing William Blackstone, 4 *Commentaries* 397 (U. Chicago, 1979)).

222. *Id.* at 868-69.

223. Bedau, 18 N.Y.U. Rev. L. & Soc. Change at 257 (cited in note 137). Not much has changed in three decades. Abramowitz and Paget, writing in 1964, observed:

In the American system of government, the clemency power is not inherent in any particular branch of government,<sup>224</sup> although it is usually associated with the executive branch. Elkan Abramowitz and David Paget observed a trend in the first half of this century away from clemency's exclusive exercise by governors and toward the creation of advisory boards that counsel the governor in clemency matters or restrain him or her from acting without its favorable recommendation.<sup>225</sup> Some boards have entirely displaced governors in clemency decisions.<sup>226</sup> Today, state laws fall into one of three basic models. In the first model, the governor has primary or exclusive authority to grant commutations in death penalty cases.<sup>227</sup> Most states follow this approach.<sup>228</sup> In the second model, a parole or pardons board has primary or exclusive jurisdiction over the commutation of capital sentences.<sup>229</sup> In the third model, the clemency power is shared by the governor and the parole or pardons board.<sup>230</sup>

The use of the commutation power is more or less vulnerable to public pressure depending upon where the power is vested and who appoints the decision makers.<sup>231</sup> The *Guide to Executive Clemency Among the American States* indicates that in most of the states that vest the clemency power in a board, its members are appointed by the governor.<sup>232</sup> That most states continue to vest primary clemency power in the governor was borne out by a recent study by the

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(1) the exercise of the clemency power is completely within the discretion of the clemency authority and cannot effectively be challenged in the courts; (2) the clemency hearing is not an appeal and the clemency authority is not bound by the substantive, procedural, and evidentiary rules applicable to the courts; (3) no one has a right to clemency review, much less a clemency hearing, unless state law so provides; (4) the due process clause of the fifth and fourteenth amendments do not apply in full to the clemency system.

Abramowitz and Paget, 39 N.Y.U. L. Rev. at 177 (cited in note 5).

224. Christen Jensen, *The Pardoning Power in the American States* 115 (U. Chicago, 1922).

225. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 141 (cited in note 5).

226. *Id.*

227. *Governors' Guide* at 15 (cited in note 141). See, for example, Ala. Const., Art. V, § 124; Ala. Code § 15-22-36 (1983); *Wilson v. State*, 268 Ala. 86, 105 So.2d 66 (1958).

228. *Governors' Guide* at 15 (cited in note 141).

229. *Id.* See, for example, Ga. Const., Art. 4, § II, para. II-A; Ga. Code Ann. § 42-9-20 (1994).

230. *Governors' Guide* at 15 (cited in note 141). The governor either sits on the board or may not grant commutation without the favorable recommendation of the board. See, for example, Ind. Const., Art. 5, § 17; Ind. Code § 11-9-2-2 (1992 & Supp. 1995). See also notes 257-60 and accompanying text.

231. In some states, the entire range of clemency power is vested in the same body; in others, it is divided among more than one authority. *Governors' Guide* at 164 (cited in note 141). For example, Florida's governor may suspend fines and grant reprieves alone, but must have the approval of three cabinet members to grant a pardon or commute a sentence. Fla. Admin. Code Ann. R. 27-8.009, Rule 1 (1976).

232. *Governors' Guide* at 17-20 (cited in note 141).

Association of Paroling Authorities International.<sup>233</sup> The 1994 survey of paroling authorities asked representatives from fifty-two boards<sup>234</sup> whether they were empowered to commute sentences. Five responded that they were, twelve replied they were not, and thirty-five said that they could recommend commutation to the governor.<sup>235</sup>

Typically, clemency requests require investigation to ensure that sufficient facts are available to the decision maker.<sup>236</sup> The investigation is usually conducted by the staff of the decision maker.<sup>237</sup> A clemency investigation typically inquires into the circumstances surrounding the crime, the petitioner's biography, reports of psychological and psychiatric examinations, and comments from the trial judge and prosecuting attorney.<sup>238</sup> More recently, investigations have included input from victims.<sup>239</sup> Some of the information garnered may be confidential.<sup>240</sup>

Few state or federal courts have considered whether the Due Process Clause requires fair procedures in the consideration of clemency petitions. Those courts that have considered the issue have provided no constitutional protection.<sup>241</sup> Commutation procedures are therefore quite varied.<sup>242</sup> Procedures for clemency application range from informal to formal submission of an official petition. The greater the formality, the greater the burden on the applicant and, seemingly, the greater the need for legal representation. At one time, virtually all petitioners were represented by counsel.<sup>243</sup> Today, state statutes regarding representation range from prohibiting representatives of

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233. John C. Runda, Edward E. Rhine, and Robert E. Wetter, *The Practice of Parole Boards* (Internatl. Assoc. of Paroling Authorities, 1994).

234. The survey included the boards for the District of Columbia and the U.S. Parole Commission. See *id.*

235. *Id.* at 44.

236. *Governors' Guide* at 176 (cited in note 141). See also Abramowitz and Paget, 39 N.Y.U. L. Rev. at 148 (cited in note 5).

237. This might be the staff of the governor, the board, or both. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 149 (cited in note 5). See also *Governors' Guide* at 177 (cited in note 141).

238. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 148 (cited in note 5).

239. *Governors' Guide* at 16 (cited in note 141).

240. Fla. Rule Admin. 7.B.

241. *Otey v. Stenberg*, 34 F.3d 635, 637 (8th Cir. 1994); *Bundy v. Dugger*, 850 F.2d 1402, 1424 (11th Cir. 1988).

242. *Spinkellink v. Wainwright*, 578 F.2d 582, 619 (5th Cir. 1978) ("The clemency decision of the governor and cabinet of Florida did not infringe or implicate any interest protected by the Due Process Clause").

243. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 147-48 (cited in note 5).

applicants from receiving fees<sup>244</sup> to providing counsel for an applicant who is indigent.<sup>245</sup>

There is great variation in clemency hearings, as well. Usually, the clemency authority is not required to conduct a hearing.<sup>246</sup> If a hearing is held, some states allow the petitioner to attend the clemency hearing;<sup>247</sup> others do not. Those who do not allow the petitioner to attend the hearing may conduct an interview and include the transcript or report in the file prior to the hearing.<sup>248</sup> In the overwhelming number of states, clemency hearings are public<sup>249</sup> and informal. Some states have written procedures,<sup>250</sup> but many do not.<sup>251</sup> The course of the hearing is determined by the presiding official, and the rules of evidence do not apply.<sup>252</sup> Officials conducting clemency hearings often have subpoena power,<sup>253</sup> although few states make a transcript or other record of the clemency hearing.<sup>254</sup> Most states require clemency decisions to be reported to the legislature or filed with the Secretary of State.<sup>255</sup>

"[No state constitution] conditions the exercise of clemency [on] articulated standards."<sup>256</sup> Richard Burr, Director of the Capital Punishment Project of the NAACP Legal Defense and Educational Fund, describes the governors' clemency discretion as a "Wizard of Oz" process because it completely lacks standards.<sup>257</sup> Nor do courts limit the discretion of those making commutation decisions.<sup>258</sup> The federal courts treat the executives' reasons for granting clemency as beyond review, with the narrow exception of reviewing and invalidating some pardons for impermissible effect, such as those resulting

244. *Governors' Guide* at 76 (cited in note 141). See, for example, Kan. Stat. Ann. § 22-3706 (1981).

245. Fla. Stat. § 925.035.

246. See, for example, Ga. Comp. R. & Regs. 475-3.10 (1995). But see Ariz. Rule Admin. 5-4-602 (1995), which requires the board to conduct a "personal interview" with the condemned person. In *Bundy*, 850 F.2d at 1424, the Eleventh Circuit rejected a claim that the lack of a clemency hearing violated the Eighth Amendment.

247. See, for example, Utah Rule Admin. 671-302-2.

248. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 149 (cited in note 5).

249. *Id.* at 155. See, for example, Ind. Code Ann. § 4-22-3-1 (Burns, 1990).

250. See, for example, La. Rev. Stat. Ann. § 15:572.4A (West, 1992).

251. Kobil, 69 Tex. L. Rev. at 605 (cited in note 4).

252. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 156 (cited in note 5).

253. *Id.*; Utah Code Ann. § 77-27-9-(3) (1994).

254. Abramowitz and Paget, 39 N.Y.U. L. Rev. at 156-57 (cited in note 5).

255. *Id.* at 157.

256. *Id.* at 143.

257. Lewin, N.Y. Times at A14 (cited in note 136).

258. Not everyone finds this degree of discretion disturbing. Former Ohio Governor Michael DiSalle said that the precise grounds on which clemency should be granted are more easily felt than prescribed. DiSalle, 25 Ohio St. L. J. at 71 (citing Montesquieu, *Spirit of the Laws* (D. Appleton, Thomas Nugent trans. 1900)).

in violations of the Equal Protection Clause.<sup>259</sup> State courts place equal confidence in the decision making of commutation authorities.<sup>260</sup>

A state clemency system is more than the sum of its procedures. It includes a human factor that results from the personal impact decision making has on the decision maker.<sup>261</sup> The decision always rests heavily on the shoulders of those who must make it. The next Section discusses the decreasing frequency with which those who hold this awesome power exercise it.

### B. *The Decline in the Use of Commutation*

If at one time the commutation power was a meaningful source of justice, this is no longer the case. The heyday of commutations was the early- and mid-1940s, during which twenty to twenty-five percent of death penalties were commuted.<sup>262</sup> Though not written at this time, books by former California Governor Edmund (Pat) Brown<sup>263</sup> and former Ohio Governor Michael V. DiSalle<sup>264</sup> illustrate that, while commutations were not commonplace during the 1960s, they were sufficiently frequent that, at least in some states, meritorious cases were carefully considered and commuted. Members of the *Furman* Court noted that commutations accounted for a decline in the number of annual executions in the years prior to 1972.<sup>265</sup> Commutation was one of several reasons that executions had dwindled to approximately eighteen cases a year prior to *Furman*.<sup>266</sup> By Justice Brennan's

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259. *Osborne v. Folmer*, 735 F.2d 1316, 1317-18 (11th Cir. 1984) (holding that a pardon of a parole decision may be challenged on equal protection grounds).

260. *Andrews v. Utah Board of Pardons*, 192 Utah Adv. Rep. 8, 836 P.2d 790, 794 (1992) ("The grant or denial of [a new commutation] hearing is a matter committed to the sound discretion of the Board of Pardons").

261. Most governors have not welcomed commutation petitions. Former Louisiana Governor Edwin Edwards tried to divest himself of the power altogether. To Sister Helen Prejean he said:

I tried to got the legislature to remove the whole process from the governor, but I recognize that in the final analysis some one person has to have the authority to stop the execution. . . . The whole process is in the judicial system; then, all of a sudden, in the last thirty days to have it sitting on the heart and mind and soul of one man is a very difficult position to be in.

Prejean, *Dead Man Walking* at 57 (cited in note 53).

262. Bedau, 18 N.Y.U. Rev. L. & Soc. Change at 262 (cited in note 137).

263. Edmund G. (Pat) Brown, Sr., with Dick Adler, *Public Justice, Private Mercy: A Governor's Education on Death Row* (Weidenfeld & Nicolson, 1989).

264. Michael V. DiSalle and Lawrence G. Blochman, *The Power of Life and Death* (Random House, 1965).

265. 408 U.S. at 291-92.

266. *Id.* at 292 (Brennan, J., concurring) (citing U.S. Dept. of Justice, *National Prisoner Statistics No. 46: Capital Punishment 1930-1970* at 9 (1971)).

account, governors had "regularly commuted a substantial number" of death cases.<sup>267</sup> Long after commutations ceased to be common, however, writers have continued to promote the belief that they occur with great frequency.<sup>268</sup>

In the last quarter century, there has been a dramatic decline in death penalty commutations—so much so that some say the clemency power is now defunct. Michael Radelet, a noted University of Florida sociologist, believes that "clemency is not a component of the modern death-sentencing process."<sup>269</sup> Experiences in Florida and Louisiana illustrate how sharp the decline has been. Between 1920 and 1972, Florida governors commuted from twenty to forty percent of death sentences. After the penalty was reinstated in 1976, only six sentences were commuted by Governor Bob Graham, and neither of his successors have commuted any capital sentences.<sup>270</sup> Writing in 1974, William J. Bowers observed that about one in four or five death sentences was commuted to life imprisonment.<sup>271</sup> By 1988, data collected by Hugo Adam Bedau demonstrated that the frequency had dwindled to one in forty. The decline has prompted some to declare that clemency, like UFOs and Bigfoot, exists only in theory.<sup>272</sup>

The phenomenon of declining clemency grants is also present in the federal system, although until recently there was no federal death penalty.<sup>273</sup> The presidential clemency power has atrophied in the last half century. President Johnson granted over seventy clemencies per year at the beginning of his term.<sup>274</sup> When he was criticized for one in particular, the number was reduced to only five

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267. *Id.* at 299 (Brennan, J., concurring).

268. "[J]uries . . . give due consideration to the incontrovertible fact that the vast majority of those sentenced to death will be finally reprieved." Leon S. Sheff, *Ultimate Penalties: Capital Punishment, Life Imprisonment, Physical Torture* 111 (Ohio St. U., 1987). The use of "reprieve" in this statement creates the erroneous impression that commutation rather than errors ferreted out in the appeals process account for the diminution in death sentences.

269. Berry, *Dallas Morn. News* at 1J (cited in note 22).

270. *Id.*

271. Bedau, 18 *N.Y.U. Rev. L. & Soc. Change* at 266 (cited in note 137) (citing William J. Bowers, *Executions in America* 76 n.b. (Lexington, 1974)).

272. *Id.* at 266, 270 n.97 (citing David von Drehle, *Clemency Exists Only in Theory*, *Miami Herald* 8 (July 10-13, 1988)). This perception was borne out by the experience of Sister Prejean when she approached Louisiana Governor Edwin Edwards regarding a commutation of the sentence of Patrick Sonnier. She believes that he was not merely predisposed to deny the clemency request, but that he had already made up his mind not to grant it, regardless of the merits of Sonnier's case. Prejean, *Dead Man Walking* at 55-56 (cited in note 53).

273. See 21 U.S.C. § 848(e) (1994 ed.) (providing the death penalty for murders that occur in the context of certain specified drug transactions).

274. *Governors' Guide* at 1 (cited in note 141) (citing Kevin Krajick, *The Quality of Mercy*, 5 *Corrections* 51 (1979)).



over the remaining eighteen months of his presidency.<sup>275</sup> President Nixon granted thirty-six percent of all requests for clemency; President Ford awarded twenty-seven percent; and President Carter just over twenty-one percent.<sup>276</sup> President Bush granted fewer clemencies during his tenure than most presidents in the past twenty-five years.<sup>277</sup> Presidential clemency has become trivialized, now being almost exclusively a tool to cleanse the records of federal offenders who have served their sentences as originally imposed and as a post incarceration benefit of good behavior.<sup>278</sup>

A death row inmate who petitions for commutation to a life sentence has only the remotest hope for relief. The next Section of this Article investigates the reasons for the decline in commutations. It argues that among the myriad reasons, political consequences contribute most directly and most significantly to the erosion of commutations.

### C. *The Reasons for the Decline*

There are many circumstances that have contributed to the atrophy of commutation power. First and foremost, the political consequences of granting commutations are simply too great. This is evident from the experiences of those who have granted commutations and from the efforts of legislatures to abolish or limit clemency.<sup>279</sup> The political pressure is, at least in part, a reaction to past abuses of the power.<sup>280</sup> Second, many believe that commutation is no longer necessary. They mistakenly believe that the judicial system is flexible enough to render full justice<sup>281</sup> and that injustice cannot survive "super due process."<sup>282</sup> Third, there is a conservative philosophy among executives that the judgments of courts and juries should not be overridden.<sup>283</sup> This Section explores the political ramifications of

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275. Id.

276. Kobil, 69 Tex. L. Rev. at 602 (cited in note 4).

277. Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J. L. & Pol. 1, 49 (1994).

278. Kobil, 69 Tex. L. Rev. at 604 (cited in note 4).

279. Cobb, 99 Yale L. J. at 394-95 (cited in note 68).

280. The change in public attitude toward pardons began with the excesses of then-Tennessee Governor Ray Blanton and the scandal that followed. John Maginnis, *The Last Hayride* 207 (Gris, 1984).

281. Cobb, 99 Yale L. J. at 394-95 (cited in note 68).

282. Bedau, 18 N.Y.U. Rev. L. & Soc. Change at 268-69 (cited in note 137) (describing the multiple levels of procedure required to impose a death sentence).

283. Kobil, 69 Tex. L. Rev. at 602-03 (cited in note 4).

commutations and argues that, standing alone, they can and have prevented appropriate exercises of commutation.

Some governors have been generous in their exercise of clemency,<sup>284</sup> but serious political consequences can follow when a governor grants clemency against the popular will. Pat Brown held office as the governor of California from 1959 to 1966. He believed that his death row decisions played a part in his sound defeat by Ronald Reagan.<sup>285</sup> Republican Dave Treen challenged incumbent Louisiana Governor Edwin Edwards in 1979 and used Edwards's clemency record to help defeat him.<sup>286</sup>

Commuting a death sentence can pose personal risks as well. When New Mexico's Governor Tony Anaya had made up his mind to commute the sentences of the five offenders on death row, he spoke with no one about his intention because of threats of physical injury and even death he had received, presumably to deter or prevent his exercising the commutation power.<sup>287</sup> Just *considering* commutation can be risky as well. When the Utah board conducted its commutation hearing for William Andrews in 1989, the community was in a furor and board members were advised to take security precautions. Officers, some with trained guard dogs, stood watch at the homes of some board members twenty-four hours a day while the matter was pending.<sup>288</sup>

President Clinton may be among those who have found opposing the death penalty politically untenable. During his first term as governor of Arkansas, Clinton refused to set execution dates for two dozen death-row inmates and commuted forty-four life-without-parole sentences to make them parole eligible.<sup>289</sup> Between the start of his second term and 1992, Clinton moved quickly to set execution dates, declined to stop the executions of three men, and reduced life sentences only seven times.<sup>290</sup> During his presidential campaign, Clinton denied the commutation request of Ricky Ray Rector who had "effectively lobotomized himself with a self-inflicted gunshot to the

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284. For example, a few governors have been known to commute all death sentences during their terms, despite public outcry and even law suits filed by the legislature. These include Massachusetts Governor Endicott Peabody (1963-65), Oregon Governor Robert D. Holmes (1957-59), and New Mexico Governor Tony Anaya (1986). *Governors' Guide* at 3 (cited in note 141).

285. Brown with Adler, *Public Justice* at 52 (cited in note 263). Governor Brown lost the election by almost a million votes. *Id.*

286. Maginnis, *The Last Hayride* at 208-10 (cited in note 280).

287. *Id.* at 182.

288. The Author was a member of the board at this time.

289. George E. Jordan, *Clinton and Crime: Supports Capital Punishment as a Sign of Toughness*, *Newsday* 3 (May 4, 1992).

290. *Id.*

head, after he shot and killed a police officer."<sup>291</sup> There is substantial doubt about whether Rector realized he was about to die. On the way to the execution chamber he said he intended to vote for Mr. Clinton.<sup>292</sup>

For governors, the choice is a pragmatic one. When a "tough on crime" policy prevails in a state, commutations are reduced.<sup>293</sup> In all likelihood, wariness of political fallout accounts for some of the decline in commutations, despite the increase in the number of persons slated for execution.<sup>294</sup>

Public opposition to commutation can affect more than just the governor or board. It can have repercussions for the decision maker's office itself. Public outcry has prompted state legislators to introduce bills to abolish or limit the commutation power. After New Mexico's Governor Anaya issued two stays of execution, constitutional amendments and bills limiting the governor's power were introduced in the legislature, although none were passed.<sup>295</sup> Similarly, the Utah legislature considered and rejected abolition of commutation after a high-profile, though unsuccessful, commutation hearing.<sup>296</sup> Some years later the Utah legislature succeeded in limiting the power.<sup>297</sup> This legislative action was a major encroachment on the authority of one of the most powerful parole boards in the country.

It may be that the caution of today's governors has been engendered by the excesses of their predecessors. The commutation power provides the flexibility necessary to correct injustice, but it also provides opportunities for abuse. In the past, some governors have seized those opportunities. Oklahoma Governor J.C. Walton was impeached for selling pardons.<sup>298</sup> Perhaps one of the best known

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291. Berry, Dallas Morn. News at 1J (cited in note 22).

292. Id.

293. Cheatwood, 34 *Crime & Delinq.* at 49 (cited in note 4) (citing Susan E. Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29 *Crime & Delinq.* 593, 608 (1983)). Not all commentators agree about the effect of public opinion on clemency decision makers. Michael Radelet believes that there is an "erroneous perception that public opinion would not tolerate commutation." Berry, Dallas Morn. News at 1J (cited in note 22). Nor does Hugo Bedau believe it is necessary for a governor or pardon board to be extraordinarily courageous or to have a political death wish in order to commute a capital sentence. Bedau, 18 *N.Y.U. Rev. L. & Soc. Change* at 261 (cited in note 137).

294. Kobil, 69 *Tex. L. Rev.* at 609-10 (cited in note 4).

295. Toney Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 *U. Richmond L. Rev.* 177, 180 (1993).

296. *The Heavy In Selby Odyssey Is Not State Pardons Board*, Salt Lake Tribune A18 (Sept. 6, 1987); Phil Jensen, *Panel Tables Pardons Bill After Long Debate*, Ogden Standard-Examiner 1A (Oct. 22, 1987).

297. See Utah Code Ann. § 77-27-5.5 (1992).

298. *DOJ Survey* at 150-53 (cited in note 5).

abuses of clemency power took place in Tennessee, where Parole Board Chair Marie Raggianti played a key role in the prosecution of board members who subsequently confessed to selling paroles.<sup>299</sup> Then-Tennessee Governor Ray Blanton was also implicated. And in Louisiana, before Republican Dave Treen defeated incumbent Governor Edwin Edwards in 1979, he revealed that Edwards had pardoned 1,181 convicts, including 124 convicted murderers, that one pardoned man paid a state representative \$2,000 to influence the Governor in his case, and that the Governor's executive counsel and the Governor's brother represented many successful clients in clemency matters.<sup>300</sup>

Although blatant abuses such as selling commutations are reprehensible, even more insidious are subtle abuses such as those uncovered by Sister Prejean in the early 1980s as she advocated for death row inmates Pat Sonnier and Robert Willie before the Louisiana Pardons Board, which makes recommendations to the Governor. After the petitions for these men were denied, the board chairman, Howard Marsellus, was convicted of accepting a \$5,000 bribe for the pardon of an Angola inmate.<sup>301</sup> In a telephone conversation with Marsellus a year after his release from a federal prison in Fort Worth, Sister Prejean learned about how clemency really operated during that period.<sup>302</sup>

Sister Prejean learned that politically volatile cases had no hope of commutation. Such a case was that of Tim Baldwin, convicted of having murdered his 81-year-old grandmother. When Baldwin applied to the board for clemency, the investigation raised doubts in Marsellus's mind about Baldwin's guilt. He took those doubts to the Governor's chief counsel, Bill Roberts, whose response was that the Governor did not like to be confronted with such cases.<sup>303</sup> Roberts directed the board to "handle it." Roberts asked Marsellus, "Why do you think we appointed you, Howard? This is why you're chair of this committee. If you can't hack it, we'll just have to replace you with someone who can."<sup>304</sup> It was a simple statement of fact. Marsellus believed that the Governor relied on the board's negative recommendation to avoid the political fallout of commuting a sentence. The Sonnier and Willie commutation petitions were denied for similar

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299. Peter Maas, *Marie, A True Story* 414 (Random House, 1983).

300. Maginnis, *The Last Hayride* at 208-10 (cited in note 280).

301. Prejean, *Dead Man Walking* at 169 (cited in note 53).

302. *Id.*

303. *Id.* at 171.

304. *Id.*

reasons.<sup>305</sup> On the other hand, when files marked "Expedite" appeared on the board's calendar, it was understood that a deal had been cut with the Governor's office. Marsellus's job was to see that recalcitrant board members cooperated in delivering the outcome the Governor had already promised.<sup>306</sup>

Howard Marsellus spoke at a conference on the death penalty at Loyola University in New Orleans on July 7, 1993. He depicted the pardon and parole process as a "cesspool" and described a "cheat list" containing names of prisoners whose hearings were expedited "depending on the urgency or how important the supporting person was. People with money, power, or respect in the community could get the attention of the decision makers. Poor whites and blacks were at the mercy of the system."<sup>307</sup> Marsellus continued, "Everyone on the board knew from the outset that we could not send a recommendation for commutation of the sentence to the governor. The governor did not want to be put in the position of having to make the ultimate decision of whether a man lived or died. It was much easier to accept the decision of the pardon board."<sup>308</sup>

Though there may be disagreement about why governors seldom grant clemency, there is no refuting that the incidence of clemency grants has slowed to a trickle. Yet, applications for clemency are filed by death row inmates as routinely as are petitions for appellate review.<sup>309</sup> What happens when the optimism of the Supreme Court's commutation jurisprudence is tested by the reality of a commutation petition from death row? The next Section uses a case study to address this question.

#### *D. The Commutation Petition of William Andrews*

The commutation petition of William Andrews was the culmination of a saga that is typical of death penalty cases, as he raised numerous claims that were unsuccessful in the courts.<sup>310</sup> Neither the evidence nor Mr. Andrews suggested there was doubt about his par-

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305. Id.

306. Id. at 169-73.

307. Berry, *Dallas Morn. News* at 1J (cited in note 22).

308. Id.

309. Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 *Yale L. J.* 889, 896 (1981).

310. See, for example, *Stoker v. State*, 788 S.W.2d 1, 4 (Tex. Crim. App. 1989) (affirming the appellant's capital conviction for the murder of a convenience store clerk and rejecting the appellant's twelve points of error).

ticipation in this serious crime.<sup>311</sup> Nevertheless, his case calls into question the reliability of his conviction for *capital* murder and his death sentence. It is a case study of the factors that can undermine the reliability of a death sentence and, therefore, invites discussion of the ability of the clemency power to inject justice into current death penalty practice.

William Andrews was an African-American airman who was stationed in Utah in 1974. He, Keith Roberts,<sup>312</sup> and Pierre Dale Selby<sup>313</sup> robbed a Hi-Fi Shop in a nearby community. Only Mr. Andrews and Mr. Selby entered the shop. During the three-hour robbery, five white people were tortured, and three were killed. Andrews participated in the torture but left when his companion indicated he intended to kill the victims.<sup>314</sup> A black, non-Mormon tried in a community of outraged white Mormons, Andrews was convicted of capital murder and sentenced to death. Despite numerous flaws in the process leading to Andrews's conviction and sentencing,<sup>315</sup> both were upheld (over sometimes vigorous dissents<sup>316</sup>)

311. There are, to be sure, more sympathetic cases, but Andrews's case is appropriate to make the point that reliability is important in *every* case.

312. As an interesting aside relevant to culpability, some, including then-Weber County Attorney Robert L. Newey, believed Roberts was the mastermind of the robbery, though he did not enter the shop or participate in the murders. Charles F. Trentelman, *Third Participant in Hi-Fi Case to be Paroled*, Ogden Standard-Examiner A1 (May 8, 1987). There was circumstantial evidence that linked Roberts to the murders, but the jury could not reach a verdict on the three counts of murder against him. *State v. Andrews*, 574 P.2d 711, 711-12 (Utah 1977). The trial judge believed Roberts would have been convicted of murder had he been tried alone. Letter from Judge John F. Walquist, Second Judicial District, to Warden Sam Smith, Utah State Prison, and Michael D. Cannon, Secretary of the Utah State Board of Pardons (Jan. 2, 1975) (on file with the Board). Roberts, a native of Oklahoma, was paroled after serving twelve years on two counts of robbery. Laurie Sullivan, *Hi-Fi Robber Receiving Parole as 2 Others Await Execution*, Deseret News 2B (May 8, 1987).

313. At the time of the crime, his name was Dale Selby Pierre. See *State v. Dale S. Pierre*, 572 P.2d 1338, 1338 (Utah 1977). He later changed it to Pierre Dale Selby. *Andrews v. Shulsen*, 94 Utah Adv. Rep. 11, 773 P.2d 832, 832 (1988).

314. One court found that "Andrews . . . was not observed firing any gun nor was he present when . . . all the victims were shot." *Andrews*, 574 P.2d at 709. This aspect of the case has been among the many subjects of controversy. Mr. Williams's advocates claim that he tried to dissuade Selby from killing the hostages. Michael Farrell, *Andrews Granted Stay of Execution in Utah*, Natl. Catholic Reporter 2 (Sept. 1, 1989). His detractors, on the other hand, claim he loaned his gun to Selby for the purpose of committing the murders. Paul Schatt, *Browsing Through the News: What Kind of Society Are We Fashioning?*, Phoenix Gazette A12 (July 31, 1992).

315. See notes 320-37 and accompanying text.

316. See, for example, *Pierre*, 572 P.2d at 1357-59 (Maughan, J., concurring in part and dissenting in part); *State v. Andrews*, 191 Utah Adv. Rep. 30, 843 P.2d 1027, 1035-41 (1992) (Durham, J., dissenting). In *Andrews v. Morris*, 607 P.2d 816 (Utah 1980), Justice Maughan dissented, arguing that the finality of convictions is an insufficient reason to adhere rigidly to a restrictive waiver doctrine in death penalty cases. *Id.* at 825-27 (Maughan, J., dissenting). Dissenting from a decision not to reach the merits of Mr. Andrews's petition regarding a lesser included offense instruction, Utah Supreme Court Justice Christine Durham wrote:

throughout multiple levels of post-trial review.<sup>317</sup> By 1989, one of Andrews's few hopes for relief was the Utah Board of Pardons and its commutation power.<sup>318</sup> The reality of this "historic remedy for preventing miscarriages of justice,"<sup>319</sup> however, failed Andrews as it fails so many others like him.

There were a number of problems with the process that led to Andrews's conviction and sentencing. First, his trial lawyer was inexperienced<sup>320</sup> and, although he was not so inept as to be unconstitutionally inadequate,<sup>321</sup> he made a number of serious errors. He failed to call mitigating witnesses,<sup>322</sup> request the inclusion of a lesser included offense instruction,<sup>323</sup> challenge important testimony on recidivism offered at the sentencing phase,<sup>324</sup> object to the racially based exclusion of a black potential juror,<sup>325</sup> and object to a jury instruction that prejudicially misstated the burden of proof for death

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I acknowledge the devastating impact on all concerned of delays required for meticulous and time-consuming review of the fairness with which the State imposes the death penalty. Balanced against that terrible cost, however, must be the even more terrible possibility that a defendant's life may be taken without fundamental fairness and due process.

*Andrews*, 773 P.2d at 834 (Durham, J., dissenting).

On one occasion, U.S. Supreme Court Justice Marshall protested the majority's denial of certiorari, saying that all Andrews sought was an "opportunity to prove actual [racial] bias" at a hearing. *Andrews v. Shulsen*, 485 U.S. 919, 921 (1988) (Marshall, J., dissenting).

317. See *Andrews*, 574 P.2d at 710 (incorporating the reasoning adopted in a companion case, *Pierre*, 572 P.2d at 1338). Fourteen years later the Tenth Circuit affirmed that Mr. Andrews had received "full determination" on the merits of these claims. *Andrews v. Deland*, 943 F.2d 1162, 1174 (10th Cir. 1991).

318. In Utah, the Parole Board has the exclusive authority to grant a commutation. The governor's power is limited to granting a temporary respite or reprieve. Utah Const. Art. 7, §§ 12(2)(a)-(b), 12(3)(a); Utah Code Ann. §§ 77-27-5(1)(a)-(d), -(4) (1995). The Author was a member of the Utah Parole Board at that time and sat on the three-member panel.

319. See *Herrera*, 113 S. Ct. at 866 (denying an appeal by a capital convict who murdered a police officer).

320. *Andrews*, 943 F.2d at 1197 (McKay, C.J., dissenting in part and concurring in part).

321. It was held that the quality of Mr. Andrews's representation was "well within the range of competent and acceptable defense counsel performance." *Id.* at 1193-94. Because of the low standard for adequate attorney conduct and the difficulty of showing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), the capital defendant is not likely to be able to demonstrate that his counsel was ineffective.

322. *Andrews*, 943 F.2d at 1198.

323. *Id.* at 1169. See also *State v. Hansen*, 734 P.2d 421, 424 (Utah 1986) (outlining the elements where a lesser-included offense instruction is required).

324. *Andrews*, 942 F.2d at 1169; *In the Matter of William Andrews*, unpublished opinion of the Utah State Board of Pardons 8 (no date) (citing Commutation Hearing Transcript 277) (on file with the Board).

325. *Andrews v. Barnes*, 779 P.2d 228, 228 (Utah 1989). Exclusion of the black venireman was noted as part of Justice Marshall's dissent on the broader race issue in 1988. *Andrews*, 485 U.S. at 920 (Marshall, J., dissenting, joined by Brennan, J.). Andrews's counsel joined in a challenge for cause against the venireman, additional evidence, argued Mr. Andrews, that counsel was inadequate.

penalty sentencing decisions.<sup>326</sup> The lawyer's procedural defaults made a number of trial court errors immune from appellate review.<sup>327</sup>

Furthermore, the trial court failed to grant an appropriate change of venue to reduce the influence of the community outrage over the murders<sup>328</sup> and to sever Andrews's trial from those of his co-defendants in order to better distinguish the actors' different degrees of culpability in the minds of the fact finders.<sup>329</sup> While Andrews was not an innocent man, he did not kill anyone, and was not present when the killing took place.<sup>330</sup>

Finally, Andrews's trial was tainted by a racially charged attempt to prejudice the jury: during a lunch break in the trial, one juror turned his napkin over to see a stick figure at a gallows and the words "hang the niggers" written on it. At least two, possibly three, jurors saw this message, and the napkin was preserved as evidence.<sup>331</sup> Andrews's claim that Utah's application of the death penalty discriminated on the basis of race was never heard because his submissions were "inadequate to indicate that evidence of discrimination at his trial would be forthcoming if a hearing were held."<sup>332</sup>

Andrews was also denied the benefit of several changes in the law that came after his conviction. These changes would have required (1) a higher stand of proof to impose the death penalty,<sup>333</sup> (2) a

326. In *State v. Wood*, 648 P.2d 71, 71 (Utah 1981), the Utah Supreme Court adopted a more stringent standard than was in place for Mr. Andrews's penalty. The following standard was adopted:

After considering the totality of the aggravating and mitigating circumstances, you must be persuaded *beyond a reasonable doubt* that total aggravation outweighs total mitigation, and you must further be persuaded, *beyond a reasonable doubt*, that the imposition of the death penalty is justified and appropriate in the circumstances.

Id. (emphasis added).

327. Indeed, the state supreme court refused to consider the issue on its merits because it said that Andrews did not establish good cause for failing to raise the claim earlier, an error Andrews said was due to his lawyer's lack of experience. *Andrews*, 773 P.2d at 832-33.

328. *Andrews*, unpublished opinion of the Utah State Board of Pardons at 8.

329. Rodd Wagner, *Appeals Court Grants Andrews a Stay*, Salt Lake Tribune A1 (Aug. 20, 1989); *State Board Clemency Hearing Separates Andrews From Selby*, Salt Lake Tribune A8 (Aug. 14, 1989).

330. The Tenth Circuit considered whether imposition of the death penalty violated the standards articulated in *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (holding that death is too great a penalty for one who does not intend to participate in or facilitate a murder), and decided that it did not. *Andrews v. Shulsen*, 802 F.2d 1256, 1272-74 (10th Cir. 1986).

331. *State v. Andrews*, 576 P.2d 857, 858-59 (Utah 1978). Thirteen years later the Tenth Circuit affirmed that Andrews had received "full determination" on the merits of this claim. *Andrews*, 943 F.2d at 1174. In a dissent from denial of certiorari, Justice Marshall referred to the affair as a "vulgar incident of lynch-mob racism reminiscent of Reconstruction days." *Andrews*, 485 U.S. at 922 (Marshall, J., dissenting).

332. *Andrews*, 802 F.2d at 1266.

333. *Wood*, 648 P.2d at 71.



lesser included offense instruction for felony murder,<sup>334</sup> and (3) the non-discriminatory use of peremptory challenges to potential jurors.<sup>335</sup> Another change added a life without parole penalty to the criminal code,<sup>336</sup> a sentence that could decrease the likelihood of a death sentence by creating an option that would protect the community from future violence without executing the defendant.<sup>337</sup>

Andrews, consistent with the Supreme Court's confidence in the commutation process, raised all of these issues before the Utah State Board of Pardons. The issues gave the Board the opportunity to commute Andrews's death penalty to a sentence of life imprisonment, and subsequently the opportunity to commute to life without parole.<sup>338</sup> The Board could have commuted the sentence to correct cumulative infirmities in the trial that undermined the reliability of both the conviction and sentencing decisions. It could have done so to promote systemic values by giving Andrews the benefit of subsequently created rights. It could have commuted the sentence in order to promote more appropriate proportionality in sentencing. It could have commuted the sentence in order to ameliorate the effects of racism demonstrated by the climate at the time of Andrews's trial, including the napkin with the hate-filled epithet and the exclusion of the African-American venireman.<sup>339</sup> But Utah, like so many other states, has placed the commutation power with decision makers who are subject to strong influences having nothing to do with the merits of a petition. The Utah Board is not elected. Rather, the paid, professional board members are appointed by the elected governor, and though Utah's governor does not possess the power to commute,

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334. *Andrews*, 773 P.2d at 832-33.

335. *Andrews*, 779 P.2d at 228.

336. See Utah Code Ann. §§ 76-3-207, -207.5 (1995).

337. *Andrews v. Carver*, 798 F. Supp. 659, 661-62 (D. Utah 1992). In her dissent, Justice Durham wrote, "The majority permits a miscarriage of justice in allowing the state to execute Andrews in 1992 based upon an eighteen-year-old justification that has now, because of a change in our law, disappeared." *State v. Andrews*, 843 P.2d 1027, 1040 (Utah 1992) (Durham, J., dissenting).

338. When the Board first considered Andrews's petition in 1989, the Utah statute did not provide a life without parole option. One was adopted before the second consideration of Andrews's case by the Board. Utah Code Ann. §§ 76-3-207, -207.5 (effective April 27, 1992).

339. Mr. Andrews's case became a cause célèbre in Utah and has drawn the attention of legal scholars. See, for example, Carol Sisco, *Black Leaders Say Racism Abounds In Andrews' Case*, Salt Lake Tribune A1 (Aug. 20, 1989); Lisa Carricaburu, *Blacks Outraged at Decision*, Ogden Standard-Examiner 1A (Aug. 9, 1989); Jan Thompson, *Utah Justice System Is Corrupted by Prejudice, NAACP Leader Says*, Desert News 1A (Aug. 20, 1989); Lisa Curricaburu, *NAACP: We Want Justice*, Ogden Standard-Examiner 1A (Aug. 20, 1989); Kevin Reed, Richard Wilson, and Joan Fitzpatrick, *Race, Criminal Justice and the Death Penalty*, 15 Whittier L. Rev. 395, 403-09 (1994).

his appointment power is a forceful influence on board members.<sup>340</sup> The Board denied Andrews's petition by a two-to-one vote,<sup>341</sup> and he was executed by lethal injection on July 30, 1992. For Andrews, commutation failed to provide a meaningful remedy for the problems unreachable through post-trial review. Yet this is the process to which the Supreme Court refers death row inmates for justice.

## V. IMPLICATIONS OF THE COURT'S COMMUTATION JURISPRUDENCE

It is well established that the administration of criminal justice, and particularly the death penalty, is filled with infirmities. There is evidence of a disturbing number of unreliable capital convictions and sentences,<sup>342</sup> despite the heightened reliability the Supreme Court has said is necessary for constitutional imposition of the death penalty.<sup>343</sup> There is also evidence to believe that many death sentences have resulted from a process that is unfair.<sup>344</sup> No one's objectives—neither those who favor the death penalty nor those who oppose it—are served by executing people convicted by an unfair process, some of whom may be innocent.<sup>345</sup>

Many of the system's flaws are inherent in the task of adjudicating and punishing wrongdoers. Nevertheless, the inevitability of the errors produced by the system does not obviate the need for a remedy when injustice results in an individual case. The nation's

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340. Governor Norm Bangerter had expressed dissatisfaction some years earlier at the prospect of commutation of those involved in the events at the Hi-Fi Shop. In a discussion with the media, the Governor was quoted as saying he would be "very disappointed" if the Board commuted the sentence of Pierre Dale Selby to life. Brett DelPorto and Jerry Spangler, *Pardons Board Won't Disqualify Itself From Selby Hearing*, *Deseret News* A1 (Aug. 8, 1987); Phil Jensen, *Governor Accused of Pressuring Board*, *Ogden Standard-Examiner* A1 (July 18, 1987); Karen Kuchie, *Utah's Governor Can't Commute Selby's Death Sentence*, *Ogden Standard-Examiner* 1A (Aug. 11, 1987).

341. The Author dissented.

342. Since 1987 seven men have been released from Texas's death row by courts that found their convictions or sentences "unfounded or unfair." Christy Hoppe, *Death Row Appeal Bill Advances*, *Dallas Morn. News* A1, A11 (April 11, 1995). Justice Blackmun became convinced that innocent men are being executed. *Callins*, 114 S. Ct. at 1138 n.8 (Blackmun, J., dissenting). See Part II.A.

343. *Woodson*, 428 U.S. at 305. See note 9.

344. See Part II.B.

345. Some may argue that the utility of the death penalty as a deterrent is unaffected by the execution of some innocents. In fact, the deterrent value is undermined in those circumstances because it is wrongdoers who must be punished to deter wrongdoing. Furthermore, the promise of sanction for wrongdoing cannot be kept without a fair process that yields reliable results.

highest court pretends<sup>346</sup> that there is an effective safety net that enables state systems to save the unfairly and wrongfully convicted, yet there is little evidence that intervention in fact occurs.

This Part identifies four consequences of the Court's fantasy. First, the Court's view of commutation advances the deregulation of death. Second, the Court has left the business of commutation to state systems, but those systems are inherently unable to satisfy the need to ameliorate injustice. Third, death penalty decisions are largely decisions without attribution. Because no one feels responsible for imposing the death penalty, injustices are allowed to go uncorrected. Finally, the Court has abdicated its constitutional responsibility to protect discrete and insular minorities, namely those living on death rows throughout the thirty-six jurisdictions that have imposed death sentences.<sup>347</sup>

#### A. Implications of the Deregulation of Death

The deregulation of death has become the hallmark of modern supreme court death penalty jurisprudence. The Court's denials of relief have involved cases with merit. For example, Justice Rehnquist wrote that the claim that executing an innocent person violated the Eighth Amendment had "elemental appeal."<sup>348</sup> The Court, professing that it is justified in denying relief, appears to feel compelled to assure a justice-seeking audience that there is a way to derail any injustice produced by its decisions—after all, what if Gary Graham is innocent?<sup>349</sup> Deregulating death requires sufficient finesse to meet the arguments of those who point out problematic outcomes in death

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346. For a more general discussion of judicial veracity, see Martin Shapiro, *Judges as Liars*, 17 Harv. J. L. & Pub. Pol. 155 (1994) (arguing that judges consistently lie).

347. See *Death Row Reporter* at 1 (cited in note 71). New York's newly adopted death penalty will add to these numbers. See Malcolm Gladwell, *After 18 Years, N.Y. Death Penalty Revived*, Wash. Post A15 (March 8, 1995).

348. *Herrera*, 113 S. Ct. at 859.

349. Gary Graham, a Texas death row inmate, asserts his innocence based on evidence, some new, that he says shows that (1) Graham is several inches shorter than the assailant described by two witnesses, (2) several witnesses failed to identify Graham as the murderer, (3) the sole witness who identified Graham could not select him from among five photos, but her testimony alone is the basis for his conviction, (4) two new witnesses have come forward to say Graham is not the killer they saw, and (5) four people have testified they were elsewhere with Graham at the time of the murder. David Elliot, *Witnesses: Death Row Inmate Too Tall to be Gunman*, Austin American-Statesman B1 (April 21, 1993); Susan Fahlgren, *Death Row Inmate Seeks Pardon, New Trial*, Fort Worth Star-Telegram 30 (April 21, 1993). The Court's holding in *Herrera* left Graham to look to commutation for relief. For the results of Graham's petition, see Stephen E. Silverman, Note, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 Ariz. L. Rev. 375, 376-77 (1995).

penalty administration. Without a way to diffuse the criticism of those who argue that executing Johnny Penry is like executing a nine-year-old child,<sup>350</sup> anti-death penalty sentiment could ascend, thereby damaging the Court's credibility. The Court's profession of faith in the commutation fantasy promotes its overall deregulation of death by assuaging the nay-sayers.

The Court's eagerness to avoid the responsibility for death penalty policy has become evident. This attitude manifests itself in language that brims with hostility when the Court confronts the view that it should provide death penalty oversight. Most recently, Justice O'Connor wrote that the Court should not engage in "micro-management" of the death penalty.<sup>351</sup> The term calls to mind details, trivial in nature, and suggests that the business of capital punishment is not worth the bother of national policy making. The Court's eagerness to avoid providing federal guidance makes oversight by the states particularly important. State supreme courts have also been reluctant to undertake oversight of death penalty administration.<sup>352</sup> Without state commutation systems that provide *meaningful* commutation consideration,<sup>353</sup> however, the system's capacity for providing heightened reliability<sup>354</sup> is significantly undermined.

The Court's deregulation of death is premised on federalism, and in the name of federalism, the Court shows an amazing tolerance for irregularity, a tolerance boosted by the commutation fantasy.<sup>355</sup> One aspect of federalism purports to make decision makers more accountable by allowing decisions to be made at the state or local level. The Court is indeed urging that death penalty policy be made at the state level. Unfortunately, death penalty policy is precisely the sort of public policy that should *not* be locally determined. Too often greater "accountability" simply means that commutation petitions are denied out of fear of mercurial opinion polls rather than on their

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350. In *Penry*, 492 U.S. at 340, the Court held that mental retardation could be considered a mitigating factor in the penalty phase of the trial, but that it did not make one per se ineligible for capital punishment. Evidence was given that Penry's mental age was equivalent to that of a nine- or ten-year-old child. *Id.* at 308.

351. *Harris v. Alabama*, 115 S. Ct. 1031, 1036, 130 L. Ed. 2d 1004 (1995).

352. See Alice McGill, *Murray v. Giarratano, Right to Counsel in Post-conviction Proceedings in Death Penalty Cases*, 18 Hastings Const. L. Q. 211, 234 (1990) (arguing that state courts are not doing their share in upholding the constitutional rights of death row inmates). The states' lack of relish for this task is not surprising given the experience of the California Supreme Court in 1986. See note 368 and accompanying text.

353. See Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. Richmond L. Rev. 201, 218 (1993).

354. *Woodson*, 428 U.S. at 305.

355. Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990's*, 20 Fla. St. U. L. Rev. 7, 14 (1992).

merits. Another aspect of federalism holds that the states are fifty political and judicial laboratories in which experiments take place. From the results of these varied experiences we learn better ways to govern. Experimentation also means failure, however, and those upon whom the burden of failure falls have no remedy because meaningful state commutations are a thing of the past.<sup>356</sup> Because the Supreme Court's commutation jurisprudence masks this reality, deregulation is advanced.

Although some believe that the role of federal courts is to ensure that the states administer death penalty practice according to norms articulated in the Constitution,<sup>357</sup> it seems clear that the Court's commutation jurisprudence is consistent with its refusal to involve itself in the capital punishment business. It does not see *Furman* as having presented a moral directive to articulate standards for deciding who will be executed. Furthermore, the Court's refusal to engage in death penalty policy making at the federal level places responsibility squarely in the hands of the states. The states by and large have spoken out in favor of finality, state-determined policy, and speedier execution of death sentences. As the next Section demonstrates, these policy choices do not foster the integrity of death decisions.

### B. Justice the States Cannot Deliver

Having eschewed death penalty policy making, the Supreme Court now looks to the states to ensure that capital punishment is justly administered.<sup>358</sup> To the extent that the Court relies on clemency, this is an enterprise that is ill-advised and destined to fail because popular support for capital punishment is overwhelming, and current systems provide insufficient insulation between the commutation decision maker and the electorate.

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356. See generally Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. Rev. L. & Soc. Change 315 (1990-91); Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 Widener J. Pub. L. 25 (1993).

357. Professor Garvey argues that the Supreme Court has delegated norm-selection power to state courts. It relinquished the power to determine the scope of eighth amendment protection by a subtle, but significant, modification in the "evolving standards of decency" doctrine. Stephen P. Garvey, *Politicizing Who Dies*, 101 Yale L. J. 187, 188 (1991).

358. State courts have shown little enthusiasm for the task. McGill, 18 Hastings Const. L. Q. at 234 (cited in note 352).

Part IV.C discussed the difficulty that pro-death-penalty public sentiment can pose for a governor wishing to commute a death sentence. Governors' reluctance to commute death sentences is only a small part of a larger political reality. Other decision makers in the death penalty process face tremendous political pressure as well.<sup>359</sup> In the end, public support for and widespread politicization of the death penalty threaten the fairness and reliability of capital sentences.

Surveys show that nearly eighty percent of the American population voices support for capital punishment.<sup>360</sup> Not surprisingly, Texans' approval of the death penalty is ninety-two percent, according to one poll.<sup>361</sup> American politicians are likely to follow public opinion, rather than try to change it.<sup>362</sup> No participant in death sentence decisions is immune from the political pressure that accompanies those decisions. Almost always, the political winds blow in favor of execution. While some public officials have been elected despite anti-death-penalty beliefs, they are the exception rather than the rule.<sup>363</sup> The pressure put upon these decision makers begins early in the process with the prosecutor's initial decision to seek capital punishment. Since the death penalty is requested in only a small fraction of all capital murders, this decision is the most critical juncture for

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359. Judges, prosecutors, and jurors all face political pressure in death penalty cases. See Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 73 B.U. L. Rev. 759, 791 (1995); Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: The Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471, 513 (1987); Stanton D. Krauss, *The Witherspoon Doctrine at Witt's End: Death-qualification Reexamined*, 24 Am. Crim. L. Rev. 1, 89 (1986).

360. McGill, 18 Hastings Const. L. Q. at 205 (cited in note 352). See *The Politics of Death*, Economist 26 (March 24, 1990). Support for the death penalty fluctuates. In 1971 scarcely 49% favored it. ABC News, *Crime and Punishment: The Death House*, Nightline 11695D (Jan. 16, 1995) (transcript on file with the Author).

361. James Pinkerton, *Crime Poll Finds Many Fear Even a Daytime Walk*, Houston Chronicle A28 (Aug. 7, 1992). One might expect that other felons might exhibit some sympathy for their counterparts on death row but that is not the case. An investigation of the attitudes of inmates in four state prisons at all security levels revealed that many believed capital punishment should be used more often to eliminate "low life" individuals. Dennis J. Stevens, *Research Note: The Death Sentence and Inmate Attitudes*, 38 Crime & Delinq. 272, 275 (1992). Violent offenders appeared to be more adamant in their pro-death-penalty beliefs. *Id.* at 276. Those violent offenders who favored the death penalty approved it for others, but not themselves, and many allowed that it would not deter them personally. *Id.* at 277.

362. Economist at 26 (cited in note 360).

363. New York Assemblywoman Susan John and Chief Justice Exum of the North Carolina Supreme Court gave accounts of their campaigns against pro-death-penalty opponents. Both were successful but spoke of fierce criticism of their anti-death-penalty beliefs during their campaigns. Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urban L. J. 239, 265-73 (1994).

homicide defendants.<sup>364</sup> Recent highly publicized cases illustrate that prosecutors face close public scrutiny while making these decisions and are often vilified for declining to seek capital punishment.<sup>365</sup>

Elected judges face the pressure as well. At the ABA Symposium on politics and the death penalty, Bryan Stevenson, Executive Director of the Alabama Capital Representation Resource Center, observed:

Approximately one hundred and twenty people are on death row in the State of Alabama. Nearly twenty-five percent of those people received life verdicts from juries.<sup>366</sup> When you do a statistical study, a mini-multiple regression analysis of how the death penalty is applied and how override is applied, there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides take place. And it is one of the clearest examples of the precise dynamic of politics in the administration of the death penalty.<sup>367</sup>

State supreme court justices have been replaced because of their view on the death penalty. Chief Justice Rose Bird and her two liberal colleagues were voted out of office in 1986, following a period during which the California Supreme Court had reversed sixty-four of the sixty-eight capital sentences it had reviewed. The California Supreme Court now upholds seventy-five percent of the capital sentences it reviews.<sup>368</sup> Candidates for state supreme court justice positions are keenly aware of the public's strong approval of capital punishment. In a recent primary campaign, a candidate for the Texas Supreme Court boasted her enthusiastic support for the death penalty, an odd "qualification" in light of the fact that the Texas Court of Criminal Appeals, and not the Texas Supreme Court, has exclusive jurisdiction over criminal cases.<sup>369</sup>

Governors appear to be particularly vulnerable to political pressure, although New York's former Governor Mario Cuomo man-

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364. Sorensen and Marquart, 18 N.Y.U. Rev. L. & Soc. Change at 743, 750 (cited in note 59).

365. See, for example, Bruce Ledewitz, *Cruelly Unusual; If O.J. Simpson Will Not Face the Death Penalty, Why Should Anyone Else?*, Pittsburgh Post-Gazette C3 (Jan. 25, 1995); Scott Armstrong, *Case Against Simpson Intensifies Death Penalty Debate in U.S.*, Christian Science Monitor 2 (March 24, 1995); *Life Term for Susan Smith Harsher Than Death Penalty*, U.S.A. Today 10A (Jan. 17, 1995); *Voices: What Do You Think About Seeking the Death Penalty for Susan Smith?*, U.S.A. Today 8A (Jan. 18, 1995).

366. An Alabama statute permits the judge to override the jury's verdict. Ala. Code § 13A-5-47 (1994).

367. Symposium, 21 Fordham Urban L. J. at 255-56 (cited in note 363).

368. Economist at 26 (cited in note 360).

369. Bruce Nichols, *Court Candidates Trade Charges During Debate*, Dallas Morn. News 28A (April 6, 1994).

aged to "take the moral high ground"<sup>370</sup> before he was ultimately defeated, in part at least, for his anti-death-penalty stance.<sup>371</sup> When Florida's former Governor Bob Graham was running for the United States Senate, he signed four death warrants between February and the November election.<sup>372</sup> In Governor Bob Martinez's 1989 campaign, Martinez stated, "I now have signed ninety death warrants in the state of Florida."<sup>373</sup> During the 1990 election campaigns, gubernatorial candidates indulged in what has been called "ghoulish rivalry" in support of the death penalty.<sup>374</sup> California's candidates each vowed to keep the gas chamber busy. When Texas gubernatorial candidate Ann Richards received unsolicited support from a prison newspaper, her rival Jim Mattox adopted the slogan: "Jim Mattox. There are not endorsements for him on death row."<sup>375</sup> In their eagerness to jump on the death penalty bandwagon, candidates have made absurd claims. According to Governor Anaya's report, the newly elected New Mexico governor, Garrey Carruthers, stated publicly that he was eager to assume office. The first act he would perform, he announced, would be to sign a death warrant.<sup>376</sup> But judges, not governors, sign death warrants in New Mexico.<sup>377</sup>

The public's overwhelming approval of capital punishment affects commutation decision makers with full force because states provide little or no insulation to buffer clemency officials from public ire. Although a decision maker in a representative republic should generally be accountable to citizens, he or she should not be so sensitive to public opinion that paralysis results.<sup>378</sup> Perhaps the Supreme Court recognized the danger of officials' oversubscribing to public opinion when it suggested that impeachment should be the only check on their reasons for granting clemency.<sup>379</sup>

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370. *Economist* at 26 (cited in note 360).

371. *Death-row Inmate Says He's in Charge*, Dallas Morn. News 47A (Feb. 19, 1995); *News: Death Penalty*, U.S.A. Today 3A (Feb. 16, 1995).

372. Symposium, 21 *Fordham Urban L. J.* at 246 (cited in note 363).

373. *Id.* at 246 n.28 (citing Richard Cohen, *Playing Politics with the Death Penalty*, Wash. Post (March 26-April 1, 1990)).

374. *Economist* at 26 (cited in note 360).

375. *Id.*

376. Anaya, 27 *U. Richmond L. Rev.* at 181 (cited in note 295).

377. N.M. Stat. Ann § 31-41-1 (1993).

378. See, for example, Garvey, 101 *Yale L. J.* at 208 (cited in note 357) (describing these concepts as moral proximity and moral independence).

379. See *Grossman*, 267 *U.S.* at 121. Tongue in cheek, Bedau has recommended that we elect more courageous governors, change public opinion so that capital punishment is no longer tolerated, or "sentence to death offenders that evoke more sympathy than the present lot." Bedau, 18 *N.Y.U. Rev. L. & Soc. Change* at 271 (cited in note 137).



Unfortunately, an appropriate balance has not been struck in capital clemency decision making. A governor who wields the commutation power alone or shares it with others faces re-election periodically. Board members who have the power to grant clemency eventually face reappointment by an elected governor. No matter how much merit these officials see in a case, the fallout of a commutation could be fearsome, or even politically fatal. By ignoring the political pressure against commutations and by pretending commutation authorities are free to grant clemency in meritorious cases, the Supreme Court obscures the reality of commutation practice and promotes the fantasy of the commutation ideal. As long as that is the case, state commutation decision making will continue to be the slave of public opinion and an empty promise to death row inmates seeking justice.

### C. Responsibility for Death Penalty Decisions

Who decides who dies? The Court's commutation jurisprudence contributes to a disturbing phenomenon. Modern death penalty practice diffuses responsibility among multiple actors, each of whom legitimizes the decision of the actor preceding it, until responsibility never really settles anywhere, and no one actually appears to do the killing.<sup>380</sup>

On a macro level, it is the electorate who is responsible for the death penalty, though, of course, the voters do not decide which offenders will receive it and which will not. The decision to impose the death penalty is a collective judgment read from ballots according to the choices voters make about candidates' positions on crime and capital punishment (as well as other issues). An odd thing about collective decisions, however, is that sharing responsibility enables some to do what they would otherwise not do alone.<sup>381</sup> The actor feels less responsible if the decision turns out to be wrong, because so many others share his or her view. If he or she did not vote for the pro-death-penalty candidate, the reasoning goes, many others would have.

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380. Garvey, 101 Yale L. J. at 187 (cited in note 357) (citing Jason DeParle, *Louisiana Diarist: Killing Folks*, 190 New Republic 43 (Jan. 30, 1984)). While covering an execution in Louisiana, DeParle observed that "the strange thing about executions is that nobody actually seems to do the killing." He wondered whether the offender was to be killed by the jury that convicted him, the judge that sentenced him, or the governor who signed the death warrant. *Id.*

381. See Stanley Milgram, *The Individual in a Social World: Essays and Experiments* 220-21 (McGraw-Hill, 2nd ed. 1992); Bibh Latané and John M. Darley, *The Unresponsive Bystander: Why Doesn't He Help?* 90 (Appleton-Century Crofts, 1970).

It is unlikely that any of the hundreds of thousands of voters who support candidates with pro-death-penalty views feels personally responsible for the death penalty in that state. Because it is impossible for an individual acting alone to be responsible for establishing and maintaining capital punishment, ownership for capital punishment remains widely diffused. Citizens, in whose name the death penalty is carried out, have delegated that task to public officials.

Consider next, in the quest for who decides who dies, the public official who drafts, proposes and does all that is necessary in the labyrinth of the legislature to bring about the death penalty. It is the legislator who hears victims and their families, reads letters to the editor and editorials, and tries to assess the sentiment among his or her constituents. In this tug-of-war for the legislator's vote on the floor, popular support in favor of the death penalty overwhelms whatever arguments might be put forth on behalf of offenders who, as Bedau pointed out, are not a very sympathetic lot.<sup>382</sup> And again, there is that shared responsibility that diffuses personal ownership.

The prosecutor is another actor who decides who lives or dies. He or she is, after all, the first one in the system to connect the death penalty with a particular criminal actor. It is the prosecutor's decision that determines whether a particular defendant ever faces the prospect of being sentenced to death. Guidance for this decision comes from the statute fashioned by the legislature. Within the confines of that statute, the prosecutor still exercises tremendous discretion. The task is to do justice, but what justice is may well be determined by the political structure under which the prosecutor toils. Re-election of the boss, the county or district attorney, may nudge the prosecutor toward seeking the death penalty. The ultimate decision is made to conform to the county attorney's policy, which is intended to please voters. Thus, the prosecutor can place some of the responsibility for that decision on the shoulders of another.

Probably the most visible decision makers are the jurors and the judges who decide to impose death rather than life at the sentencing stage of a defendant's trial. There are decisions prior to and after that moment, however, without which the execution would not take place. Juries and judges know that the system was designed by

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382. Indeed, some suggest it is populist support. Hugo Adam Bedau, *American Populism and the Death Penalty: Witnesses at an Execution*, 33 *Howard J. Crim. Just.* 289 (1994). "[T]he death penalty is increasingly not only a popular but a populist practice in America. No wonder politicians run scared before the electorate on this issue, rarely commuting a death sentence, rarely vetoing new death penalty legislation, rarely introducing bills to reduce or abolish the death penalty." *Id.* at 300.

others and that there will be a review of their decisions. If mistakes happen, they will be corrected by others.<sup>383</sup> Judges have no one with whom to share responsibility for imposing a death penalty, but they may see themselves as acting on behalf of the people, or, less admirably, they may act to ensure retention or re-election. Juries do not have to face election, but they divide their responsibility among the group.

Appellate courts review convictions and sentences to ensure their integrity. They make their judgments with the knowledge that defendants have enjoyed "super due process" at trial and that others will review what they have reviewed. The farther the case proceeds through the system, the less likely it is that the conviction or sentence will be reversed.<sup>384</sup> This is in part because errors have been weeded out, but it is also because the conviction and sentence become self-validated as they proceed.<sup>385</sup>

Commutation is the last resort for the condemned prisoner. It is here where the strength of the many previous affirmations of the conviction and sentence weighs most heavily. A nearly irrebuttable presumption of validity exists. Because it is unthinkable that a meritorious claim could have gone unrecognized during the course of many appellate and habeas corpus proceedings, governors and boards are loath to commute a sentence. Commutation decision makers, then, take their place among the many others who had nothing to do with the execution of a person whose conviction and sentence may have been seriously flawed.

Ironically, it is the person who actually shoots the bullet or pulls the switch that has the last responsibility of all the actors in the capital punishment drama—yet we protect the executioners from guilt. We protect the person on the firing squad by loading one rifle with a blank and the others by screening from their view the graphic results of their handiwork.<sup>386</sup>

The capital punishment process is a nameless, faceless machine. It is made up of multiple actors, none of whom bears the undivided responsibility for a given death sentence. Moral labor so di-

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383. "Finally, [the state] argues that any error in the imposition of the death penalty by the jury can be cured by the judge after a hearing on the aggravating and mitigating circumstances." *Beck v. Alabama*, 447 U.S. 625, 633 (1980) (holding unconstitutional a death sentence imposed after a jury verdict where the jury was not permitted to consider a lesser included offense).

384. "The possibility that [habeas corpus] claims [have] merit [grows] increasingly remote as the process [is] repeated." Jeffries, *Powell* at 444 (cited in note 102).

385. *Id.*

386. Robert Johnson, *Death Work* 21 (Brooks-Cole, 1990).

vided encourages those who act first to believe those who follow will correct errors. It persuades the final actors that the hard work and deliberations of previous actors produced a reliable conviction and sentence that ought not to be disturbed.<sup>387</sup> A bureaucracy in which no one appears to make decisions may produce the least humane decisions.<sup>388</sup> Instead of providing the buck-stops-here fail-safe measure, commutation procedures merely add another layer to the bureaucracy that frustrates those who seek justice.<sup>389</sup>

#### *D. Abdication of the Court's Role as Protector of the Powerless*

A related concern raised by the Supreme Court's commutation jurisprudence and its tendency to promote deregulation is the apparent abdication of the Court's responsibility to protect the powerless. The Supreme Court has traditionally been seen as the protector of those who cannot protect themselves in a pluralistic political process.<sup>390</sup> The justices' independence from political pressure allows the Court to act in a countermajoritarian way.<sup>391</sup> The notion that the Court is a protector of minorities was laid down in footnote four of *United States v. Carolene Products Co.*,<sup>392</sup> and has engendered substantial controversy.<sup>393</sup>

That minorities need protection in the ordinary course of a representative democracy is demonstrated by public choice theory, which holds that public officials act in their own self interest and that "an overwhelming preponderance of political incentives favor unrestricted enforcement of criminal law" by whatever means, legiti-

387. Garvey, 101 Yale L. J. at 187 (cited in note 359). See also Cobb, 99 Yale L. J. at 404 (cited in note 68).

388. Hannah Arendt, *The Human Condition* 45 (U. Chicago, 1958) (noting that in modern society action is eventually replaced by bureaucracy—"the rule of nobody").

389. A commentator in a recent television program on the death penalty observed, "Apparently, the more that we, as a nation, support the death penalty, the less interested we are in those who are executed in our name." ABC News, Nightline at 11695D (cited in note 360).

390. See, for example, Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. Pitt. L. Rev. 430 (1983).

391. Note, *Race for Justice*, 106 Harv. L. Rev. 2015, 2016 (1993).

392. 304 U.S. 144, 153 n.4 (1938). *Carolene Products* is widely viewed as the font of the notion that the Supreme Court is willing to protect "discrete and insular minorities" from the excesses of the political process. See, for example, Daniel A. Farber and Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Cal. L. Rev. 685, 689-716 (1991) (arguing that the footnote-four model of judicial review must be preserved in light of modern political realities).

393. Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 Syracuse L. Rev. 1079 (1993).

mate or illegitimate.<sup>394</sup> Likely, it was the tyranny of public opinion that induced the Court to invoke the Eighth Amendment and “withdraw certain subjects from the vicissitudes of public controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the court.”<sup>395</sup>

Regrettably, say some, the Supreme Court has done little to place capital punishment “beyond the reach of majorities.” Justice Thurgood Marshall condemned the Court for having become “an accessory to the perpetuation of racial discrimination.”<sup>396</sup> The Court’s modern commutation jurisprudence supports this view. People on death row are disproportionately black and overwhelmingly poor.<sup>397</sup> What little power members of these groups have diminishes upon arrest and disappears upon conviction. An innocent or unfairly convicted inmate on death row has little political currency available to correct his plight. At the same time, crime is at the top of the list of public concerns. With public controversy at its peak, fairness in the process is subordinated in favor of law-and-order rhetoric. The Court declines to provide death row inmates with a remedy and instead refers them to a farcical commutation process. In doing so, it closes the door on those without the power to challenge their convictions.

## VI. CONCLUSION

Wrongful convictions, unfair distribution of the death penalty, and a restricted review of death sentences reaffirm the need for a mechanism to provide a remedy for those who are innocent, and those whose proceedings, though constitutional, were seriously flawed. This is particularly true where certain arguments never found a forum. According to the literature on commutations and the Supreme Court’s clemency jurisprudence, commutation should be the ideal mechanism for ensuring justice because a power so broad could be used for many

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394. *Id.* at 1081.

395. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

396. *City of Mobile v. Bolden*, 466 U.S. 55, 141 (1980) (Marshall, J., dissenting). See Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* (N.Y.U., 1993).

397. See Michael Echevarria, *Reflections on O.J. and the Gas Chamber*, 32 San Diego L. Rev. 491 (1995); Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 Ala. L. Rev. 403, 422 (1994); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 Capital U. L. Rev. 23, 47 (1994); Jack Healey, *You Can Make a Difference*, 34 Howard L. J. 82, 83 (1991).

justice-enhancing reasons. The Court's decisions demonstrate further that it assumes that commutation currently operates as the idealized process for enhancing justice. In fact, commutation does not so operate because strong pro-death-penalty public opinion stands in the way and states have not provided insulation from public opinion for commutation decision makers.

Unfortunately, the rosy but inaccurate picture painted by the Court has these deleterious effects: (1) by failing to acknowledge that its decisions can leave petitioners without a remedy, the Court quells legitimate criticism of its actions and proceeds apace with the deregulation of death, (2) the Court's obscured reality maintains the tie between commutation decisions and popular opinion via the political process and therefore the states do not provide the hoped for fail-safe mechanism, (3) a non-functioning commutation process does harm because it contributes another bureaucratic layer to insulate those who so strongly support the death penalty from responsibility for all of its consequences, and finally (4) by maintaining the fiction of idealized commutation, the Court adds to the growing evidence that it has abandoned its role as protector of the politically powerless by refusing to prevent an execution. One undertaking of this Article has been to inform the emperors that they have no clothes.<sup>398</sup> The Court's stated reliance on commutation is a smoke screen that draws attention from the consequences of its refusal to regulate the death penalty.

The message having been delivered to the emperors, what can be done about miscarriages of justice in light of the Court's position? I add my voice to those of others who have suggested that commutation can be revived.<sup>399</sup> It can be reinstated to some degree by insulating decision makers from the political consequences of granting commutation in an unpopular case. Only then can decision makers render judgments based more on the merits and less on political pressure.

This Article argues that the traditional governor-appointed board is an insufficient buffer against strong public opinion. Better protection against public opinion can be provided if the governor

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398. I follow the time-honored tradition of using Hans Christian Andersen's story to criticize disingenuous failure to provide adequate remedies. See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 *Hastings Const. L. Q.* 625, 672 (1986); Stefan H. Krieger, *An Advocacy Model for Representation of Low-income Intervenors in State Public Utility Proceedings*, 22 *Ariz. St. L. J.* 639 (1990).

399. See, for example, Kobil, 69 *Tex. L. Rev.* at 633-36 (cited in note 4).

appoints a selection board,<sup>400</sup> comprised primarily of unpaid citizens, which would then appoint the commutation authority. The selection board would follow statutory qualifications and other selection factors to ensure balanced representation on the clemency board. For example, candidates for the clemency board should have to meet qualifications relating to education and experience. Additionally, the number of appointments from a single political party should be limited, and representation by a variety of races and genders should be encouraged. Although the governor would still appoint the selection board, the collectiveness of that board's appointment decisions would make each individual less vulnerable to retaliation and political pressure. Further, the commutation decision itself would be made by the clemency board, which would be sufficiently far removed from the governor to attenuate his or her possible influence.

The strengths of a citizen selection board are its independence from state criminal justice agencies, its ability to reflect public sentiment in a tempered fashion, and its potential for attracting useful expertise to the problems of criminal justice policy. Its shortcoming is that its members may lack insight into the ongoing, every-day problems of criminal justice administration. For this reason, a minority of the selection board should include criminal justice professionals such as judges, correctional administrators, and parole board members.

Unfortunately, the dearth of information about commutation decisions leaves the would-be architect of change with little guidance. There is, for example, no collection and analysis of state death penalty commutation practices. Such a study could suggest more effective ways to insulate clemency boards from public influence and could provide insight into more appropriate standards of conduct for them. Research is needed in other areas as well. For example, instances of granted death penalty commutations have been identified and counted, but information about differences between the merits of commutations granted and commutations denied is not available, aside from some dated, anecdotal works. Inquiry into how jurors' expectations that clemency will be granted actually influence conviction rates is also warranted.

When justices of the Supreme Court have uttered phrases such as "heightened reliability" and "death is different," they acknowledge the truly awesome nature of the death penalty. With the decline in

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400. This discussion presumes that the commutation power should not be exercised by a single individual (and, least of all, by an elected one). Group decisions distribute the political heat among several people, making it somewhat more endurable.

the use of the commutation power, we have lost an important means of ensuring that executions occur only when the process and its outcome are fair.